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(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias

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This Article investigates whether one of the most intractable problems in trial procedure can be ameliorated through the use of one of the most striking discoveries in recent social science. The intractable problem is selecting a fair jury. Current doctrine fails to address the fact that jurors harbor not only explicit, or conscious, bias, but also implicit, or unconscious, bias. The discovery is the Implicit Association Test ("IAT"), an online test that aims to reveal implicit bias.

This Article conducts the first comparison of proposals that the IAT be used to address jury bias. They fall into two groups. The first group would use the IAT to "screen" potential jurors for implicit bias; the second group would use the IAT to educate jurors about implicit bias. These proposals merit deeper consideration. Implicit bias is pervasive, and affects crucial juror functions: evaluation of evidence, recall of facts, and judgment of guilt. Juries are generally told nothing about implicit bias. The judiciary has expressed concern about implicit juror bias, and sought help from the academy in addressing the problem.

This Article provides what these two groups of proposals lack: critique and context. It shows that using the IAT to screen jurors is misguided. However, the Article contends that the educational project has merit because implicit bias can be countered through knowledge of its existence and motivation to address it. To refine the project, this Article identifies two vital issues that distinguish the proposals: when jurors should learn about implicit bias, and how they should learn about it.

On the issue of when, this Article argues that the education should begin while the jurors are still being oriented. Orientation is not only universal, but, as research into "priming" and "framing" suggests, a crucial period for the forming of first impressions. On the issue of how, this Article argues that those proposals that would include the jurors taking an IAT are superior to those that would simply instruct jurors on what the IAT shows. In an area fraught with denial, mere instruction would likely be dismissed as irrelevant. This Article uses pedagogical theory to show that experiential learning about bias is more likely to be effective.

Finally, this Article brings when and how together, proposing a model that would include the use of the IAT as an experiential learning tool during orientation. This model would harness the civic energy of jurors to an educational purpose, rather than letting it morph into boredom; by putting jurors in an active mindset, it would enhance their satisfaction with the process, and their ability to perform optimally. As for potential jurors who are never selected, their participation would honor the long-standing educational function of jury service.

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(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias

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I. INTRODUCTION

This Article investigates whether one of the most intractable problems in trial procedure can be ameliorated through the use of one of the most striking discoveries in recent social science. The intractable problem is the challenge of creating a fair process for the selection of fair jurors. Current doctrine fails to address the fact that jurors harbor not only explicit, or conscious bias, but also implicit, or unconscious, bias.[1] Among other problems, the presence and strength of individual bias can be extremely difficult to detect. The striking discovery is the Implicit Association Test ("IAT"), an online test that, through measuring response times to certain words and images, aims to reveal the presence and strength of the test taker's implicit bias.[2] The IAT offers the possibility that bias could be detected, and perhaps lessened, within the jury.

This Article conducts the first comparison of the recent rash of proposals relating to the use of the IAT to address jury bias. These proposals fall into two groups. The first group would use the IAT to "screen" potential jurors, so that those with the strongest bias could be removed; the second group would use the IAT as a means of educating jurors about implicit bias. These proposals, most of which have been merely sketched out, merit deeper consideration. It is clear that implicit

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[1] *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009) ("Two potential sources of disparate treatment in court are explicit bias and implicit bias.").

[2] *See* John Tierney, *In Bias Test, Shades of Gray*, N.Y. TIMES, Nov. 18, 2008, at D1 (noting that the IAT measures reaction times as test-takers associate words with whites and blacks).

bias is pervasive, and that it affects the most important functions of jurors: evaluation of witnesses and evidence, evaluation of behavior, recall of facts, and judgment of guilt.[3] Juries are generally told nothing about implicit bias, however, despite the constitutional requirement that they be fair and impartial.[4] Meanwhile, members of the judiciary have expressed their concern about implicit juror bias;[5] one has called out to the academy for help with this problem,[6] while another has proceeded to devise his own solutions.[7]

While the proposals are important, insufficient attention has been devoted to their disadvantages. In addition, by failing to consider the contexts wherein they would be implemented—for example, current practices and best practices in juror education—they have failed to maximize their potential advantages. Drawing on the social science relating to implicit bias and on pedagogical theory, this Article provides critique and context. It demonstrates that screening jurors on the basis of their IAT scores brings risks that outweigh the advantages. Specifically, it fails to address the fact that bias is complex, and accusations of bias freighted. The proposals that the IAT be used as an educational resource have more potential. Social science supports the idea that implicit bias can be countered through knowledge of its existence and motivation to address it.[8] In order to refine the educational project, this Article identifies the two crucial issues that distinguish the various proposals: the issue of *when* jurors should be taught about implicit bias, and *how* they should be taught.

On the issue of *when* jurors should be introduced to this material, this Article argues that those proposals that would begin the education during juror orientation hold more potential than those that would begin only once jurors are sent to specific courtrooms. This Article critiques the failure of

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[3] *See* Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 600–01 (2009) (noting that Americans have biases that manifest themselves when they "categorize information, remember facts, and make decisions").

[4] Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030–31 (2008).

[5] *See id.* at 1029; Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010); *see also* Michael B. Hyman, *What the Blindfold Hides*, 48 JUDGES' J. 32, 33 (2009).

[6] *See* Arterton, *supra* note 4, at 1029 ("[B]eing aware of the potential for jurors to bring unacknowledged biases to the deliberative process, how can and should judges react?").

[7] Bennett, *supra* note 5, at 169.

[8] *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276 (2002) ("To the extent that there is good news in the current science about stereotypes, it is that while we may be unable to do much about their automatic activation, we can nevertheless behave in substantially nonprejudiced ways if we are so motivated."); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1555 (2004) ("There is some evidence that awareness of automatic reactions can trigger attempts to counteract them, and that such attempts are sometimes successful.").

scholars, administrators, and advocates to scrutinize the content of juror orientation, especially given what has been learned from research on "priming" and "framing" about the importance of first impressions.[9] It shows, for example, that while juror orientation programs are haphazard, one constant is the failure to provide jurors with any information about implicit bias. This Article highlights the particular advantage of the universality of orientation: waiting until jurors are in a particular courtroom allows judicial rulings, inadequate attorney resources, or fear of appearing to "play the race card," to prevent this education.

On the issue of *how* jurors should be educated about implicit bias, this Article highlights a distinction that these proposals downplay. It argues that the proposals that would involve the jurors actually taking an IAT, and getting their results, are superior to those that would simply *instruct* jurors on what the IAT reveals about implicit bias. In an area that is as fraught with denial as racial bias, there is a real possibility that an instruction on this topic would be dismissed as inapplicable. The IAT, by contrast, allows test takers physically to experience their bias. Drawing on pedagogical theory, this Article argues that it is this type of active, experiential learning that is most valuable in the area of implicit bias.

This Article then brings the questions of *when* and *how* together, proposing the use of the IAT as a means of experiential learning during juror orientation. The Article shows that the IAT's usefulness as a means of raising awareness about implicit bias has been demonstrated in research conducted with doctors, and it gives additional reasons why the use of such a program with jurors would have particular advantages. It would capture the civic energy that potential jurors bring to the courthouse, and harness it to an educational purpose, rather than letting it morph into boredom and resentment. By putting jurors in an active mindset from the earliest opportunity, it would enhance their satisfaction with, and investment in, the judicial process, and their ability to function optimally. Bringing social science and pedagogical theory together, this Article suggests that juror orientation materials should maintain their focus on egalitarian norms: these have been shown to aid in combating implicit bias.[10] They should be modified, however, to include information about implicit bias, and to encourage potential jurors to take an IAT. The conversation begun in orientation could then usefully be continued in the courtroom. As for the majority of potential jurors—who never reach a courtroom—their participation in a public education project would be consistent with the

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[9] *See* ELLIOT ARONSON ET AL., SOCIAL PSYCHOLOGY 56–57 (7th ed. 2010) (priming); GORDON B. MOSKOWITZ, SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS 33–34 (2005) (framing).

[10] John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 56 (2009).

long-standing educational function of jury service, and might help to justify the time spent at the courthouse.

Part II lays out the intractable problem of bias in juries and jury selection. It introduces the concepts of implicit and explicit bias, and discusses how they affect jurors, as well as judges and attorneys. It critiques as inadequate the existing doctrine relating to such bias. Part III introduces the IAT, and examines its first appearances in the courtroom. Part IV examines proposals that have been made to use the IAT as a means of screening potential jurors. While these proposals attempt to address many of the types of bias described in Part II, Part IV concludes that their advantages are outweighed by their disadvantages.

Part V turns to the proposals to use the IAT to educate jurors. It concludes that these have more merit as a means of addressing the problems outlined in Part II. Part V compares the proposals along the two most salient axes, looking at *when* the jurors would be taught, and *how* they would be taught. A lack of attention to two areas of opportunity appears—the opportunity effectively to prepare jurors during their orientation for what they should expect and how they should perform their task, and the opportunity to engage jurors through experiential modes of learning rather than purely passive instruction. Part V suggests that the use of the IAT as an educational tool administered during jury orientation could exploit both of these opportunities, and proposes a format for further investigation.

Part VI discusses three possible objections to this proposal. This Part concludes that while none of them creates an insuperable bar to its implementation, efforts to tackle implicit bias through jury education are no substitute for, and must be combined with, continued efforts to diversify juries.

II. THE INTRACTABLE PROBLEM

The intractable problem with which this Article is concerned is the challenge of devising a system for the fair selection of fair jurors, given the continuing presence of bias. This Article will focus on racial bias, a type of bias to which a great deal of research has been devoted.[11] This Part introduces the two main categories of racial bias inherent in juries and jury selection: implicit bias and explicit bias, categories now discussed more frequently than "unconscious discrimination" and "conscious

[11] *See* Samuel Sommers & Phoebe Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 202 (2001) ("As the review of psychological research demonstrates, in psychology there is a substantial body of theory and research on prejudice against minority groups and on White Americans' racial bias against Black Americans in particular.").

discrimination."[12] Under each heading, the concept and its role in the selection and the decision-making of juries are explained, and the protections that are currently set up against the phenomenon are described. This Part concludes that these protections are failing to address the problems identified.

A. *Implicit Bias*

"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.[13] They are so subtle that those who hold them may not realize that they do.[14] Implicit bias operates in areas such as gender, nationality, and social status,[15] but strong levels of implicit racial bias relating to African-Americans have drawn the most attention. African-Americans, for example, are stereotypically linked to crime and violence;[16] their behavior is more likely to be viewed as violent, hostile, and aggressive than is the behavior of whites;[17] and they are more readily associated with weapons than are whites.[18]

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[12] *See* David C. Baldus et al., *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southwest Arkansas (1990–2005) with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, 76 TENN. L. REV. 555, 566 n.26 (2009) ("The distinction between 'conscious' and 'unconscious' racial prejudice . . . has evolved in recent years into a distinction between 'explicit' and 'implicit' bias."). *But see* Transcript of Motion: Evidentiary Hearing at 477, New Hampshire v. Addison, No. 07-S-0254, 2008 WL 2675622 (N.H. Super. Ct. Apr. 14, 2008) [hereinafter *Banaji Testimony*] (Mahzarin Banaji announcing intention to use "implicit bias" and "unconscious prejudice" interchangeably).

[13] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 948–51 (2006).

[14] *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995); *see also* Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem and Self-Concept*, 109 PSYCHOL. REV. 3 (2002).

[15] Greenwald & Krieger, *supra* note 13, at 951.

[16] Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 40 (2010); Mona Lynch, *Stereotypes, Prejudice, and Life-and-Death Decision Making*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 182, 188 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) ("[T]he stereotype of African-Americans as violent and criminally inclined is . . . strong and influential, particularly among Whites.").

[17] Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 406 (1996) (discussing the fact that interpretations of ambiguous acts can be affected by the race of the actor, and citing studies that "suggest that stereotypes about Blacks as violent or dangerous people influence perception and judgment").

[18] *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 (2005) (noting that these associations are held by both Blacks and Whites). Other examples of implicit bias operating against members of one's own "group" include women joining men in implicit gender stereotypes that are sometimes negative toward women and people over sixty joining those in their twenties in implicit preference for young over old. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 361 (2007).

Levels of implicit bias frequently conflict with self-reported attitudes,[19] usually because explicit measures show no bias, while implicit measures show bias.[20] Because of this disconnect, implicit bias is sometimes offered as a partial explanation of the continuation of racial stratification even while, as measured by surveys, openly held racial stereotypes and prejudice have declined substantially over the last fifty years.[21]

"Seek, and ye shall find" has been the theme of implicit bias research. Implicit bias has been shown to be widespread among the general public,[22] and to influence behavior by professionals and laypeople in contexts that include employment, medicine, voting, and law enforcement;[23] it has also been detected in juvenile and criminal justice authorities.[24] Paul Butler claims that implicit bias may have lurked beneath the robe of Chief Justice Rehnquist.[25]

Implicit bias can affect various types of behaviors. These include snap judgments, such as whether to fire a gun,[26] but also "positions arrived at after careful consideration such as the policy choices of legislators, policemen, and employers."[27] Other mental activities that are affected include perception, forming of impressions, processing of information, use of information, and retrieval of information.[28] Implicit bias is thus both "pervasive" and "deep."[29]

There is some indication that the fact, or at least the effects, of implicit

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[19] Levinson, *supra* note 3, at 601.

[20] Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1066 (2009).

[21] *See* Kang, *supra* note 18, at 1506; Geoff Ward et al., *Does Racial Balance in Workforce Representation Yield Equal Justice? Race Relations of Sentencing in Federal Court Organizations*, 43 LAW & SOC'Y REV. 757, 771 (2009).

[22] Ward et al., *supra* note 21, at 759.

[23] *See* Jost et al., *supra* note 10.

[24] Ward et al., *supra* note 21, at 759.

[25] Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1035 (2006).

[26] *See* Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 126 ("Behavioral data replicated previous findings: participants shot armed Blacks more quickly than armed Whites, and decided not to shoot unarmed Whites more quickly than unarmed Blacks.").

[27] Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, The Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 958 (2008).

[28] *See* Levinson, *supra* note 3, at 600–01 ("These biases manifest automatically and without conscious awareness in a variety of basic circumstances, such as when people categorize information, remember facts, and make decisions.").

[29] Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1895 (2009); *see also* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1562 (1989) (arguing that a person who reacts negatively to blacks has "assimilated negative stereotypes about blacks before she reached the age of judgment. She will, therefore, have accepted them as truth rather than opinion.").

bias might be combated.[30] Implicit associations have been termed "malleable,"[31] and, according to Kristin Lane and other psychologists, "[c]onscious exertion to be unbiased may—at least temporarily—reduce implicit bias."[32] Factors that aid this project include awareness of the bias,[33] and motivation for non-biased behavior.[34] Pretending that race is irrelevant does not help.[35]

1. *Implicit Bias in the Courtroom*

Implicit bias is no less prevalent in the courtroom than in the street. Judges harbor implicit bias,[36] as do death penalty attorneys,[37] despite very different self-characterizations by both groups.[38] So, too, do prosecutors.[39]

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[30] For information on overcoming implicit bias, see Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1367 (2010). For information on combating the effects of implicit bias, see Gary Blasi, *supra* note 8, at 1276 ("To the extent that there is good news in the current science about stereotypes, it is that while we may be unable to do much about their automatic activation, we can nevertheless behave in substantially nonprejudiced ways if we are so motivated."), and Eisenberg & Johnson, *supra* note 8, at 1555.

[31] *Answers to Frequently Asked Questions About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo/background/faqs.html (last visited Oct. 21, 2011).

[32] Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 438 (2007).

[33] *See* Blasi, *supra* note 8, at 1275 ("Whatever our motivations, none of us can do much about prejudices of which we are completely unaware.").

[34] *See* Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 102 n.27 (2010) (quoting Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 133 (1994)) ("There is considerable evidence, then, that forewarning and debiasing manipulations are most likely to work when . . . [t]hey make people aware of the unwanted processing, they motivate people to resist it, and people are aware of the direction and magnitude of the bias and have sufficient control over their responses to correct for it.").

[35] Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 477 (2008) ("[P]retending that race is irrelevant allows unconscious racism to operate without any constraints.").

[36] *See* Judith Olans Brown et al., *Some Thoughts About Social Perception & Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1517 (1997) ("Of course judges, being human, are prone to the same prejudices as the rest of us. They too hear stories through a skewed cognitive filter . . . .").

[37] Eisenberg & Johnson, *supra* note 8, at 1553.

[38] *Compare* Hyman, *supra* note 5, at 32 ("Most judges, if asked, consider themselves free of bias, even-handed, and open-minded . . . ."), *and* Rachlinski, *supra* note 1, at 1225 (reporting that ninety-seven percent of judges surveyed placed themselves in the top half of their peer group in their ability to "avoid racial prejudice in decisionmaking," and fifty percent placed themselves in the top quartile), *with* Eisenberg & Johnson, *supra* note 8, at 1555–56 (reporting that many of the capital defense attorneys tested for racial preference "were surprised at their own automatic preferences and, therefore, would not have previously realized that they should struggle against those preferences").

[39] *See* MICHELLE ALEXANDER, THE NEW JIM CROW 115 (2010) ("Numerous studies have shown that prosecutors interpret and respond to identical criminal activity differently based on the race of the offender."); Levinson, *supra* note 3, at 617 (citing research indicating that implicit bias among prosecutors may lead to racial disparities in capital cases, and that unconscious bias may affect prosecutors even more than others).

So, too, does the jury,[40] despite its characterization by the Supreme Court as the criminal defendant's fundamental "protection of life and liberty against race or color prejudice."[41]

Judges, as well as scholars, have recognized the existence of implicit bias in the courtroom. Supreme Court opinions have acknowledged its presence in jurors,[42] its potential to affect their assessments of evidence,[43] and its potential to affect their verdicts.[44] Some state and lower federal courts have followed suit,[45] noting that implicit bias among jurors extends beyond evaluations of a criminal defendant, to other juror tasks such as evaluation of witnesses.[46] Supreme Court Justices, and other judges, have also acknowledged the possibility of implicit bias in attorneys[47] and in

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[40] *See* Levinson, *supra* note 3, at 623 ("Death qualification may activate jurors' implicit racial stereotypes by indirectly priming racial constructs."); Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 419 (2003) ("[T]he unconscious nature of juror bias prevents the voir dire from impaneling fair and impartial jurors . . . .").

[41] Strauder v. West Virginia, 100 U.S. 303, 309 (1880).

[42] *See, e.g.*, Turner v. Murray, 476 U.S. 28, 42 (1986) (Brennan, J., dissenting) ("[I]t is certainly true, as the Court maintains, that racial bias inclines one to disbelieve and disfavor the object of the prejudice, and it is similarly incontestable that subconscious, as well as express, racial fears and hatreds operate to deny fairness to the person despised . . . ."); Crawford v. United States, 212 U.S. 183, 196 (1909).

[43] *Turner*, 476 U.S. at 41–42 (Brennan, J., dissenting).

[44] J.E.B. v. Alabama, 511 U.S. 127, 162 (1994) (Scalia, J., dissenting); Georgia v. McCollum, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); *id.* at 61 (Thomas, J., concurring); *Turner*, 476 U.S. at 35 (White, J., plurality opinion) ("On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether the petitioner's crime involved the aggravating factors specified under Virginia law. . . . 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 facts of the petitioner's crime, might incline a juror to favor the death penalty."); Smith v. Phillips, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring).

[45] *See, e.g.*, United States v. Stephens, 421 F.3d 503, 509–10 (7th Cir. 2005); People v. Taylor, 229 P.3d 12, 65–66 (Cal. 2010); State v. Tucker, 629 A.2d 1067, 1077–78 (Conn. 1993) ("A juror is not likely to admit being a prejudiced person . . . and indeed might not recognize the extent to which unconscious racial stereotypes might affect his or her evaluation of a defendant of a different race . . . ."); Commonwealth v. McCowen, 939 N.E.2d 735, 767 (Mass. 2010) (Ireland, J., concurring) ("Courts are aware that unconscious racism could affect the outcome of trials."); Commonwealth v. Laguer, 571 N.E.2d 371, 377 (Mass. 1991) (quoting *Smith*, 455 U.S. at 221–22) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.").

[46] *Tucker*, 629 A.2d at 1077–78.

[47] *See, e.g.*, Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) ("[N]ot even the lawyer herself[] can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial . . . stereotype."); Miller-El v. Dretke, 545 U.S. 231, 267–68 (2005) (Breyer, J., concurring); Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror

judges.[48]

Implicit bias in judges and jurors can inhere in unintentional "misremember[ing]" of facts in racially biased ways,[49] during all stages of legal decision-making.[50] Jody Armour has suggested that "habitual stereotype-congruent responses to blacks, even by sincerely racially liberal whites, may distort legal judgments concerning blacks as much in contemporary America as in the America [Clarence] Darrow knew."[51] Ronald Tabak has illustrated the extent and seriousness, including constitutional seriousness, of the potential impacts of implicit bias on jurors:

- It can affect how jurors react to assertions that someone acted in self-defense[;]
- It can affect assertions that there was excessive force by the police[;]
- It can affect whether there really is a presumption of innocence . . . [;]
- It can affect whether the jury believes that remaining silent, which is a defendant's constitutional right, is an admission of guilt[;]
- It can even affect how the jury perceives an expert witness who is a person of color.[52]

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had acted identically."); United States v. Clemmons, 892 F.2d 1153, 1162 (3d Cir. 1989) (Higginbotham, J., concurring); King v. Nassau, 581 F. Supp. 493, 501–02 (E.D.N.Y. 1984).

[48] *See Clemmons*, 892 F.2d at 1162 ("[T]he prosecutor's prejudice may be subtle, unconscious, and shared by the judge . . . .") (quoting *Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1581 (1988)); Chin v. Runnels, 343 F. Supp. 2d 891, 908 (N.D. Cal. 2004) (finding "sizeable risk that perceptions and decisions made [in selection of Grand Jury foreman by judge, in consultation with others] may have been affected by unconscious bias").

[49] Levinson, *supra* note 18, at 347.

[50] *Id.*

[51] Jody Armour, *Stereotypes & Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 764 (1995); *see also id.* ("If so, these distorted judgments are more insidious than before because they result from automatic processes, which often (but not necessarily always) escape conscious detection."); *id.* at 747 (adding that "finding a nonracial reason to discriminate against a black litigant is especially easy to do—one simply gives more weight to the evidence favoring the opposing litigant").

[52] Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama's Election*, 37 N. KY. L. REV. 243, 256–57 (2010). Levinson offers support for the idea that "when it comes to racial equality and the presumption of innocence, there is reason for concern." Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association*

Strategies for addressing implicit juror bias are discussed below.[53] In the case of addressing implicit judicial bias, there are some promising signs. Even though the racial imbalance of the justice system may reinforce the implicit racial bias of judges who work in it every day,[54] judges are able to suppress their implicit racial bias when they are both aware of the need to monitor its influence, and are motivated to do something about it.[55]

2. *Existing Protections Against Implicit Bias in the Courtroom*

Despite the threats to impartiality created by implicit bias on the part of judges, attorneys, and jurors, protections against it and its effects are few.

Some effort has been made to educate the various courtroom players about their implicit bias. Judicial trainings on this topic have been created.[56] Federal judges, however, are not required to attend any judicial trainings,[57] and most judges remain uninformed on this issue.[58] Proposals have been initiated to educate prosecutors about implicit bias.[59] As for educating jurors about their own implicit biases, one judge has devised his own solutions.[60]

Whether or not they receive such education, judges and jurors are required to be impartial. In the case of federal judges, this is the subject of

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Test, 8 OHIO ST. J. CRIM. L. 187, 207 (2010) (discussing study designed by the authors that found, "[First,] that participants held implicit associations between Black and Guilty. Second, we found that these implicit associations were meaningful—they predicted judgments of the probative value of evidence"); *see also* Lee, *supra* note 17, at 413 (mentioning the "oft-unstated assumption that blacks are still on probation" and "are not necessarily granted a presumption of innocence") (quoting ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 72 (1993)).

[53] *See infra* Parts IV, V.

[54] *See* Darrell A. H. Miller, Iqbal *& Empathy*, 78 UMKC L. REV. 999, 1008 (2010) (reporting that researchers have speculated that the implicit bias harbored by judges may "result from repeated exposure to minorities in the justice system").

[55] *See* Rachlinski, *supra* note 1, at 1197 ("Judges can, at least in some instances, compensate for their implicit biases.").

[56] *See* Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis,"* 99 KY. L.J. 259, 308–10 (2010–11) (discussing several judicial training programs).

[57] Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591, 621 (2009).

[58] *See* McKoski, *supra* note 56, at 306 ("Few judges understand the complicated mental processes involved in receiving and evaluating information during the decision-making process. Judges are simply unaware of how heuristics and other subconscious biases and stereotypes influence outcomes. It is education in these matters, foreign to most judges, that holds the greatest hope for improving judicial impartiality.").

[59] *See, e.g.*, Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 448 n.418 (2009).

[60] *See* Bennett, *supra* note 5, at 169 (discussing the use of a slide about implicit bias in a PowerPoint presentation shown by the author before voir dire).

an oath;[61] in the case of all judges, it is an ethical rule,[62] and a matter of professional identity.[63] Implicit bias, however, can impair judges' ability to align their conduct with what is ethical.[64]

In the case of jurors, impartiality is a constitutional requirement,[65] and bias in even one juror violates a criminal defendant's right to a fair trial.[66] However, procedures for removing biased jurors were established long before the existence and significance of implicit bias were widely known.[67] Motions by attorneys to remove jurors "for cause"—in other words, on the basis that they cannot be fair—have been viewed as the primary opportunity for removing biased jurors.[68] Such motions, however, are granted only on the basis of a narrow set of rather obvious biases,[69] and not on grounds of implicit bias.[70] Indeed, despite the Supreme Court's acknowledgement of the phenomenon,[71] courts have typically been hostile

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[61] 28 U.S.C. § 453 (2006) ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.'").

[62] Ramirez, *supra* note 57, at 596 n.21 (citing MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007)).

[63] John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 10 (2010).

[64] *See id.* at 7 ("Judges naturally strive to reach decisions that are both correct on the merits and correct from an ethical perspective. Implicit biases can potentially impair the ability of judges to reach correct decisions from either perspective.").

[65] *See* Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976) ("A criminal defendant in a state court is guaranteed an 'impartial jury' by the Sixth Amendment as applicable to the States through the Fourteenth Amendment. Principles of due process also guarantee a defendant an impartial jury.").

[66] *See* Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998) ("The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate Dyer's right to a fair trial.").

[67] *See* Jay M. Spears, Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1499 (1975) ("Because this system [of cause and peremptory challenges] evolved and rigidified long before there was general awareness of the existence and impact of unconscious bias, it is not surprising that challenges for cause, which are based on admitted or clearly implied bias, have traditionally been considered the primary tool for eliminating prejudiced jurors . . . .").

[68] *See* Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 379 (2010).

[69] *See* Benjamin Hoorn Barton, Note, *Religion-Based Peremptory Challenges After* Batson v. Kentucky *and* J.E.B. v. Alabama*: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191, 191 n.2 (1995).

[70] *Id.* at 1500 n.31. *But see* State v. Gesch, 482 N.W.2d 99, 103 (Wis. 1992) (finding implied bias in part because of the potential for unconscious bias); Nancy Lewis Alvarez, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L.J. 959, 961–62 (1982) ("Implied bias, which may be defined by statute, is based on the recognition that certain relationships between a litigant and a prospective juror are likely to result, consciously or unconsciously, in the bias of the juror.") (footnotes omitted).

[71] *See supra* notes 36–38 and accompanying text.

to considerations of the possible impact of implicit bias in the courtroom,[72] as elsewhere.[73]

The process of voir dire, the dialog with jurors during jury selection, has proven largely unable to detect or correct implicit bias in jurors. The types of judicial exhortations that are typically issued, including that jurors "remove bias from their deliberations,"[74] are likely to be rejected as irrelevant[75] and may be counterproductive.[76] The types of perfunctory questions that are commonly asked—whether the jurors can be fair and impartial, for example[77]—are unlikely to succeed if the jurors have no idea.[78] Indeed, because of the prevalence of implicit bias, commentators, such as the late Derrick Bell, have despaired that "even the most extensive and penetrating voir dire will not screen the vast majority of bigoted jurors."[79]

The peremptory strike, a way for attorneys to remove jurors without having to give a reason, allows attorneys to strike jurors whom they believe may harbor implicit bias.[80] However, the peremptory strike has been criticized as an augmenter of, rather than a protector against, bias. Naturally, potential jurors are unlikely to give voice to their implicit bias

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[72] *See* Levinson, *supra* note 3, at 613 n.91 (citing Chin v. Runnels, 343 F. Supp. 2d 891 (N.D. Cal. 2004), as an exception to the general tendency of courts to be "hesitant to rely upon [implicit bias] research in published decisions"); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1720 n.25 (1977) ("In spite of evidence that unconscious bias is widespread and important, many courts have resisted recognition of its significance at trial.").

[73] *See* Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 125, 138 (2011) ("[C]ourts have turned a blind eye to racism where it is not overt and explicit.").

[74] *See, e.g.*, Commonwealth v. McCowen, 939 N.E.2d 735, 763 n.34 (Mass. 2010); *see also* Brown et al., *supra* note 36, at 1510 n.110 (noting that standard general instructions include language such as "[t]he law does not permit you to be governed by sympathy, prejudice or public opinion").

[75] *See infra* note 300 and accompanying text.

[76] *See* Tabak, *supra* note 52, at 259 (mentioning the "pink elephant" effect, namely the risk that "if a juror is told that which is stated in certain pattern jury instructions, *i.e.*, 'you are not to consider race,' the juror may end up considering race more than if the juror had not been told to avoid considering race . . . [especially] if the juror has a high degree of prejudice").

[77] *See* Bennett, *supra* note 5, at 160.

[78] *See* Levinson et al., *supra* note 52, at 207 n.97 ("[A]sking jurors whether they can be unbiased is unlikely to reveal jurors with strong implicit biases."); Collin P. Wedel, Note, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discrimination*, 7 STAN. J. C.R. & C.L. 293, 310 (2011) (noting that "the overwhelming weight of evidence suggests that biased jurors are simply unaware of their biases"). For a suggestion that such questions might in fact *lessen* fairness, see Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL'Y REV. 112 (forthcoming 2012) (citing research from the employment context that showed that "asking questions like 'Are you objective?' and 'Do you use the evidence and facts to make decisions?' (to which virtually all people agree) led to *greater* use of gender stereotypes in a subsequent simulated hiring decision. The researchers [whose work was cited] argued that the self-declaration of 'I am objective' affirmed that one's thoughts arise from objective sources, so whatever thoughts come to mind are acceptable to use.").

[79] DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 331 n.2 (6th ed. 2008).

[80] *See* Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981); Spears, *supra* note 67, at 1502.

and, during a voir dire process that can be short,[81] attorneys may learn little about the jurors and about their implicit biases.[82] Thus, attorneys often rely on stereotypes in their peremptory strikes,[83] including unconscious stereotypes.[84] Whereas the *Batson* doctrine exists to protect against purposeful discrimination by attorneys against potential jurors,[85] the doctrine fails to protect against the implicit bias of attorneys.[86] In addition, the heavy reliance that the doctrine places on judicial discretion opens the door to the influence of implicit judicial bias.[87]

Thus, under the current regime, implicit bias is allowed to "flourish"[88] within jurors, attorneys, and judges,[89] as the biases of one party run the risk

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[81] *See* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 254 (2005) ("Voir dire may be as limited as brief 'yes' or 'no' group questioning by the judge . . . .").

[82] *Limiting the Peremptory Challenge*, *supra* note 72, at 1720–21 ("Because attorneys often have insufficient information to make individual judgments about the unconscious prejudices of prospective jurors, they tend to act on the basis of stereotypes and presumptions.") (footnotes omitted).

[83] *Id.*

[84] One commentator has captured the irony by stating that "unconscious racism—which may cause a prosecutor to attribute bias to a prospective juror by virtue of his or her membership in a particular group—may manifest itself in a prosecutor's finding of specific bias in a juror." Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1022 (1989).

[85] Batson v. Kentucky, 476 U.S. 79, 79–81 (1986).

[86] *See* 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, 1024 (1996) ("*Batson* also fails to recognize that much discrimination in jury selection, like discrimination generally, is the product of unconscious racism and sexism.") (footnote omitted). Some, however, have asserted that "purposeful discrimination" *can* be established by evidence that is consistent with a lack of conscious bias. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 375–76 (1991) (Stevens, J., dissenting) (arguing that the Court in *Hernandez* erred in concluding that "a defendant's *Batson* challenge fails whenever the prosecutor advances a nonpretextual justification that is not facially discriminatory" because "[u]nless the prosecutor comes forward with an explanation for his peremptories that is sufficient to rebut [a] prima facie case, no additional evidence of racial animus is required to establish an equal protection violation"); Page, *supra* note 81, at 171 ("The Supreme Court, however, has never directly clarified what it means by 'purposeful discrimination' in the exercise of peremptory challenges. There is a conflict between the Court's language that suggests a subjective intent requirement and the Court's statements endorsing the use of evidence that will not invariably illuminate the attorney's state of mind.") (footnotes omitted).

[87] *See* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 67–68 (1993) ("[W]hat if the judge is racially biased too? The *Batson* majority's answer—that we should trust trial judges to obey the law—is only satisfactory if bias is conscious. If bias were sometimes unconscious, then a judge might in good faith believe she was executing the law, but in fact be approving the racially biased action of attorneys."); *Race and the Criminal Process*, *supra* note 48, at 1581 ("[B]ecause the prosecutor's prejudice may be subtle, unconscious, and shared by the judge, the prosecutor may be able to articulate non-racial explanations that the judge would find reasonable.") (footnote omitted).

[88] *See* Bennett, *supra* note 5, at 150 ("[J]udge-dominated voir dire and the *Batson* challenge process are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish.") (footnote omitted).

[89] *See id.* at 161 ("[T]he Batson challenge process may allow the implicit biases of the judges and attorneys to go unchecked during jury selection.").

of reinforcing the biases of another. The protections in place, conceived in an earlier era, fail to address the implicit biases that are now known to exist, and in fact may intensify them. Potential jurors who, by sincerely professing their lack of bias, might create particular concern,[90] may be left on the jury. A call has gone out, from the judiciary as well as the academy,[91] for implicit bias research to be marshaled to address bias in both jury selection[92] and juries.[93]

B. *Explicit Bias*

The increasing focus on implicit bias should not obscure the fact that explicit bias, meaning "the kinds of bias that people knowingly—sometimes openly—embrace,"[94] still exists and still wields power.[95]

1. *Explicit Bias in the Courtroom*

Supreme Court Justices and scholars have acknowledged the risk of explicit bias being harbored by juries, affecting their assessment of evidence and their verdicts.[96] They have also acknowledged the risk of explicit bias being harbored by judges[97] and, of course, by attorneys:[98]

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[90] *Banaji Testimony*, *supra* note 12, at 620 ("I would be especially worried about people who really think that they aren't biased.").

[91] *See* Arterton, *supra* note 4, at 1029 & n.24.

[92] *See* Kang, *supra* note 18, at 1536 ("As future research confirms, constrains, and elaborates these results, a vast research agenda will open for those who explore the nexus of law and racial mechanics. Topics on that agenda include . . . criminal law (for example, racial profiling, self-defense, community policing, jury selection, penalty setting) . . . .") (footnotes omitted).

[93] *See id.* at 1537 (advocating a research agenda that includes "lawyering and evidence (for example, strategies and rules with which to engage jurors' implicit biases) . . . .").

[94] Rachlinski et al., *supra* note 1, at 1196 (2009).

[95] *See* Benforado, *supra* note 16, at 5 (providing examples of recent explicit bigotry against minorities); Eisenberg & Johnson, *supra* note 8, at 1541 (noting that some researchers have observed that polls may overstate the trend away from overt racism, "given the growing social unacceptability of racial hostility"); Kang, *supra* note 18, at 1592–93 ("Explicit bias still thrives in many circles."); Lane et al., *supra* note 32, at 430 ("Consciously held attitudes and stereotypes are also important predictors of behavior. They are simply not the only ones to contend with as we understand human behavior and its vicissitudes.").

[96] *See* Georgia v. McCollum, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); *id.* at 60 (Thomas, J., concurring) ("'It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.'") (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1979)); *see also* Alvarez, *supra* note 65, at 961 ("An impartial jury is basic to the judicial system in all criminal cases. It is this impartiality that enables the jury to analyze the evidence and to make a fair and reliable determination of guilt or innocence. Many jurors, however, possess a state of mind that affects their ability to render an impartial verdict; they have a conscious or unconscious bias.") (footnote omitted).

[97] *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986).

hence the need for the *Batson* doctrine.[99]

2. *Existing Protections Against Explicit Bias in the Courtroom*

The *Batson* doctrine has failed to prevent attorneys from relying on explicit bias in jury selection. It is all too easy for attorneys who are "of a mind to discriminate" to mask their discrimination behind a reason for their peremptory strike that is facially neutral, whatever its intent or disparate impact.[100] Judicial policing of such strikes is ineffective.[101] Thus, attorneys continue to rely on stereotypes in making their selections, often viewing group affiliations as an indicator of implicit bias[102] and often justifying their behavior on the ground that voir dire is too short to give them information more valuable than stereotypes.[103] This behavior has been described variously as a form of prosecutorial misconduct,[104] and as a regrettable requirement of zealous defense advocacy.[105] From the latter camp, Abbe Smith describes the problem as follows:

> It is not that I believe that racial or demographic stereotypes are an accurate proxy for the attitudes and life experience of all prospective jurors. I do not. It is that, absent a meaningful exploration of the latter, I am stuck with the former, and it would be foolhardy or worse not to

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[98] *See* Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1032 & n.104 (1988) (citing Justice Marshall's *Batson* concurrence and its review of data from four jurisdictions to illustrate "the overwhelming propensity of prosecutors to strike black jurors from cases with black defendants").

[99] Laura I. Appleman, *Reports of* Batson*'s Death Have Been Greatly Exaggerated: How the* Batson *Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607, 609 (2005).

[100] *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)); *see also* United States v. Clemmons, 892 F.2d 1153, 1162 (3d Cir. 1989) ("[T]he *Batson* standard, as it has been interpreted, appears now to allow prosecutors to strike non-white jurors for reasons that are clearly, but subtly, racial in nature . . . ."); Montoya, *supra* note 86, at 1024 ("[J]udges are apparently ill-equipped to discern lawyer's [sic] intentions . . . .").

[101] *See* Montoya, *supra* note 86, at 1009 ("*Batson*'s requirement of articulating a neutral explanation for suspect peremptory challenges creates no substantial hurdle for 'those . . . who are of a mind to discriminate,' let alone for those who discriminate unconsciously.") (footnotes omitted); Tabak, *supra* note 52, at 266 (referencing several studies that "show that requiring prosecutors to justify their discretionary challenges has an 'extremely modest' effect in reducing the racially based use of peremptory challenges") (footnote omitted).

[102] Commonwealth v. Futch, 424 A.2d 1231, 1235 (Pa. 1981).

[103] *See* Abbe Smith, *"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 530–31 (1998).

[104] Howard, *supra* note 68, at 374 n.25.

[105] *See* Smith, *supra* note 103, at 565 ("No matter how personally distasteful or morally unsettling, zealous advocacy demands that criminal defense lawyers use whatever they can, including stereotypes, to defend their clients.") (footnotes omitted).

> at least consider the generalizations on which the stereotypes are based.[106]

Constraints other than a lack of time prevent voir dire from providing protection against explicit juror bias. While potential jurors may harbor bias of which they are aware, taboos are likely to prohibit its disclosure,[107] however skillful the questioning.[108] Jurors will often give the answers that "seem acceptable."[109] For example, one survey revealed that sixty percent of people will tell a stranger on the phone that they do not believe in the presumption of innocence; however, when asked the same question in the courtroom, hardly a one will express anything other than complete fealty to this noble tenet.[110] In a formal setting such as the courtroom, especially where the risk of public expulsion attends a disclosure of bias,[111] racial attitudes that might be revealed elsewhere are particularly likely to be choked down.[112] In addition, jurors may remain silent when asked about bias because they do not comprehend the extent to which their biases will affect their ability to assess the case fairly.[113] They will also remain silent if they are "intent on giving play to their biases."[114] Finally, the common practice of questioning potential jurors as a group makes a disclosure less

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[106] *Id.* at 530–31 (footnotes omitted).

[107] *See* Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1391 (2005) ("[W]e restrict our own speech because we cannot bear admitting our own racism.").

[108] *See* BELL, *supra* note 79, at 331 n.2 ("Given that much racial antipathy is unconscious or hidden because of fear of social disapproval, even the most extensive and penetrating voir dire will not screen the vast majority of bigoted jurors.").

[109] Andrea B. Horowitz, Note, Ross v. Oklahoma*: A Strike Against Peremptory Challenges*, 1990 WIS. L. REV. 219, 224 n.37 ("A prospective juror may be afraid to admit during voir dire the prejudice and bias that later causes him to vote against a defendant in the privacy of the jury room. More likely, a juror gives responses that seem acceptable.") (citation omitted); *see also* United States v. Dellinger, 472 F.2d 340, 375 (7th Cir. 1972) ("Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial.").

[110] Horowitz, *supra* note 109, at 224 n.37.

[111] *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1675 (1985) ("[J]urors 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.").

[112] *See* LESLIE HOUTS PICCA & JOE B. FEAGIN, TWO-FACED RACISM: WHITES IN THE BACKSTAGE AND FRONSTAGE, at x (2007) ("Much of the overt expression of blatantly racist thought, emotions, interpretations, and inclinations *has gone backstage*—that is, into private settings where whites find themselves among other whites, especially friends and relatives.").

[113] Mu'Min v. Virginia, 500 U.S. 415, 443 (1991) (Marshall, J., dissenting) ("Where, as in this case, a trial court asks a prospective juror merely whether he can be 'impartial,' the court may well get an answer that is the product of the juror's own confusion as to what impartiality is.") (footnote omitted); Horowitz, *supra* note 109, at 224 ("[J]urors may not be aware of their own prejudices or may underestimate the impact of their biases on their ability to weigh the evidence.").

[114] Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 588–89 (1998).

likely,[115] since, as Sheri Johnson puts it, "it is easier to stay quiet untruthfully than to respond untruthfully."[116]

Thus, various pressures mean that jurors tend to assert that they can try a case fairly; in turn, judges tend to accept such assertions.[117] In their resolutions of questions regarding juror fairness, judges are afforded great discretion,[118] in part because of the importance of individualized evaluation;[119] discretion and individualized evaluations, of course, permit the influence of bias.[120]

There is a limited set of circumstances in which the Supreme Court requires the questioning of potential jurors about racial prejudice. Different standards apply depending on whether the requirement is a constitutional one, or an exercise of the Court's supervisory power over federal courts. For the former requirement to apply, there must be a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be indifferent as [they stand] unsworne."[121] The Court has found the standard satisfied in only two circumstances. The first, *Turner*, involved a death penalty sentence for an African-American defendant convicted of killing a Caucasian.[122] The second, *Ham*, was the trial of a civil rights worker, in which the defendant alleged that he was being framed because of his work,[123] and where the Court found that racial issues were "inextricably bound up with the conduct of the trial."[124] Under

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[115] Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 73 (1992) ("Because overtly racist attitudes have become socially unacceptable, people are reluctant to admit them, particularly when questioned as a group.").

[116] Johnson, *supra* note 111, at 1675.

[117] *See Race and the Criminal Process*, *supra* note 48, at 1583 n.173 ("Cause challenges would be more effective if when deciding whether to grant the challenges, judges did not rely solely on the assertions of prospective jurors about their ability to be impartial.").

[118] *See* Howard, *supra* note 68, at 380 ("A judge has broad discretion in assessing whether a juror can, in fact, be fair, and different judges may come to different conclusions based on the same information.").

[119] *See* Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) ("Despite its importance, the adequacy of *voir dire* is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions.").

[120] *See* Ramirez, *supra* note 57, at 635 (2009) ("Thus, if one even marginally accepts the social psychology studies that suggest bias may operate at a subconscious or unconscious level, then one must also recognize that implicit attitudes may undermine discretionary decision making.").

[121] Turner v. Murray, 476 U.S. 28, 33 (1986) (quoting Turner v. Bass, 753 F.2d 342, 345–46 (4th Cir. 1985)).

[122] *Id.* at 29, 36 (concluding that "[b]y refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury").

[123] Ham v. South Carolina, 409 U.S. 524, 525 (1973) (recounting the defendant's claim that "law enforcement officers were 'out to get him' because of his civil rights activities, and that he had been framed on the drug charge").

[124] Ristaino v. Ross, 424 U.S. 589, 596–97 (1979) (discussing the circumstances of *Ham*).

its federal court supervisory power, the Court requires questioning on racial prejudice where there is a reasonable possibility that racial or ethnic prejudice will influence the jury.[125] This standard is satisfied if a defendant is accused of a violent crime and the defendant and the alleged victim belong to different racial groups.[126] The Court has declined to require any particular number or form of questions,[127] or to take away from the trial judge "the decision whether to question the venire individually or collectively."[128] As long as the topic is "covered,"[129] the details are left to the judge's discretion.[130]

The Court's decisions have been subject to a variety of critiques. The limitations on the availability of such questioning have been criticized by Sheri Johnson as "contradicted by empirical findings on the prevalence of prejudice,"[131] and have been held responsible for trial judges' acquiescence to pressures to keep voir dire short.[132] Jerry Kang's research suggests that the doctrine is topsy-turvy, since it is precisely when race is *not* an obvious issue that white juror bias is particularly likely.[133] Johnson suggests that *Turner* was topsy-turvy in another way—by finding a violation only during sentencing, and not trial. She cites research suggesting that "the defendant's race affects guilt determinations *more* often than it affects sentences; it is the subtle, unconscious alteration of judgment, not the conscious desire to injure, that most threatens the fair administration of the criminal justice system."[134] Even when voir dire questioning is permitted, reliance on that device to detect prejudice has been criticized as hopelessly

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[125] Rosales-Lopez v. United States, 451 U.S. 182, 191–92 (1981).

[126] *See id.* at 192 ("[F]ederal trial courts must make [an inquiry into racial or ethnic 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.").

[127] Mu'Min v. Virginia, 500 U.S. 415, 431 (1991) ("[W]e held that the subject of possible racial bias must be "covered" by the questioning of the trial court in the course of its examination of potential jurors, but we were careful not to specify the particulars by which this could be done."); *Turner*, 476 U.S. at 37; *Ham*, 409 U.S. at 527.

[128] *Turner*, 476 U.S. at 37.

[129] *Mu'Min*, 500 U.S. at 431.

[130] *Ham*, 409 U.S. at 527 ("[I]n a context where [the Court's] authority within the federal system of courts allows a good deal closer supervision than does the Fourteenth Amendment . . . [the trial court] 'ha[s] a broad discretion as to the questions to be asked.'").

[131] Johnson, *supra* note 111, at 1681; *see also* Forman, *supra* note 115, at 71 (criticizing the doctrine as an expression of "indifference to the need for effective questioning on these sensitive subjects").

[132] *See* Forman, *supra* note 115, at 71 ("Pressed by overcrowded dockets and dismayed by some extreme cases, judges are more likely to curtail voir dire than to expand it.").

[133] *See* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEG. STUD. 886, 900–01 (2010).

[134] Johnson, *supra* note 98, at 1022; *see also* Turner v. Murray, 476 U.S. 28, 43 (1986) (Brennan, J., dissenting) ("Does the Court really mean to suggest that the constitutional entitlement to an impartial jury attaches only at the sentencing phase? Does the Court really believe that racial biases are turned on and off in the course of one criminal prosecution?").

naïve.[135]

Thus, the existing doctrine leaves both implicit bias and explicit bias largely unchecked in the courtroom. The *Batson* process, designed to control the bias of attorneys as they make efforts to control the bias of juries, is viewed by at least one member of the federal judiciary as "thoroughly inadequate."[136] This is in part because the process "allows the implicit and explicit biases of attorneys to impact jury composition."[137] The peremptory strike procedure rests on the use of stereotypes, while failing to do much for jury impartiality.[138] The potential biases of the jurors—deemed by Susan Herman "far more critical than those of the lawyers"—remain largely undetected.[139] Whereas the Sixth Amendment right to an impartial jury was designed as a safeguard against the "corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,"[140] prosecutorial failings and judicial bias are in fact playing a part in *shaping* the jury.

III. THE POTENTIAL SOLUTION

A. *The IAT*

The previous Part discussed the inadequacy of doctrinal protections against the bias of jurors, attorneys, and judges; this Part describes a tool whose use has been proposed in response to this intractable problem. It emerged in the 1990s, and aimed to detect the existence, and the strength, of certain types of implicit bias. The IAT is not the only means by which

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[135] William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race & Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 262–63 (2001) (describing the notion that voir dire questioning could detect "deeply engrained and often unconscious racial attitudes" as "wishful thinking," and presenting research supporting the argument that *Turner* has failed "to purge sentencing decisions of race-linked attitudes and their consequences"); David L. Wiley, Comment, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 ST. MARY'S L.J. 193, 229 (1995) (stating that because the *Turner* approach is "at best, only effective in excluding overtly biased jurors, it fails to account for the probability that discrimination by jurors is an unconscious process").

[136] Bennett, *supra* note 5, at 150.

[137] *Id.*

[138] *See* 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, 170 (1989) ("Peremptory challenges ensure the selection of jurors on the basis of insulting stereotypes without substantially advancing the goal of making juries more impartial.").

[139] Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1852 (1993) (adding that "by focusing all our attention on how jurors are selected, we allow ourselves to ignore the fact that discrimination will still be able to enter and hide in the jury room").

[140] Holland v. Illinois, 493 U.S. 474, 509 n.7 (1990) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

implicit bias is measured, but it is the most prominent[141] and the most widely employed,[142] and has enjoyed the most success at predicting prejudicial attitudes and stereotypes.[143] Its developers include Mahzarin Banaji, who compares her role to that of a physicist who might ask someone to look through a telescope to see that the earth is not at the center of the universe; her techniques allow people to look inside *themselves*, and discover that the internal cosmos is not aligned as they had thought.[144]

Versions of the IAT are available online,[145] and a pencil-and-paper version also exists.[146] The test takes only ten minutes to complete,[147] and provides a "compelling interactive experience."[148] While IATs assess bias in areas such as gender, age, and sexual orientation,[149] the racial bias IAT has attracted the most attention.[150] This "Race IAT" asks participants to strike a certain computer key with their left hand when an African-American face or a "negative" attribute (such as "bad") appears on the computer screen, and to strike a different key with their right hand when a white face or a "positive" attribute (such as "good") appears.[151] The order is then reversed: the right hand key is struck for "positive" words and African-American faces and the left hand key is struck for "negative" words and white faces.[152] Participants are instructed to take the test as quickly as possible.[153] The test is based upon the hypothesis that participants will match a group to an attribute more quickly if they connect the two in their mind, regardless of whether they are aware of the

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[141] Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1025 (2006).

[142] Benforado, *supra* note 30, at 1363–64 (reporting that the IAT has "been the most widely employed in the 'hundreds (if not thousands) of studies on implicit bias'") (quoting Jost et al., *supra* note 10, at 64).

[143] *See* Greenwald & Krieger, *supra* note 13, at 954 ("[W]ithin the critical group of studies that focused on prejudicial attitudes and stereotypes—in other words, within the studies of implicit bias—predictive validity was significantly greater for the IAT measures" than for self-report measures); *see also* Kang, *supra* note 18, at 1509 (observing that the IAT "has become the state-of-the-art measurement tool" in this field).

[144] *Banaji Testimony*, *supra* note 12, at 476.

[145] PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/ (last visited Dec. 16, 2011).

[146] Eisenberg & Johnson, *supra* note 8, at 1543 (describing decision to use print version because of "time and computer accessibility constraints").

[147] Saujani, *supra* note 40, at 412.

[148] Banks & Ford, *supra* note 20, at 1057.

[149] *Id.* at 1060 (discussing various traits with respect to which IATs have been developed).

[150] *Id.*

[151] McKoski, *supra* note 56, at 320.

[152] *Id.*

[153] *See* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 19 (2010).

connection.[154] The computer calculates reaction time (in milliseconds) and accuracy in completing the task.[155] At the end of the test, it tells participants what the data suggest about the nature and strength of their implicit bias.[156]

Taking advantage of the flexible nature of the test,[157] and the fact that it has not been patented,[158] others have designed their own versions of the IAT. Justin Levinson, for example, has designed a test that aims to discover whether participants associate guilt with African-Americans more strongly than with whites.[159] They do.[160]

Over six million IATs have been taken, with the results being used by the developers to refine the test.[161] The sample of participants is, in contrast to the typical college sample,[162] "large and diverse."[163] The participants have varied in gender, age, race, ethnicity, class, location, and religion.[164] Jerry Kang describes the results as "clear and overwhelming."[165] 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."[166] This pattern exists across social groups.[167] IAT findings of implicit bias are perfectly compatible with explicit commitments to equality.[168]

The results of the Race IAT have garnered particular attention. As

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[154] Alexander R. Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1231 (2007).

[155] Levinson & Young, *supra* note 153, at 19.

[156] Banks & Ford, *supra* note 20, at 1057.

[157] *See* Levinson & Young, *supra* note 153, at 19 (describing the IAT as an "exciting and flexible" methodology for testing implicit bias).

[158] Shankar Vedantam, *See No Bias*, WASH. POST MAG., Jan. 23, 2005, at W12.

[159] Levinson et al., *supra* note 52, at 190 ("[S]tudy participants held strong associations between Black and Guilty, relative to White and Guilty, and these implicit associations predicted the way mock jurors evaluated ambiguous evidence.").

[160] *Id.*

[161] The IAT has been "constantly" refined over the course of its use. *See Banaji Testimony*, *supra* note 12, at 469.

[162] *See* Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117, 137 (Henry L. Roediger III et al. eds., 2001).

[163] Mitchell & Tetlock, *supra* note 141, at 1107.

[164] *Banaji Testimony*, *supra* note 12, at 477 (noting that the data have been collected from tens of thousands of participants all over the world).

[165] Kang et al., *supra* note 133, at 889; *see also Banaji Testimony*, *supra* note 12, at 470 (claiming that of the four or five hundred "peer review" articles that have been published regarding the IAT, "less than one percent" are critical).

[166] Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 474 (2010).

[167] Mitchell & Tetlock, *supra* note 141, at 1047–48.

[168] Kang, *supra* note 18, at 1559.

Adam Benforado points out, "doctors and nurses, police officers, students, and employment recruiters, among many others, all have demonstrated white preference on the IAT."[169] Study participants "of European, Asian, and Hispanic descent implicitly preferred white over black,"[170] although an equal number of black participants preferred black as preferred white.[171]

The results have not been "clear and overwhelming" to all.[172] Critics have raised questions about what it is that the IAT measures,[173] and have focused particular scrutiny on whether IAT results can predict real-world behavior, even if they do predict discriminatory behavior in experimental studies.[174] In response to these concerns about predictive validity, a meta-analysis was conducted of 122 studies.[175] In the area of interracial behavior and other intergroup behavior, the IAT predicted behavior better than did the self-report method.[176] One particularly striking study involved doctors, tasked with deciding whether to recommend state-of-the-art thrombolytic therapy for patients with coronary artery disease.[177] As the doctors' anti-black bias, as measured by the IAT, increased, their rate of

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[169] Benforado, *supra* note 16, at 40.

[170] Lane et al., *supra* note 32, at 433. According to the most recent results, seventy percent of those who have taken the "race IAT" demonstrate a preference for "European American compared to African American." PROJECT IMPLICIT, *supra* note 145. Twelve percent demonstrate the opposite preference. *Id.*

[171] Lane et al., *supra* note 32, at 433.

[172] Kang et al., *supra* note 133, at 889 (noting that some academics have "voiced concerns about the proper interpretation of implicit bias scores while others have also suggested improvements for the IAT") (internal citations omitted).

[173] *See* Mitchell & Tetlock, *supra* note 141, at 1031 ("[V]ariations in the mere familiarity of the group categories activated by the IAT can lead to scores indistinguishable from those motivated by animus toward those groups; so too can egalitarian empathy for disadvantaged social groups; so too can performance anxiety linked to the fear of being labeled a bigot; so too can mere awareness of cultural stereotypes and depressing socio-demographic facts."). *But see* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479–80 (2007) (rebutting the critiques put forth by Mitchell and Tetlock and arguing that their theory "does not at all undermine the case for taking account of implicit bias in antidiscriminatory policy").

[174] *See* Mitchell & Tetlock, *supra* note 141, at 1033.

[175] Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18–19 (2009); *id.* at 19 (the types of behaviors covered by the meta-analysis included "a wide variety of measures of physical actions, judgments, preferences expressed as choices, and physiological reactions"). A meta-analysis is "a comprehensive quantitative analysis of experiments on a particular topic allowing more general conclusions than any single study." Lane, *supra* note 32, at 432.

[176] Greenwald et al., *supra* note 175, at 28. The average IAT-criterion correlation was .274, "a level conventionally characterized as moderate." *Id.* Supporters such as Benforado find this evidence indicative of the "strong" predictive ability of the IAT for racially differential behavior, judgments, and physiological manifestations. Benforado, *supra* note 16, at 42; *see also* Kang, *supra* note 18, at 1514 ("There is now persuasive evidence that implicit bias against a social category, as measured by instruments such as the IAT, predicts disparate behavior toward individuals mapped to that category."). To others, the evidence that the IAT accurately predicts discriminatory behavior is "surprisingly weak." McKoski, *supra* note 56, at 321.

[177] Green et al., *supra* note 154, at 1232.

recommending this treatment for black patients decreased.[178]

With respect to addressing the implicit biases suggested by the IAT, Justin Levinson cautions that overcoming them "appears to be quite difficult, given that [they] are particularly resistant to conscious efforts."[179] It may be done, however, by "altering our informational and interactional environment."[180] Moreover, the IAT has been used as a pedagogical tool: it has "educated numerous professionals in the world of business, medicine, law, law enforcement and social work."[181]

B. *The IAT in the Courtroom*

Courtroom testimony relating to the IAT and implicit bias is a recent phenomenon[182]—but it is becoming more frequent.[183] It was permitted in a New Hampshire capital case in 2008 in support of the defendant's motion for the death penalty to be barred because racial bias in the jury would violate the state's equal protection guarantee.[184] Mahzarin Banaji testified, and asserted her belief that because of implicit bias, an African-American defendant in New Hampshire could not get a fair trial.[185] While the court found the testimony "very interesting,"[186] it denied the motion, concluding that the implicit bias research did not establish that any such bias would

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[178] *Id.* at 1235 (describing the significant interaction between doctors' "implicit antiblack bias" and their treatment recommendations for black patients).

[179] Levinson, *supra* note 18, at 371.

[180] Kang, *supra* note 18, at 1562; *see also infra* Part V.

[181] Reply to State's Objection to Defendant's Motion for Services Other than Counsel: Expert on Implicit Racial Bias at 7, New Hampshire v. Addison, No. 07-S-0254, 2008 WL 2703957 (N.H. Super. Ct. Feb. 8, 2008).

[182] *Banaji Testimony*, *supra* note 12, at 571; Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 165 (2010) (describing the paltry results for the search terms "IAT" and "implicit bias" in his survey of published federal and state cases).

[183] *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 638 (9th Cir. 2010) (Ikuta, J., dissenting) (noting that in district court, William Bielby, an expert witness, testified that subjective decision making is "susceptible to unconscious discriminatory impulses"), *rev'd* 131 S. Ct. 2541 (2011); Farrakhan v. Gregoire, No. CV-96-076, 2006 WL 1889273, at *5–6 (E.D. Wash. July 7, 2006) (finding that expert testimony on racial discrimination, including implicit biases, in Washington's criminal justice system was admissible, relevant, and persuasive), *aff'd* 623 F.3d 990 (9th Cir. 2010); Michael Orey, *White Men Can't Help It*, BUS. WK., May 15, 2006, at 54 ("Now if an employer is faced with a class action based on gender or race, there is at least a 50% chance that plaintiffs will cite unconscious bias theory . . . .").

[184] Specifically, the trial court agreed that Mr. Addison needed the testimony in support of his argument that *McCleskey v. Kemp*, 481 U.S. 279 (1987), "no longer accords with established social science research." Order on Defendant's Motion for Services Other than Counsel: Expert on Implicit Racial Bias, New Hampshire v. Addison, No. 07-S-0254 (N.H. Super. Ct. Feb. 11, 2008).

[185] *Banaji Testimony*, *supra* note 12, at 623.

[186] *Id.* at 621. The court added that "I felt like I was back in college, although I paid a lot more attention to you than I did then." *Id.*

"infect" the case at hand.[187] The court supported its conclusion with a statement relating to the relationship between IAT scores and jurors' decisions: "Preliminarily, only one unpublished dissertation has linked IAT scores with mock jurors' individual decisions, and no studies have examined the IAT in jury deliberations in real trials."[188]

The court also noted that the IAT "does not account for the impact of the deliberative process" that might intervene between implicit associations and jury decisions.[189] It concluded that "statistics and social science evidence are not sufficient to prove a discriminatory purpose in the death penalty context."[190]

IV. THE IAT AS A SCREENING DEVICE

The first set of IAT proposals that have been made in the jury context would involve weeding out potential jurors based on their scores. After summarizing the proposals, this Part will examine their advantages and disadvantages in light of the challenges laid out in Part II.

A. *Details of the Proposals*

Reshma Saujani was the first to float this idea, in an article that focused on a proposal to use the IAT to determine whether legislators' actions resulted from implicit bias.[191] In light of the difficulty that even experienced lawyers faced in trying to determine the "racial attitudes and beliefs" of eligible jurors,[192] she argued, the IAT "could be a useful tool to ferret out intentional discrimination that is hidden under a cloak of neutral rationalizations."[193]

Mark Bennett, a district court judge for the Northern District of Iowa, offered a proposal that aimed to address the bias of judges, attorneys, and jurors. He suggested that courts could administer "computer or hand-written bias sensitivity tests to potential jurors and share the results with the lawyers before voir dire."[194] This would be a "judge-neutral and

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[187] Order Denying Defendant's Motion to Bar Death Penalty No. 25 at 18, New Hampshire v. Addison, No. 07-S-0254, 2008 WL 2675622 (N.H. Super. Ct. June 5, 2008).

[188] *Id.* at 18.

[189] *Id.* at 19.

[190] *Id.* at 27 (citing *McCleskey v. Kemp*, 481 U.S. 279, 294–97 (1987)) (noting further that the defendant, just as in *McCleskey*, "relies solely on statistical evidence and social science research to compel the inferences that the prosecutor's decision to seek the death penalty was motivated by racially discriminatory intent and any future decision by the jury to sentence him to death will be similarly motivated").

[191] Saujani, *supra* note 40, at 396 (arguing that the IAT may provide a measuring device for a legislator's reliance on "unconscious racial stereotypes").

[192] *Id.* at 419.

[193] *Id.* at 420.

[194] Bennett, *supra* note 5, at 170.

lawyer-neutral method to attempt to discover and address implicit bias of jurors, without placing the burden on attorneys, for example, to use other expensive resources to develop strategies to address the implicit biases of prospective jurors."[195]

Finally, Dale Larson proposed that jurors have their implicit biases tested while waiting in jury assembly rooms, with the results made available to judges and attorneys during voir dire.[196] The tests would be administered before the jurors were assigned to any particular case, and would "test jurors for the categories most likely to generate bias that could play a role in the cases scheduled for the day, such as age, immigration status, nationality, poverty, sex, sexual orientation, religion, as well as for different types of relevant professions, like police officers or corporate executives."[197] Each juror would take only one of these IATs, but the results could be used as a factor in the decision whether to remove the juror, either by peremptory strike or for cause.[198]

B. *Advantages of the Proposals*

Proposals of this nature could, in theory, tackle bias in jurors, attorneys, and judges. Implicit bias on the jury could be reduced because those with the highest scores would be removed, without any need to rely on the vagaries of self-reporting,[199] and all members of the jury might gain increased awareness of implicit bias from the experience of taking the IAT.[200] The effect of implicit and explicit bias on attorneys exercising peremptory strikes might be lessened because they could now replace their ignorance about the jurors with concrete knowledge.[201] In addition, by participating in a discussion about implicit bias, attorneys might become more vigilant about their own.[202] Similarly, judges focused on the problem of implicit bias, and given more information about the potential jurors, might be more able to counteract their own implicit and explicit bias when ruling on challenges for cause and peremptory strikes.[203]

In a case that expanded the *Batson* doctrine, Justice Kennedy justified

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[195] *Id.* at 170.

[196] Larson, *supra* note 182, at 169.

[197] *Id.*

[198] *Id.* at 167.

[199] *See* Spears, *supra* note 67, at 1499 n.29 ("[T]he judge must ordinarily base his decision [regarding challenges for cause for actual bias] entirely on the juror's self-evaluations.").

[200] *See* discussion *infra* Part V.

[201] Montoya, *supra* note 86, at 1013.

[202] *See* Page, *supra* note 81, at 261 ("[L]awyers should be made aware of the possibility, or likelihood, that they are unconsciously using race- and gender-based stereotypes . . . ."); Tabak, *supra* note 52, at 260 (noting that Vincent Southerland of the NAACP Legal Defense and Educational Fund, Inc., remarked that "talking about race can expose . . . explicit and implicit biases and can sensitize everyone in the courtroom to the issue of race and its potential influence in the courtroom").

[203] *See* Tabak, *supra* note 52, at 260.

his rejection of reliance on stereotypes in the exercise of peremptory strikes in part because "[o]ther means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test."[204] If a litigant believes that a prospective juror harbors explicit or implicit biases, he added, "the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color."[205] While his words have been described as "somewhat Delphic,"[206] at least one commentator has gleaned amidst the murk some support for developing rational means of detecting racial bias.[207] What could be more rational than a scientific test that produces a ranked score, on the basis of which "neutral" decisions can be made?[208]

C. *Disadvantages of the Proposals*

Ambitious though they are, these proposals involve significant disadvantages. The first relates to the question of the connection between an IAT score and any real-world phenomena that would affect the impartiality of a juror. Some of the strongest critiques on this front have been voiced by Gregory Mitchell, who stated: "[T]o date, no empirical research has established that any particular score on the IAT reliably predicts any particular behavior in any particular setting."[209] It is important in this context to resist the scholarly tendency to focus on implicit bias in juries only in connection with the ultimate decision—the verdict—rather than focusing on the ways in which implicit bias can affect the jury at *every* stage of its work:[210] the evaluation of each witness,[211] each piece of

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[204] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991). Justice Kennedy added that "[t]he quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes." *Id.* at 631.

[205] *Id.* at 631.

[206] Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 289 (2005); *see also* Judith Heinz, Comment, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOY. L.A. INT'L & COMP. L. REV. 201, 235 n.198 (1993) (referring to the textual context in *Edmonson* as being "ambiguous").

[207] *See* Phoebe A. Haddon, *The Litigator's Dilemma: "Should I Confront or Ignore Concerns About Racism, Sexism or Other Isms in My Case?,"* 36 ALI-ABA COURSE OF STUDY MATERIALS 253, 256 (1999).

[208] *See* Spears, *supra* note 67, at 1500 (arguing that "there is not sufficient certainty involved in detecting unconscious or concealed biases to make them grounds for court-controlled challenges").

[209] Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 710–11 (2009).

[210] *See* Levinson, *supra* note 18, at 364 n.92 ("Scholarship in the area of race and juries for the most part focuses either on the ultimate decision of the jury or on areas like eyewitness identification. These projects often overlook the powerful workings of unconscious bias in the various stages of legal decisionmaking.").

[211] *See* Veronica S. Tetterton & Stanley L. Brodsky, *African Americans on the Witness Stand: Race and Expert Witness Testimony*, *in* CRITICAL RACE REALISM 94, 94 (Gregory S. Parks et al. eds., 2008).

evidence,[212] and so on. The distinction between thoughts or associations, on the one hand, and behavior or actions on the other,[213] is a porous one: a juror's impressions are absolutely critical,[214] and form *part* of a juror's actions.[215] They are unlikely to be erased as the result of an epiphany during deliberation.[216] Thus, looking for real-world *consequences* of implicit bias may overshadow the need to have a jury that is impartial *throughout* the trial. In addition, several studies have now linked IAT scores to behavior by real-world decision-makers such as doctors,[217] judges,[218] and employers.[219] It remains true, however, that a specific IAT score does not possess sufficient predictive validity to justify the IAT's use in this kind of selection context.[220]

The second concern relates to the fact that, even if one could accurately divine implicit racial bias, each of us is a repository of various biases, overlapping and conflicting,[221] and implicit and explicit.[222] It is

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[212] *See* STEVEN J. BURTON, JUDGING IN GOOD FAITH 249 (1992) ("The sifting of evidence is guided at many points by one's general beliefs about how the world works, including beliefs about various classes of people. Stereotypical beliefs can generate inferences from the evidence to the finding of fact and thereby introduce improper bias in adjudication.").

[213] *See, e.g.*, Vedantam, *supra* note 158, at W12 ("[T]he tests do not measure actions. The race test, for example, does not measure racism as much as a race bias.").

[214] *See* Ham v. South Carolina, 409 U.S. 524, 531–32 (1973) (Marshall, J., concurring in part, dissenting in part) (explaining that a defendant has the right "to present his case to neutral and detached observers capable of rendering a fair and impartial verdict"); United States v. Wood, 299 U.S. 123, 145 (1936) (asserting that impartiality "is a state of mind").

[215] Intuitive first impressions are inevitable in adjudication. Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 284–85 (2010) (arguing that adjudication will inevitably involve intuitive decision-making). They can even influence deliberative decisions. *See* Irwin & Real, *supra* note 63, at 7 (describing how, "[t]o the extent that deliberative [judicial] decisions are based on carefully weighing available options and factors," implicit biases might have a significant impact on judges' decision-making).

[216] *See* B. Michael Dann, *From the Bench: Free the Jury*, 23 LITIG. 5, 6 (1996).

[217] *See* Green et al., *supra* note 154.

[218] *See* Rachlinski, *supra* note 1.

[219] *See* Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECONOMICS 523, 529 (2010) (reporting on a Swedish study finding "strong and consistent negative correlations" between a participant's score on the Arab-Muslim IAT and the likelihood of inviting an "applicant with an Arab-Muslim sounding name for an interview").

[220] *See* Nosek & Riskind, *supra* note 78 (manuscript at 17) ("[T]he circumstances of predictive validity are not yet well enough understood to anticipate when or how much a particular implicit bias will influence behavior.").

[221] *See* Kang, *supra* note 18, at 1502 n.59 ("[T]here is the possibility of schemas canceling each other out on some relevant metric, for example if the target is simultaneously a member of one ingroup and one outgroup.").

[222] *See* Armour, *supra* note 57, at 750–51 ("[S]ocial and personal categories include information about social groups (e.g., blacks, women, gays and lesbians), social roles and occupations (e.g., spouses, maids, police officers), traits and behaviors (e.g., hostile, crime-prone, patriotic, and intelligent), and social types (e.g., intellectual, social activists, and rednecks).").

unlikely that only one type of implicit bias will be relevant,[223] and jurors might override their implicit biases with countervailing explicit preferences.[224] In addition, because of the complex nature of bias, and of trials, the result of one implicit bias score may not persuade attorneys to abandon their discriminatory methods. In any event, they may be more interested in trying to address explicit bias in jurors than implicit bias.

Another set of concerns relates to the effects of this proposal on jurors. Requiring jurors to take an IAT may trigger juror privacy concerns[225] and increase the unpopularity with which jury service is viewed.[226] Some evidence suggests that if the disclosure of implicit bias creates anger and shame, it can lead to an *increase* in stereotyping.[227] Even though no such effect has been demonstrated with the IAT, the specter of jurors provoked into new depths of bias militates in favor of caution. Paradoxically, the risk might be particularly great for whichever party appears most likely to have requested such a screening, since questions to potential jurors about racial attitudes might be viewed, and punished, as "playing the race card."[228] Clarence Darrow might have been able to triumph in a trial in which he told the all-white jury "I haven't any doubt but that every one of you is prejudiced against colored people,"[229] but lesser attorneys might shrink from that role.

It should be added that those who developed the IAT, as well as other

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[223] *See* Benforado, *supra* note 16, at 38 ("Key associations—both positive and negative—relate to 'race, ethnicity, nationality, gender, social status, and other distinctions.'") (quoting Jost et al., *supra* note 10, at 39).

[224] Devotees of Paul Butler, for example, might vote to nullify certain prosecutions against African-Americans, whatever their implicit biases. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 715–18 (1995); *see also* Armour, *supra* note 57, at 749 ("One reason it seems so anomalous to apply the value-laden term 'sexist' to feminists is because feminists have both renounced the cultural stereotype about women and developed egalitarian personal beliefs about women. Thus, feminists have two distinct and conflicting cognitive structures concerning women: the cultural stereotypes and their egalitarian personal beliefs. Similarly, low-prejudiced people have two conflicting cognitive structures concerning blacks: the black cultural stereotype and their nonprejudiced personal beliefs.").

[225] *See Jury Service and the Jury System*, 43 HOUS. LAW. 24, 32 (2005) (discussing jurors' privacy concerns regarding the questionnaires that they fill out); Vedantam, *supra* note 158, at W12 (describing takers of the IAT who did not want their results revealed.).

[226] *See* Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18, 18 (2001) ("Numerous studies document that perceived insensitivity to the privacy concerns of prospective jurors is one cause of dissatisfaction with jury service.").

[227] *See* Bartlett, *supra* note 29, at 1966 ("[A]nger and shame . . . increase the likelihood of stereotyping.").

[228] *See* Motion to Bar Death Penalty No. 25: The Unavoidable Impact of Race Makes the Death Penalty Unconstitutional in this Case, New Hampshire v. Addison, No. 07-S-0254, 2008 WL 2703965 (N.H. Super. Ct. Jan. 4, 2008) (noting that in some mock juror studies, defendants are negatively impacted if their attorneys are judged to have adopted such a race-based strategy).

[229] Herman, *supra* note 139, at 1851 (quoting Clarence Darrow, *Summation in the* Sweet *Case, in* 2 THE WORLD OF LAW, THE LAW AS LITERATURE 350–51 (Ephraim London ed., 1960)).

scientists,[230] have indicated their belief that this tool is not appropriate for jury selection,[231] "[e]specially at this early stage of the IAT's development."[232] As Banaji puts it, the IAT is "not a test of DNA," but rather a test that will "give you a sense of some of the things that can be in your mind that you're not aware of."[233] Thus, in navigating the IAT website one encounters repeated warnings that the results are provided "for entertainment and educational purposes only."[234] Banaji states that she rejected the jury screening possibility despite the fact that people "constantly ask me how I can go to sleep every night arguing this when in many courtrooms in this country the measure of race bias is fairly minimal."[235]

The IAT should be rejected as a screening device for potential jurors because these disadvantages outweigh the advantages of the proposal. At least in the IAT's current state of development, the proposal is vulnerable to the Banks and Ford critique of "fruitless attempts to ferret out individual bias . . . ."[236] Those with resources available to improve the screening of jurors would be better served by investigating those questions that *do* appear to have some success at subtly probing implicit bias,[237] and increasing awareness of them across the economic spectrum.[238]

V. THE IAT AS AN EDUCATIONAL DEVICE

The other set of proposals relating to the IAT in the jury context would involve using it not as a screening device, but as a means of educating the

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[230] *See* Kang & Lane, *supra* note 166, at 477–78 ("[N]early all scientists have discouraged using the IAT in high-stakes individual selection contexts, such as judicial nominations.").

[231] *See* Vedantam, *supra* note 158, at W12 (noting that one of the IAT's developers would testify in court against use of the IAT to "identify biased individuals" because such a use "assume[s] that someone who shows bias on the test will always act in a biased manner"); *Understanding and Interpreting IAT Results*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo/background/understanding.html (last visited Dec. 16, 2011) ("Can (or should) people use this test to make decisions about others? Can one, for example, use this test to measure somebody else's automatic racial preference, and use it to decide that they should or should not serve on a jury? We assert that the IAT should not be used in any such way. Especially at this early stage of the IAT's development, it is much preferable to use it mainly to develop awareness of one's own and others' automatic preferences and stereotypes.").

[232] *Understanding and Interpreting IAT Results*, *supra* note 231.

[233] *Banaji Testimony*, *supra* note 12, at 516.

[234] *Id.*

[235] *Id.* at 516–17.

[236] Banks & Ford, *supra* note 20, at 1122.

[237] *See Banaji Testimony*, *supra* note 12, at 530–31, 568–69.

[238] *See* Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 416 (1992) ("Rare is the criminal defendant who can afford to retain consultants or whose case is sufficiently noteworthy to attract volunteers."); *id.* at 371 (describing how the availability of peremptory challenges "favors those, such as the government or the wealthy, who can commit substantial resources to lawsuits over those who cannot").

jury about implicit bias. This could involve educating jurors about their *own* implicit bias, by administering the test, or instructing jurors on what tests such as the IAT reveal about implicit bias in the broader population. This Part outlines the various proposals, and then conducts a comparative evaluation.

Various commentators have hinted at the possibility that the IAT could be administered to jurors before they start their work, in order to allow them to learn about implicit bias. Susan T. Fiske, a social psychologist, has written that she wishes that the IAT could be given to all judges and juries, because "as a didactic tool, it's amazing."[239] Banaji testified that it would be of great interest to her

> to have this Court and any other Court think about this, how can we give it to people who are part of the decision making in any environment, to be able to take something like this, in the privacy of their own minds to know what there is and to use it in the same ways they would use any other educational material.[240]

Jerry Kang suggests that one option is "debiasing booths in lobbies where jurors wait to be picked,"[241] although he does not specify whether the IAT would lie behind the curtain. Similarly, while not explicitly proposing the IAT, Justin Levinson has floated the idea of "using racial stereotype measures on pretrial jury questionnaires, and nonthreateningly confronting jurors with their biases during voir dire or jury instructions."[242] While the proposals remain vague,[243] they have scholarly comrades in the form of proposals that the IAT could usefully be given to judges, not as a screening device, but so that they could have some sense of the impediments to impartiality.[244]

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[239] Susan T. Fiske, *Stereotypes in the Litigation of Work/Life Conflict*, 27 WOMEN'S RTS. L. REP. 47, 47 (2006).

[240] *Banaji Testimony*, *supra* note 12, at 517.

[241] Kang, *supra* note 18, at 1537.

[242] Levinson, *supra* note 18, at 414.

[243] *Id.* at 414 n.322 ("The exact method of how to nonthreateningly confront jurors should be studied carefully . . . . Before implementing any juror confrontation scheme, the specific design should be tested empirically.").

[244] *See* McKoski, *supra* note 56, at 321 ("The inappropriateness of the Implicit Association Tests as a screening device does not diminish the fact that the tests are a powerful and personalized starting point in educating judges about implicit bias."); Miller, *supra* note 54, at 1012 (suggesting that judicial training could begin to incorporate experiments "in which judges are assessed for bias. The point of these exercises [would] not [be] to embarrass these public servants, but to enable them to understand their own baseline cognitive biases so that through their higher cognitive processes they may compensate for these biases."). Paul Butler, however, does not rule out the possibility that the IAT could serve both an educational *and* a screening purpose in the process of selecting nominees to the Supreme Court. *See* Butler, *supra* note 25, at 1042 ("Given the high-stakes work of Supreme Court

Others suggest educating jurors about the results of tests such as the IAT simply by describing the results. Judge Bennett has taken the lead in preaching—and practicing—jury instruction on implicit bias. He discusses implicit bias with his jurors during voir dire,[245] and covers implicit bias in the instructions that he gives before opening statements.[246] His instruction on this topic draws on his knowledge of IAT results and was drafted in consultation with the United States Attorney and the Federal Defender for his district.[247] The instruction reads:[248]

> Do not decide the case based on "implicit biases." As we discussed in 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.[249]

While Judge Bennett is unaware of any colleagues who have followed his lead,[250] several scholars have endorsed the idea that jurors should be instructed on implicit bias. Susan Herman has suggested that attorneys or judges should be permitted "to educate jurors, using available social

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Justices, . . . some assessment of their unconscious bias seems useful, even if the results are not publicly disseminated. Requiring an IAT might, for example, be part of the vetting process before a judge is nominated. For a judge who is not overtly racist, knowledge of his own unconscious bias could serve as an important check when deciding a case involving a person of color. In the case of a prospective nominee for whom there are racial concerns, an IAT score demonstrating little or no bias would be significant evidence in that person's favor.").

[245] Telephone Interview with The Honorable Mark W. Bennett, U.S. Dist. Court, N.D. Iowa (July 20, 2011) [hereinafter *Bennett Interview*].

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] Judge Bennett jury instructions (on file with the author).

[250] *Bennett Interview*, *supra* note 245; *see also* Bennett, *supra* note 5, at 169 (stating that judges fear that implicit biases will only worsen if attention is drawn to them).

science data, not in an attempt to select imaginary bias-free jurors, but to educate the jurors actually selected[.]"[251] Her suggestions of ways in which jurors might learn about their biases include

> [r]equiring judges to allow expert testimony on the impact of racism on jury verdicts, to give juries a meaningful charge about the potential effect of bias on jury deliberations (prepared with the assistance of nonlegal experts on bias and jury psychology), and perhaps to include a carefully prepared videotape on this subject as part of a juror education program . . . .[252]

Others have echoed her suggestions of implicit bias education at stages such as juror orientation[253] and jury instruction.[254]

Thus, the educational proposals can be divided into two groups according to the period during which the education would begin—pre-trial or during the trial—and can also be divided into two groups according to the educational method—teaching through experience or teaching through the imparting of information. The following Sections provide a comparative evaluation of these proposals by considering both the temporal and the methodological axes. Section V.A addresses the question of *when* implicit bias might best be introduced to the jury, and Section V.B addresses the question of *how* it might best be introduced to the jury. Finally, Section V.C brings these two questions together to propose a model that merits testing.

A. *Comparison of When*

In comparing those proposals that would begin to educate the jury about implicit bias before the trial—that is, during the orientation period for potential jurors—with those that would begin once jurors are assigned to a particular case, this Section discusses the existing state of juror orientation and whether an introduction to implicit bias could usefully be included.

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[251] Herman, *supra* note 139, at 1851.

[252] *Id.* at 1851–52.

[253] Kang & Lane, *supra* note 166, at 500; Larson, *supra* note 182, at 170 (suggesting "techniques to raise awareness of possible bias including pre-jury selection videos").

[254] Brown et al., *supra* note 36, at 1531 (proposing the following instruction: "All of us, no matter how hard we try not to, tend to look at others and weigh what they have to say through the lens of our own experience and background. We each have a tendency to stereotype others and make assumptions about them. Often we see life and evaluate evidence through a clouded filter that tends to favor those like ourselves. I urge you to do the best you can to put aside such stereotypes, for all litigants and witnesses are entitled to a level playing field in which we do the best we can to put aside our stereotypes and prejudices.").

Milling around like cattle in the jury assembly rooms,[255] potential jurors have good reason to feel as neglected by the system as they are by the scholarly community.[256] Potential jurors also have good reason to feel neglected by the advocacy community. Although one judge describes it as a tenet among the criminal defense community that juror orientation materials are just one part of the "indoctrination" to which jurors are subjected throughout the judicial process,[257] attorneys are often unaware of the materials to which potential jurors are exposed,[258] and have been urged to remedy that failure.[259] The juror orientation materials are, after all, "preliminary instructions."[260]

Perhaps as a result of this lack of attention, juror orientation programs are "haphazard and vary from state to state, county to county, and court to court . . . ."[261] Many courts play a videotape or DVD in the room where potential jurors sit and wait for jury service, or, more typically, for dismissal.[262] Prospective jurors pay more attention to the videos than to the juror handbooks that were previously the norm.[263] Existing educational initiatives have, however, been criticized as inadequate,[264] because they

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[255] *See* Thomas L. Hafemeiser, *Juror Stress*, 41 ADVOCATE 14, 16 (1998) ("Jurors may [. . .] feel that they are being processed via a 'cattle call.'").

[256] *See* Elizabeth Najdovski-Terziovski et al., *What Are We Doing Here? An Analysis of Juror Orientation Programs*, 92 JUDICATURE 70, 70 (2008) ("[W]hile there is a plethora of research on juror comprehension and decision making, the literature on juror orientation is virtually nonexistent.").

[257] Michael P. Toomin, *Jury Selection in Criminal Cases: Illinois Supreme Court Rule 431—A Journey Back to the Future and What it Portends*, 48 DEPAUL L. REV. 83, 101 (1998) ("From defense counsel's standpoint, the reality of the situation is that indoctrination is pervasive in our criminal justice system.").

[258] *See* G. Thomas Munsterman, *Jury News*, 19 CT. MANAGER 40, 41, *available at* http://www.ncsconline.org/wc/publications/res_juries_jurynewsjurorient.pdf ("Although the production of orientation tapes is usually handled carefully . . . I doubt that all attorneys have seen these tapes. The Connecticut case [Connecticut v. L'Heureaux, Nos. MV 02 34555, CR 03 80373 (Conn. Super. Ct. Jan. 7, 2004), in which a defense motion resulted in changes to jury orientation videotapes] is a reminder to us that we should be very careful as to the contents of these tapes.").

[259] *See id.* (explaining how attorneys "should remain concerned" that the information provided to jurors is "accurate and consistent").

[260] *Id.* (citing *L'Heureaux*, a case in which a defense motion resulted in changes to jury orientation videotapes, in support of this proposition).

[261] Franklin Strier, *The Road to Reform: Judges on Juries and Attorneys*, 30 LOY. L.A. L. REV. 1249, 1253–54 (1997).

[262] Ruth V. McGregor, *State Courts and Judicial Outreach*, 21 GEO. J. LEGAL ETHICS 1283, 1290 (2008); Munsterman, *supra* note 258, at 40.

[263] *See* Hon. Larry L. Lehman, *Re-Examining Wyoming's Jury Trial Procedures—An Introductory Letter*, 1 WYO. L. REV. 91, 117 (2001) ("Many jurors apparently feel that they do not receive a sufficient orientation to jury service, and a juror orientation videotape may help jurors feel more comfortable and confident about jury service.").

[264] *See, e.g.*, Dann, *supra* note 216, at 64 ("In most jurisdictions, prospective jurors are given a cursory orientation in the jury assembly room . . . ."); Phoebe C. Ellsworth, *One Inspiring Jury*, 101 MICH. L. REV. 1387, 1389 (2003) ("When [those summoned] arrive at the courthouse for jury duty, they may be given a brief lecture by the judge, or shown an orientation videotape. These introductions are usually a combination of solemn reminders of the vital importance of the jury in a democratic

"undermine the jury's ability to process information efficiently and accurately,"[265] and proposals have been made for them to be expanded "into a more extensive educational orientation."[266]

Discussion of implicit bias is largely absent from orientation materials, despite its relevance to many of the functions that the materials are designed to serve. Those functions include explaining to jurors "the meaning of the rule that the case must be decided on the evidence only";[267] instilling "information about the jury trial that may affect the jurors' understanding of the process";[268] instructing jurors as to their responsibilities;[269] and "alerting jurors to problems of bias."[270] It is not even a given that *anything* will be said about bias in these materials: the topic is entirely missing from some videos.[271] There is no mention of bias in New York's much-heralded orientation video,[272] the production of which cost $150,000,[273] and which includes such eye-popping features as an opening scene "set in a barren landscape and featur[ing] a cast of hooded villagers who seem to have arrived in the Balkans by way of 'The Crucible.'"[274] In those videos where bias is mentioned, details are rarely

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society, earnest exhortations to take their responsibility seriously, and practical information about the length of the lunch hour and the process of reimbursement. The main actors (judge, lawyers, bailiff) are sometimes identified, and occasionally jurors will be told a little about the law, such as the distinction between civil and criminal cases. Usually this is all the advance information they get.").

[265] J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the* Blakely *Revolution*, 2006 U. ILL. L. REV. 301, 337 (explaining how jurors are "generally left uninformed" and usually "receive very little guidance on how precisely they should make the most of what they see and hear").

[266] Keith Broyles, Note, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714, 731–32 (1996).

[267] Strier, *supra* note 261, at 1254.

[268] FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES: HOW TO WRITE AND USE JURY INSTRUCTIONS IN CIVIL CASES 11 (2010).

[269] AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS 1, 7–8 (2005).

[270] Munsterman, *supra* note 258, at 41.

[271] *See, e.g.*, Superior Court of Arizona in Maricopa County, *Jury Service in Arizona*, JUDICIAL BRANCH OF ARIZ. (last visited Dec. 16, 2011), http://www.superiorcourt.maricopa.gov/JuryServices/GeneralInformation/juryServiceVideo.asp; Cobb County Superior Court Administration, *Juror Informational Videos*, COBB COUNTY http://sca.cobbcountyga.gov/video.htm (last visited Dec. 16, 2011); Idaho State Judiciary, *Jury Service in Idaho*, IDAHO STATE JUDICIARY, http://www.isc.idaho.gov/videos/juryvid.wmv (last visited Dec. 16, 2011); Texas Young Lawyers Association, *American Juror Video*, AMERICAN JUROR, http://www.americanjuror.org/video.htm# (last visited Dec. 16, 2011).

[272] The closest thing to a mention of bias is the statement that jurors need "an open mind, fairness, the ability to reconsider your opinions, and common sense." http://www.nyjuror.gov/JO_VideoScripts.shtml. This kind of admonition is extremely similar to that found in a New Hampshire video that was claimed by Banaji to have "zero impact." *See Banaji Testimony*, *supra* note 12, at 567 (the video "instructs jurors to be fair, impartial and unbiased and open-minded and not to base decisions on guesswork").

[273] Rebecca O'Brien, *Neighborhood Report: Greenwich Village—City People; For the Spielberg of Civic Duty, No Jury Prizes, Just Plenty of Jurors*, N.Y. TIMES, Aug. 31, 2003, § 14, at 6.

[274] *Id.*

given as to what it involves and how to address it.[275] This silence has stirred a little scrutiny from court-watchers, with the North Dakota Commission on Gender Fairness in the Courts recommending that more should be done to tell the jury about its obligation to act in a "bias-free manner."[276] The Commission identified orientation materials as one means by which "the intrusion of bias into jury functions could be minimized,"[277] and encouraged the creation of a video that would include a segment discussing "gender stereotypes and how they are improper in the justice system."[278]

Including information about implicit bias in jury orientation makes sense for a number of reasons. First, this concept is relevant to a number of the topics already covered in orientation videos.[279] Second, research on such phenomena as "primacy,"[280] "priming,"[281] "framing,"[282] and

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[275] *See, e.g.*, Court Information, *Jury Orientation Video Transcript*, BUCKS COUNTY, Ohio, http://www.buckscounty.org/courts/CourtInfo/JuryDuty/VidTranscript.aspx (last visited Dec. 16, 2011) ("Once on a jury it's your duty to act fairly and impartially."); *Ideals Made Real: California's Juror Orientation Video*, CALIFORNIA COURTS, http://www.courts.ca.gov/2599.htm (last visited Dec. 16, 2011) (featuring a former juror confiding that "I think it's fairly difficult for people to come into the jury and not have some bias. But there's the issue of bias, and there's the issue of trying to keep an open mind[,]" before moving on to a different topic); *Jury Duty, the Lamp of Freedom*, EATON COUNTY, Michigan, http://www.eatoncounty.org/index.php/courts/jury-information.html ("Like any good judge, you must be as free as humanly possible from bias, prejudice, or sympathy for either side."); Hawai'i goes a little further than others. *See Jury Pool Orientation Video*, VIMEO, http://vimeo.com/2147756 (last visited Dec. 16, 2011) ("Personal opinion and prejudices should not become a part of the decision-making. Every person entering the courthouse is entitled to equal treatment, regardless of race, national origin, gender, religion, disability status, sexual orientation, marital status, or age. As jurors, you have a duty to make decisions with an open mind, so it is particularly important that you strive to recognize and guard against possible biases. Consider only the facts presented in the trial, in relation to the law, and form your own conclusions.").

[276] *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N.D. L. REV. 1113, 1147 (1996).

[277] *See id.* at 1176 (adding that "[t]hese methods could be undertaken immediately and without further research").

[278] *Id.*

[279] *See supra* notes 268–70 and accompanying text.

[280] The "primacy effect" relates to the way in which an "ultimate judgment is manipulated as a function of the information that comes earlier." Hyatt Browning Shirkey, Note, *Last Attorney to the Jury Box is a Rotten Egg: Overcoming Psychological Hurdles in the Order of Presentation at Trial*, 8 OHIO ST. J. CRIM. L. 581, 582–83 (2011).

[281] Priming "refers to a process in which a person's response to later information is influenced by exposure to prior information." Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 306 (2010); *see also* Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How "Legal Priming" Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059, 1069 (2005) (priming of jurors probably begins "at the moment the citizen receives a summons"); Barbara O'Brien & Daphna Oyserman, *It's Not Just What You Think, but also How You Think About It: The Effect of Situationally Primed Mindsets on Legal Judgments and Decision Making*, 92 MARQ. L. REV. 149, 151 (2008) ("Psychologists have repeatedly shown that activating or 'priming' a knowledge structure in one context can influence judgments in a separate, unrelated context. Once activated, a knowledge structure can affect how one interprets subsequent ambiguous events to which the primed construct

"cognitive filtering,"[283] has made clear that impressions formed early on can shape the understanding of what follows,[284] and, indeed, can shape what follows.[285] Third, addressing the topic during orientation mitigates the risk that resource inequalities or court rulings[286] will determine whether

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relates."); *id.* at 157 (discussing "mindset priming," and concluding that "[t]here is every reason to think that various situational factors—such as how case materials are presented or the manner in which jurors are treated—affect the mindset of legal decision makers"); *id.* at 169 ("[S]ituational cues can prime a way of making sense of the world that affects how people perceive evidence and receive arguments."); Shirkey, *supra* note 280, at 583 ("Simple priming can dramatically affect the presumed causation of behavior.").

[282] *See* Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1150 (2006) ("[E]very frame defines the issue, explains who is responsible, and suggests potential solutions."); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 42 (2004) ("[T]he way in which an issue is presented to us significantly influences how we perceive it. Psychologists have dubbed this the *framing effect*. Even minor alterations in the presentation of options that are substantively identical seem to influence our perceptions and attitudes regarding the options."); Shirkey, *supra* note 280, at 585 ("Framing is a process whereby communicators, consciously or unconsciously, act to construct a point of view that encourages the facts of a given situation to be interpreted by others in a particular manner."); *id.* at 586 ("Altering identical scenarios exclusively through different frames can have dramatically different effects on judgment."); *id.* at 587 ("[F]raming affects what people do and do not perceive . . . .").

[283] *See* Gail A. Jaquish & James Ware, *Adopting an Educator Habit of Mind: Modifying What It Means to "Think Like a Lawyer,"* 45 STAN. L. REV. 1713, 1716 n.5 (1993) ("The term 'cognitive filter' refers to the attitudes, values, beliefs, and knowledge that comprise a person's conceptual framework of the world. For each of us, our cognitive filter (stemming from our cumulative life experiences) shapes how we interpret events and the behavior of other humans."); *see also* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 304 (1989) (stating that cognitive filters "select and limit the knowledge we draw upon when making judgments under uncertainty").

[284] *See* HOW TO WRITE AND USE JURY INSTRUCTIONS IN CIVIL CASES, *supra* note 268, at § IV(A) (discussing an orientation video that "contains information about the jury trial that may affect the jurors' understanding of the process"); Shirkey, *supra* note 280, at 591 ("Primacy, priming, and framing are quick, unconscious, and unintentional, but have a powerful and lasting effect.").

[285] *See* JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 159 (2010) ("[T]he most important opportunity to frame the public's perception of jury duty comes when citizens arrive at a courthouse to begin their brief stint as jurors."); Blasi, *supra* note 8, at 1277 ("Although there is a certain Orwellian irony to the idea, our system of justice might be more evenhanded if the televisions in jury assembly rooms were programmed with both apparent and subliminal fairness primes amid the usual fare of soap operas and reruns of Judge Judy."); B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1248 (1993) (stating that orientation has the advantage of "responding to jurors' pre-existing 'frames of reference' or 'stories' that they use as cognitive filters while hearing evidence"); Najdovski-Terziovski et al., *supra* note 256, at 70 ("[Orientation] is a juror's first human contact with the system, and the time at which they are likely to be most overwhelmed by their surroundings. Impressions formed, and knowledge gained, at this stage are likely to impact on their perception of the process as a whole, and their ability to perform their task."); Trenticosta & Collins, *supra* note 73, at 18 ("[T]he Confederate flag [outside the court house] impermissibly primes the expression of negative views towards African-Americans.").

[286] Some courts have barred attorneys from discussing with the jury their concerns about bias. *See, e.g.*, Daniels v. Burke, 83 F.3d 760, 766 (6th Cir. 1996) (upholding denial of questioning on racial bias); Stanton v. Astra Pharma. Prods., Inc., 718 F.2d 553, 578–79 (3d Cir. 1983) (criticizing attorney for saying to the jury that: "'[W]e were concerned about the effect of having black people come to an

implicit bias is addressed,[287] or that jurors may punish the attorneys assumed to have requested bias education.[288]

Finally, many of those who urge that implicit bias is malleable emphasize that internal motivation to be fair is a crucial component of efforts to exploit that malleability.[289] It is motivation to our highest impulses that many of the orientation videos already seek to induce. With lofty titles like "Ideals Made Real,"[290] or "Jury Duty, the Lamp of Freedom,"[291] orientation videos aim to inspire,[292] by, as Thomas Munsterman put it, "instilling pride in the jury trial and its place in a democracy."[293] There is good reason to think that these videos could succeed in their motivational efforts, given that potential jurors generally arrive at the courthouse eager to perform their civic duties correctly,[294] or can be encouraged to feel that way.[295] If the videos do succeed, an implicit

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area where there are not many black people and expecting to get justice from a jury which is mostly white people'"); *see also* Forman, *supra* note 115, at 70 ("Many judges refuse to allow probing into sensitive areas that are inevitably the most crucial, such as racism or sexism.").

[287] *See* Armour, *supra* note 51, at 768 ("[Group] references that challenge the factfinders to reexamine and resist their discriminatory responses enhance the rationality of the fact-finding process."). Relying on attorneys to have the knowledge, and the skill, successfully to evoke these concepts threatens to expand, even in the process of attempting to address, inequalities.

[288] *See* Sommers & Ellsworth, *supra* note 11, at 223 ("'Playing the race card' in order to influence White jurors could be a risky endeavor . . . . [I]f claims of racial injustice or police misconduct are perceived by Whites as baseless or as manipulative attempts to get a seemingly guilty defendant off the hook, the strategy might actually backfire. Empirical research suggests that suspicion about the ulterior motives of attorneys can undermine their attempts to influence mock jurors."); *see also* Armour, *supra* note 51, at 747 ("[I]n formal legal proceedings, finding a nonracial reason to discriminate against a black litigant is especially easy to do—one simply gives more weight to the evidence favoring the opposing litigant."); Kang et al., *supra* note 133, at 912 (suggesting that jurors actually influenced by conscious and unconscious bias about the race of the ideal litigator incorrectly convinced themselves that differing attorney conduct was the cause of their judgment about attorney competence).

[289] *See, e.g.*, Blasi, *supra* note 8, at 1276 ("The effects of motivation can be introduced in many different ways. What seems to matter most is whether antidiscrimination norms are activated, either directly or indirectly.").

[290] *Ideals Made Real: California's Jury Orientation Video*, *supra* note 275.

[291] *Jury Duty, the Lamp of Freedom*, *supra* note 275. Richard Delgado's Rodrigo expresses optimism that patriotic symbols might help in the debiasing project. *See* Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721, 727 (1994) ("On formal occasions, such as in court, when serving on a jury perhaps, the average American can sometimes get beyond race. You have all those reminders—the flag, the robes, the judge, the solemn words—that cue you that this is an occasion where the formal values, the higher, official ones, are to preponderate. Other, more intimate occasions do not evoke those same values."). *See also* Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 773 (2000) ("Because the formal values have become corrupted by an overlay of discriminatory practices, participants must constantly remind everyone to follow the American Creed.").

[292] Munsterman, *supra* note 258.

[293] *Id.*

[294] *See* Ellsworth, *supra* note 264, at 1390 ("When people are chosen to serve on a jury, they are generally anxious to perform their task well, and eager for guidance on how to be a good jury.").

[295] *See* Blasi, *supra* note 8, at 1277 (discussing research findings that "goals like fairness can, in effect, be 'injected' into people . . . . For example, it appears that merely seeing or hearing words like

bias education project that relies on motivation would do well to be positioned during orientation, where that patriotic wave swells,[296] and before it has been dashed.[297]

For all these reasons, education on implicit bias merits consideration as a component of juror orientation. The next Section addresses the question of how that education might best be effected.

B. *Comparison of How*

In their methodology, the proposals that jurors merely be instructed about this topic line up with what B. Michael Dann calls the law's "ideal juror."[298] According to that framework, jurors are, among other things:

- [P]assively acted upon;
- [E]xpected merely to observe;
- [E]mpty vessels to be filled; . . .
- [C]omplete and accurate recorders of information; [and]
- [C]apable of suspending judgment on evidence and issues until the end of the case.[299]

This view does not square with what is now known about actual jurors.[300] A rather different set of traits belongs to the "actual juror," who, among other things:

- [P]ossesses pre-existing frames of reference; . . .

'fairness' can cause people to behave as if they are more committed to being fair, entirely without the conscious knowledge of the subjects.").

[296] *See* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERS. SOC. PSYCHOL. REV. 242, 248 (2002) (explaining that Whites may "moderate automatic stereotypes if those stereotypes appear to be discrepant with social norms").

[297] *See* Bartlett, *supra* note 29, at 1901 ("Positive strategies that affirm people's good intentions . . . engage people constructively in defining their better, nondiscriminatory selves and aligning their conduct accordingly."); *id.* at 1903 ("Good intentions are . . . a form of social capital that should be fostered, like any other asset. They can be nurtured, or they can be squandered.").

[298] Dann, *supra* note 216, at 5.

[299] *Id.* at 5–6.

[300] *See id.* at 6 (noting that the view "is based on assumptions or wishful thinking about human behavior and our adversarial system, not on empirical validation").

- [H]as selective and otherwise imperfect recall of the law and the evidence;
- [A]ctively processes information as received, by evaluating and classifying evidence and making decisions prior to deliberations; . . .
- [U]ses "cognitive filters" during trial; [and]
- [S]elects evidence that best fits her frame of reference or tentative verdict choice.[301]

The persistence of the passive role for jurors is not only part of an inaccurate view of the "ideal juror," but also damaging to the ability of jurors effectively to do their work.[302] Judge Dann has claimed that the consequences of this passive role are "juror confusion, impairment of opportunities for learning, distraction, and boredom."[303] Jurors who are active, rather than passive, are more likely to learn, more attentive, and "less likely to become confused or to forget the evidence or the law."[304]

The disadvantages of the passive juror role are particularly evident in the orientation period, where juror boredom and disengagement present huge risks. Of those potential jurors present for jury selection or orientation in district courts in 2010, only 22.7% were actually selected to serve on a jury trial;[305] 14.3% were never even called into a courtroom.[306] In some state courts, the likelihood of serving is even smaller.[307] Thus, the risk is significant that after days of waiting, the potential juror will be sent home, having received little of value, and having provided nothing of value. Many jurors express frustration at being summoned for jury service,

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[301] *Id.*

[302] *Id.* at 5.

[303] *Id.* at 6; *see also id.* at 5 (advocating that each juror instead "should be a participant in an interactive process").

[304] *Id.* at 6; *see also id.* at 5 (linking the passivity of the traditional juror role to "unacceptably low levels of juror comprehension of the evidence and of the court's instructions").

[305] UNITED STATES COURTS, U.S. DISTRICT COURTS–PETIT JUROR SERVICE ON DAYS JURORS WERE SELECTED FOR TRIAL DURING THE 12-MONTH PERIOD ENDING JUNE 30, 2010, tbl.J-2 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/J02Jun10.pdf.

[306] *Id.*

[307] *See, e.g.*, THE COMMISSION ON THE JURY, INTERIM REPORT OF THE COMMISSION ON THE JURY TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 31 n.47 (2004), *available at* http://www.courts.state.ny.us/reports/Commjury_InterimReport.pdf (describing a 2004 study in New York revealing that "10–15% of jurors who actually report are never chosen for a venire or reached during a *voir dire* process"); Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, N.Y. ST. B.A. J., Oct. 2006, at 10, 14 ("Sadly, only 18% of those summoned to jury service [in New York] will actually get selected for a trial.").

only to take an extensive questionnaire and then be dismissed.[308] They have come to assume that their time will be wasted, and that efficiency will not be achieved.[309] Leaving jurors neglected and unengaged during orientation risks seducing them into a passive mindset that will prove unproductive at trial, and lulling them into a boredom that will reduce their sense of investment in the legal process.

Passive learning is particularly problematic on the topic of bias. Implicit bias is far more pervasive than self-reports would suggest.[310] In an area that is, as Banaji states, as "deep and dark as prejudice,"[311] denial will be the default.[312] Thus, an instruction to jurors that they must not be prejudiced is likely to be largely accepted—and largely useless.[313] Educators outside the jury context have advocated methods of learning about implicit bias that involve not passive exposure to information with which one may already agree, but rather the active experience of feeling the workings of implicit bias within oneself. Their techniques are used in teaching doctors,[314] judges,[315] and graduate students,[316] including law

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[308] *See* Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1, 28 (2007) (discussing the fact that perhaps as many as eighty percent of jurors are frustrated that they report for jury duty only to fill out a "comprehensive, probing questionnaire" and then be sent home).

[309] *See, e.g.*, Janet Stidman Eveleth, *Will Jury Reforms Attract More Jurors?*, MD. B. J., May–June 2000, at 42, 44.

[310] *See supra* Section II.A.

[311] *Banaji Testimony*, *supra* note 12, at 477.

[312] *See* Davis, *supra* note 29, at 1565 ("Anti-black attitudes persist in a climate of denial."); Johnson, *supra* note 98, at 1030 ("Denial . . . is a property of unconscious racism.").

[313] *See* Bennett, *supra* note 5, at 157–58 (noting that it is "unrealistic to expect that jurors, who are given only crude instructions about how to decide a case, will somehow overcome their implicit biases in considering questions presented to them"); Blasi, *supra* note 8, at 1275 ("[M]ost of us are resistant to believing that our own thinking could be marred by irrational processes.").

[314] *See* Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 635 & n.11 (2011) (discussing various means of combating unconscious bias in white doctors, and concluding that "[o]f course, the best way to create a culturally competent white doctor is through experiential learning with minority students, not formal cultural competency training or workshops").

[315] The National Judicial College's model curriculum has introductory materials that are "designed to experientially bring to the consciousness of attendees how their thoughts and actions are based on their culture and background." Ramirez, *supra* note 57, at 630–31 (internal quotation marks omitted). The course "provides active-learning experiential activities in which students share common experiences that are intended to alert them that they may be susceptible to implicit associations that inhibit their cultural competence." *Id.* at 631. Rachlinski has called for these kinds of techniques to be introduced more widely, noting:

> [O]ne problem with [judicial education], at least as it exists at this time, is that it is seldom accompanied by any testing of the individual judge's susceptibility to implicit bias, or any analysis of the judge's own decisions, so the judges are less likely to appreciate and internalize the risks of implicit bias.

Rachlinski, *supra* note 1, at 1228. Rachlinski further asserts that, "[t]herefore, while education regarding implicit bias as a general matter might be useful, specific training revealing the vulnerabilities of the judges being trained would be more useful." *Id.*

students.[317] Cynthia Lee has advocated a similar method in the context of jury instructions.[318] Lee recommends a "race-switching" instruction in certain self-defense cases, which would tell jurors that if they are in doubt about whether their assessments have been impaired by racial stereotypes, they should try mentally switching the race of the participants to see whether their assessments would remain the same.[319] Through this method, jurors have the chance to experience the bias that might otherwise have gone unnoticed.[320] Banaji has emphasized that the IAT similarly

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[316] *See* Andrea Kupfer Schneider et al., *Leadership and Lawyering Lessons from the 2008 Elections*, 30 HAMLINE J. PUB. L. & POL'Y 581, 599–600 (2009) (discussing various methods of educating students about biases).

[317] *See* Angela Onwuachi-Willig, *Teaching Employment Discrimination*, 54 ST. LOUIS U. L.J. 755, 766 (2010) (stating that the author has law students in her employment discrimination class take the "Implicit Bias Test" in order to demonstrate that "even good people such as themselves are affected by unconscious biases").

[318] *See* Lee, *supra* note 17, at 489 (stating that studies have shown that jury instructions can reduce the influence of racial bias on jurors).

[319] Lee's "race-switching [instruction] involves [having the jurors] imagin[e] the same events, the same circumstances, the same people, but switching the races of the parties" of the case. *Id.* at 482. Lee's proposed instruction would read as follows:

> It is natural to make assumptions about the parties and witnesses in any case 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 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 could imagine a Latino defendant and a White victim. In intraracial cases in which both the defendant and the victim are persons of color, you may simply assign a different race to these actors. For example, if both the defendant and victim are Black, you may imagine that both are White. 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.

Id. One of the potential drawbacks of this proposal is that "many jurors already have made up their minds before the closing argument." Armour, *supra* note 51, at 771. However, in the case cited by Lee where a race-switching instruction was used, the instruction formed only one part of a "five-part plan for addressing the racial dynamics of the case." CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 256 (2003); *see also infra* note 320 and accompanying text.

[320] Lee refers to this as a very "tangible way" for jurors to learn about the possibility of implicit bias. Lee, *supra* note 17, at 565. At least one defense attorney has persuaded a judge to give an instruction modeled on Lee's proposal. That case, in which an African-American teenager argued self-defense after being charged with hitting a white teenager in the head with a hammer, ended with a not guilty verdict. LEE, *supra* note 319, at 256; *see also* James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, CHAMPION, Aug. 1999, at 22, 24 (stating that the judge in that case, in agreeing to give the instruction, noted "that he personally engaged in a race-

stuns test-takers[321] as they discover their physical inability to make associations that defy the pull of implicit bias.[322] It is the experiential education about one's bias that forms "the essence" of the IAT.[323]

In addition, the passive learning model has already been tried with the jury in the conventional form of jury instructions—but with those conventional instructions, the result has been widespread incomprehension,[324] with troubling and racially disparate consequences.[325]

For all these reasons, the goal of introducing implicit bias to the jury during orientation through interactive, experiential education is appealing. Whereas efforts have been made to counter juror boredom and frustration—through videotapes displaying polished production techniques,[326] dramatic plot devices,[327] and celebrity participants,[328] and, in

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switching exercise whenever he was called upon to impose sentence on a member of a minority race, to insure that he was not being influenced by racial stereotypes").

[321] *See Banaji Testimony*, *supra* note 12, at 475 ("I believe very much that the way in which people can really understand what this work is about is by participating in it themselves."); *id.* at 476.

[322] *See id.* at 510 (claiming that when those who take the IAT have to make associations that run counter to their implicit biases they "mostly fall apart"); *id.* (describing being "stunned").

[323] *See id.* (adding that she thought about demonstrating the test for the court by taking it herself, so that "you could see my bias, but I don't think it is going to actually show you, in your own gut, the degree to which you have it"); *id.* at 513 (describing "the ah-ha moment"); *id.* at 536–37 ("[W]hen you take the test you will actually feel in your gut, in your mind, the inability to do certain things . . . I don't need to wait for the test result to come back, that's how amazing some of these experiences are.").

[324] *See* MARCUS GLEISSER, JURIES AND JUSTICE 228 (1968) ("Probably the most discouraging part of a trial is the time when the judge tries to cram into twelve non-legal minds all the law applicable to the case at hand. The blank expressions on the faces of the citizen-jurors is pitiful; it is matched only by the bleak look on the judge as he plods through the legal terminology that he knows is making little, if any, impression on his listeners.") (footnote omitted); Dann, *supra* note 216, at 65 ("Jurors frequently have difficulty understanding instructions because they are too technical, they use legal terms, and they are poorly organized."); Ellsworth, *supra* note 264, at 1389–90 ("At the end of the trial, before sending the jury off to deliberate, the judge reads aloud a lengthy set of instructions on the law, typically ending with a few brief snippets of advice about how to conduct their deliberations. The one clear task they are given is to choose a foreperson, in jurisdictions where the foreperson is elected. The rest is typically vague and lofty, not much more useful than the initial orientation."); Steven M. Smith & Veronica Stinson, *Does Race Matter? Exploring the Cross-Race Effect in Eyewitness Identification*, *in* CRITICAL RACE REALISM 102, 110 (Gregory S. Parks et al. eds., 2008) (noting that cautionary jury instructions "have been found to be effective if they contain easy-to-understand and accurate information" but "[u]fortunately jury instructions are typically prepared by a judge or legal scholar who may have little knowledge or understanding of empirical findings").

[325] *See* Lynch, *supra* note 16, at 195 (asserting that mock jurors who did not understand the jury instructions were more likely to vote to impose the death penalty on a Black defendant and more likely to vote to impose a life sentence on a White defendant).

[326] *See* J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1503 (1996) (describing professional-quality juror orientation videotapes that have been found to be informative, educational, and attention-grabbing).

[327] *See* Munsterman, *supra* note 258, at 40 (stating that the "cliff-hanging device is used to good effect" in these videos).

[328] New York hired Ed Bradley and Diane Sawyer for this task. O'Brien, *supra* note 273, at 6 (noting that the video "keep[s] exasperated citizens entertained and informed while they wait for jury selection" and "is one of the tools designed to make an often loathed activity slightly more palatable").

New York, through the introduction of a juror newsletter that includes "lively stories and even a crossword puzzle"[329]—these efforts may have been misdirected. Engaging jurors as active participants in the project of resolving cases fairly is more closely aligned with what the judicial system needs from them, and is also more likely to bring them satisfaction,[330] as opposed to leaving them "frustrated by their passive role."[331] Experiential learning through a tool such as the IAT offers the promise of engaging the jurors in an exercise that could enhance their understanding of themselves, their instructions,[332] and the challenge ahead of them.[333] These measures could put them in an active learning mindset,[334] which would increase their levels of comprehension and performance during trial.[335]

C. *Bringing When and How Together*

Sections V.A and V.B advocated greater attention to the nature of jury orientation, and greater use of active, experiential learning by jurors. These goals possess independent force, since orientation has faults that could be addressed by means other than experiential learning,[336] and experiential learning can be usefully introduced in phases of the trial other

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Raymond Burr narrates a similar video in Washington State. Mary Pat Treuthart, *A Summer's Tale: Of Marriage, Feminism, and Jury Duty*, 19 HARV. WOMEN'S L.J. 293, 294 (1996). In North Carolina, Charles Kuralt narrates. Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 LAW & SOC'Y REV. 601, 631 (2005).

[329] Eveleth, *supra* note 309, at 44 (noting that a "national trend to improve jury service and entice more jurors to participate in the process" has been identified); James P. Levine & Steven Zeidman, *The Miracle of Jury Reform in New York*, 88 JUDICATURE 178, 179 (2005); *see also id.* (describing a juror newsletter, "Jury Pool News," which was created "to help jurors endure the boredom of waiting periods").

[330] *See* Dann, *supra* note 285, at 1243 ("[T]he active juror is more likely to have an effective and satisfactory learning experience."); *see also* Strier, *supra* note 261, at 1254–55 (noting that "well-executed orientations" can increase juror satisfaction because jurors tend to perform their duties more effectively).

[331] Phoebe C. Ellsworth & Allan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 813 (2000).

[332] Jurors who believe that they "play a critical role in a difficult and extremely important decision, and that they should take their duties seriously and work hard to perform them in the most scrupulous possible manner" have a better chance of understanding their instructions. *Id.* at 814.

[333] *See* Prescott & Starr, *supra* note 265, at 337.

[334] *See* Dann, *supra* note 285, at 1242–43 ("The active juror model contemplates juror interaction with the judge, attorneys, and others from the time the jurors first report for duty through the post-trial debriefing."); Patricia W. Hatamyar & Todd P. Sullivan, *Active Learning and Law School Performance*, 3 J. MULTIDISCIPLINARY RES. 67, 67 (2011) ("[S]tudents learn better as active, self-reflective participants in the learning process, rather than passive recipients of information.").

[335] *See* Dann, *supra* note 216, at 6 (linking juror passivity to confusion, distraction, boredom, and "impairment of opportunities for learning"); Ellsworth & Reifman, *supra* note 331, at 813 ("[B]ecause current trial procedures discourage active participation and force jurors into an entirely passive role, jurors are prevented from performing to the best of their ability.").

[336] *See supra* Sections V.A–B.

than orientation.[337] However, a proposal that addresses both goals, such as the use of the IAT as an experiential learning device during orientation, has particular appeal, for a number of reasons. It puts jurors into an active learning mode from their first entry into the courthouse, which helps to minimize disengagement, prepares potential jurors for their ideal role during trial, and enhances the likelihood that they will understand their subsequent instructions.[338] Use of the IAT, in addition, harnesses civic energy and enthusiasm that otherwise might melt away and re-solidify as frustration;[339] provides a compelling starting-point for a subsequent discussion of bias within the courtroom, a conversation that might otherwise be difficult to initiate,[340] and that judge and attorney might benefit from hearing;[341]and allows and encourages the potential jurors to give a more nuanced and informative answer than "yes" when asked during voir dire whether they can be impartial.

For those who believe that the lessons that can be learned from the IAT have value that extends beyond jury service, an additional benefit lies in the public education opportunity that this proposal creates.[342] Jury service has a long history as a source of public education,[343] and that tradition could be continued with public education on implicit bias—a project that Banaji compares to the public health project of educating members of the

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[337] *See* Lee, *supra* note 17, at 481 (discussing the race-switching instruction that could be given to juries to protect against juror reliance on racial stereotypes).

[338] *See supra* Sections V.A–B.

[339] *See id.*

[340] *See supra* text accompanying notes 107–12.

[341] *See supra* text accompanying notes 36–39; *see also* Eisenberg & Johnson, *supra* note 8, at 1556 (noting that for capital defense lawyers "introspection about racial stereotypes and reactions, as well as vigilance concerning those effects on others, is necessary"); Ramirez, *supra* note 57, at 629–30 (stating that education that informs judges of "alternative perspectives and implicit associations should enhance impartiality in discretionary decision making").

[342] *See* Lee, *supra* note 17, at 487 (discussing possibility that her race-switching instruction could benefit society by raising social consciousness).

[343] *See* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1186 (1995) ("'To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influences on the fate of society itself is much greater still. The jury is therefore above all a political institution, and it is from that point of view that it must always be judged . . . . [The jury] should be regarded as a free school which is always open and in which each juror learns his rights . . . . I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case. I regard it as one of the most effective means of popular education at society's disposal.'") (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272 (J.P. Mayer ed., George Lawrence trans., 1969) (1840)); Brown et al., *supra* note 36, at 1511–12 ("The jury trial is a way to educate lay people about important social and political issues, the law, and the obligations of citizenship in a community. As one of the few places where the average citizen can directly participate in the governmental process, the jury trial provides an ideal forum for a dialogue about racism, cognitive processes, and the persistence of employment discrimination.") (internal footnotes omitted).

public about their blood pressure.[344] In the case of the IAT, even if six million people have taken it,[345] that leaves over three hundred million within the United States who have not. If potential jurors who take the IAT while waiting to see if they will serve on a jury learn something about implicit bias that enhances their subsequent experiences and behavior beyond the courthouse, there may be public benefits that mitigate the time away from dependents and from work.

Research has indicated that the process of taking the IAT and seeing the results can help address implicit bias.[346] For example, research into the effects of implicit bias, and implicit bias education, on doctors, offers support for the use of IATs to educate jurors. As mentioned above, in a recent study a group of physicians were given a Race IAT, and asked whether they would recommend state-of-the-art treatment for patients with coronary artery disease.[347] For those who were unaware of the nature of the study, the greater their implicit anti-black bias, the less likely they were to recommend the treatment for black patients.[348] For those who were aware of the nature of the study, however, the greater their implicit anti-black bias, the *more* likely they were to recommend the treatment for black patients.[349] In addition, after the IAT was administered, the percentage of participants who believed that subconscious racial biases affected their treatment decisions increased from sixty to seventy-one.[350] Three quarters of the participants felt that education about unconscious bias, and specifically taking the IAT, offered benefit to physicians.[351] The study's authors interpreted their results as suggesting that "implicit bias can be recognized and modulated to counteract its effect on treatment decisions,"[352] and suggested the use of "securely and privately administered IATs to increase physicians' awareness of unconscious

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[344] *See Banaji Testimony*, *supra* note 12, at 517 ("In both cases we know that knowledge is superior to ignorance, and if we know . . . what that was we'd do the equivalent of shaping our mental health in the same way as we shape our bodily health.").

[345] *See supra* text accompanying note 161.

[346] *See* Saujani, *supra* note 40, at 409–10 ("Studies show that the IAT test-taker's prejudices can actually be reduced once an individual is confronted with his unconscious prejudices. . . . Once individuals take the IAT and get their results, they can then stop and ask whether thoughtless adherence to racial stereotypes is affecting their decisions. If so, decision-makers can take remedial measures to prevent or diminish unconscious use of race-specific criteria.").

[347] Green et al., *supra* note 154, at 1235.

[348] *Id.* at 1234.

[349] *Id.* at 1234–35.

[350] *Id.* at 1235 ("Before completing the IAT section of the study, 60.5% of physicians agreed or strongly agreed with the statement: 'Subconscious biases about patients based on their race may affect the way I make decisions about their care without my realizing it.' When shown the same statement after taking the IATs, 71.6% of physicians agreed or strongly agreed with this statement.").

[351] *Id.* ("Meanwhile 74.8% felt that taking IATs is a worthwhile experience for physicians, and 76.1% felt that learning more about unconscious biases could improve their care of patients.").

[352] *Id.* at 1237.

bias."[353]

This study supports the use of the IAT as an educational device, as do other studies suggesting that exposure to the IAT can have an impact on beliefs and behavior;[354] the usefulness of such a device with jurors, however, remains untested.[355] Testing would need to be conducted before any new procedure was implemented. The following proposal is offered as one that merits testing:[356] that existing videotaped orientations maintain their invocation of egalitarian norms and their efforts to inspire their audience to honor those norms, but relate those norms to information about implicit bias;[357] that this information include an introduction to the IAT, with the potential jurors offered the opportunity to take an IAT; and that the potential jurors be provided with either the paper version or access to the online version of the IAT,[358] with the assurance that the results would be for their own edification only. A separate feedback section could monitor jurors' perceptions of the experience, to investigate whether it is stoking resentment.[359] The IAT would be optional—in light of the findings that internal motivation has a greater chance of addressing implicit bias than external motivation.[360] While this might mean that those who could most benefit from the IAT would decline to participate,[361] a more productive conversation could occur during voir dire or deliberation even if

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[353] *Id.*

[354] *See* Nosek & Riskind, *supra* note 78 (manuscript at 16) (giving examples).

[355] *See* Levinson, *supra* note 18, at 411–12 ("[S]tudies indicate that confronting jurors with their implicit biases, striving for more diverse juries, and facilitating a more counterstereotypic community of lawyers and judges could help reduce the occurrence of implicit memory bias. It must be noted, however, that before any concrete suggestions should be implemented, more research must be conducted to confirm that these changes would improve legal decisionmaking.").

[356] One important topic of such an investigation would be the risk of "rebound effect," a phenomenon in which "even if effort suppresses stereotypes in the first instance, stereotypes return with greater force when the pressure is relaxed." Bartlett, *supra* note 29, at 1943.

[357] These materials could be produced with the agreement of the prosecution and the defense bar, as in the case of Judge Bennett's jury instructions on implicit bias. *See supra* note 251 and accompanying text.

[358] For an analysis of a paper version of the IAT, see Kristi M. Lemm et al., *Assessing Implicit Cognitions with a Paper-Format Implicit Association Test*, *in* THE PSYCHOLOGY OF MODERN PREJUDICE (Melanie A. Morrison & Todd G. Morrison eds., 2008).

[359] Thanks to Lauryn Gouldin for this suggestion. For an encouraging indication of the palatability of the IAT, see Nosek & Riskind, *supra* note 78 (manuscript at 16) ("[O]n average, participant evaluations after completing the measures at the [IAT developers'] website are highly favorable . . . .").

[360] Leslie R. M. Hausmann & Carey S. Ryan, *Effects of External and Internal Motivation to Control Prejudice on Implicit Prejudice: The Mediating Role of Efforts to Control Prejudiced Responses*, 26 BASIC & APPLIED SOC. PSYCHOL. 215, 216–17 (2004).

[361] *See* Ward et al., *supra* note 21, at 770–71 ("Evidence ranging from the increased selection of neutral positions or 'don't know' on social surveys related to race to candid expressions of a lack of interest in matters of racial and ethnic group relations in qualitative interviews suggests [an increase among whites] in racial apathy in the contemporary United States.") (internal citations omitted); *id.* at 771 (stating that "racial apathy is more common to whites").

less than the full contingent of jurors had taken the test.[362] While each juror would take only one IAT (addressing race, for example, or gender), the test would be contextualized for the jurors, so that it could serve as an example of one of the many types of cognitive bias to which jurors are vulnerable,[363] and indeed to which all those whose behavior the juries have to evaluate—police officers, civilian witnesses, and so on—are vulnerable. Jury instruction could usefully reinforce,[364] and be reinforced by,[365] this introduction to implicit bias. The aim of an intervention such as this would not be to eliminate bias, but to raise awareness of it in such a way as to combat its influence on jurors' judgments.[366]

VI. POSSIBLE OBJECTIONS

This Part briefly addresses three possible objections. The first relates to the role of social science in law; the second to the project of tackling just one aspect of bias; and the third to juror diversity as an alternative means of addressing implicit bias.

A. *Social Science in Law*

Social science has been the source of many proposals for jury reform,[367] but efforts to shape the law in response to social science findings are controversial.[368] The newness of implicit bias research and the IAT adds to the controversy.[369] While the rich literature on the role of social

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[362] *See* Herman, *supra* note 139, at 1852 n.164 ("It is too much to expect to influence every juror [on the topic of unconscious bias], but influencing a few would be a start.").

[363] Contrast the weakness in restricting an IAT screening proposal to just *one* form of implicit bias. *See supra* text accompanying notes 221–23.

[364] *See Commission on Gender Fairness in the Courts*, *supra* note 276, at 1176–77 ("[A] pattern jury instruction requiring jurors to act in a bias-free manner would reinforce principles first brought to a juror's attention in the orientation videotape.").

[365] *See* Bradley Saxton, *How Well do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 109–10 (1998).

[366] *See* Nosek & Riskind, *supra* note 78 (manuscript at 11) ("Possessing an implicit preference or stereotype does not guarantee that it will influence behavior. Even when conditions are aligned for a particular social cognition to influence judgment, people may engage corrective processes to avoid such an influence."); *id.* ("Direct experience with one's own implicit biases may initiate 'cues for control,' lead people to monitor their decisions more carefully, and initiate corrective efforts when unwanted thoughts are noticed.").

[367] *See* Dann, *supra* note 216, at 5 ("Increasingly, legal authorities and social science institutions have questioned how juries function during trial, and have called for major reforms in the way our legal system utilizes and affects jurors.").

[368] *See* Mitchell & Tetlock, *supra* note 141, at 1116 (noting that "[m]any judges and legal scholars have learned to be wary of social scientists bearing intellectual gifts"); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1141–42 (1999) (arguing that cognitive bias lies beyond what the law can or should deal with).

[369] *See, e.g.*, Gregory Mitchell & Phillip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737, 755–56 (2009).

science in law is beyond this Article's scope,[370] a couple of points can be made. First, the core resistance to the importing into law of this type of social science relates to proposed changes to substantive legal rules,[371] such as the standards for proving employment discrimination,[372] or an Equal Protection violation.[373] Rules, it is argued, must be predictable.[374] No change to a substantive legal rule is proposed here. Second, concern also centers on the prospect of people being held *liable* for discrimination that was not consciously intended or committed.[375] Such a prospect is seen as in tension with norms of fairness.[376] No liability for implicit bias is proposed here. Rather, this proposal hopes to ensure that before a jury commences a process *that may lead to the imposition of liability*, it has learned something about the types of bias that threaten norms of fairness.

B. *A Small Slice of the Bias Pie*

A second set of concerns relates to the question of whether focusing on one type of bias creates a harmful disregard for, or distraction of resources from, inequality throughout and beyond the legal system.[377]

Why focus on juries, one might ask, when most cases end before

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[370] *See, e.g.*, Johnson, *supra* note 98, at 1026.

[371] *See* Greenwald & Krieger, *supra* note 13, at 951 ("The very existence of implicit bias poses a challenge to legal theory and practice, because discrimination doctrine is premised on the assumption that, barring insanity or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, and intentions."); Levinson, *supra* note 18, at 352 (calls for legal reform in response to growing scientific proof of implicit bias often "critique a substantive legal rule or construct").

[372] *See* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1676–77 (2011).

[373] *See* Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1199 (2008) ("We now possess the science, the hard evidence, and the educational tools necessary to educate both the judiciary, and the public, about the realities of implicit bias and its implications for anti-discrimination law. Our next step is to marshal this evidence, and the public's support, to mount a constitutional challenge to the Intent Doctrine [of Equal Protection Clause jurisprudence].").

[374] *See* Mitchell & Tetlock, *supra* note 369, at 755–56 (asking whether, if the IAT's inventors were to alter their definition of what constitutes "slight, moderate, and strong bias," courts and legislatures should defer to their judgments).

[375] *See, e.g.*, Lawrence, *supra* note 27, at 963 ("Legal scholars who have applied cognitive theory to legal problems have focused primarily on its usefulness in proving that unconscious bias influences an individual decision-maker's actions and thereby renders those actions discriminatory and unlawful."); Lindsay Nash, *Expression by Ordinance: Preemption and Proxy in Local Legislation*, 25 GEO. IMMIGR. L.J. 243, 276 (2011) ("Even those who recognize that unconscious bias exists may remain uneasy about the propriety of legal liability in such cases; the absence of either intent or consciousness might suggest that the decision-maker is less blameworthy or perhaps that, even if he or she were aware of the bias, is unable to control his or her unconscious impulses.").

[376] *See* Nash, *supra* note 375, at 276.

[377] *See, e.g.*, Banks & Ford, *supra* note 20, at 1120 (arguing that focusing on "unconscious bias" leads to a "misguided preoccupation with individual acts of discrimination").

trial?[378] Why focus on jury bias, when by the time a jury decides the fate of a criminal defendant he or she will already have been through a system whose racial disparities are massive[379]—and present at arrest, arraignment, indictment, plea negotiation, and every other stage of the criminal process?[380] Why focus on jury bias when he or she will already have been subject to the judgment of numerous other parties who are vulnerable to implicit bias, both those inside the criminal justice system—law enforcement officers,[381] prosecutors,[382] defense attorneys,[383] judges,[384] and witnesses[385]—and those outside it?[386] Why limit one's focus to defects in the jury system, when other aspects of the trial raise fairness questions,

[378] Of the 81,372 defendants in federal criminal court who reached adjudication in 2009, 78,283 pled guilty; 2798, or 3.4%, faced a jury trial. *Federal Criminal Case Processing Statistics*, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/fjsrc (follow "Offenders sentenced: tables" hyperlink: then select year "2009"; then select "Case disposition"; then select "All values"; then select "Frequencies" and "Percents"; then select "HTML"). In a recent survey of California dispositions, only 0.6% of Superior Court cases were resolved as a result of a jury trial. JUDICIAL COUNCIL OF CALIFORNIA, 2010 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 44 (2010), *available at* http://www.courts.ca.gov/xbcr/cc/csr2010.pdf; *see also* Alschuler, *supra* note 138, at 230 ("Battles over trial procedures typically disregard the pressures that our legal system places on defendants to abandon the right to jury trial. A system that can afford *Batson* hearings and that can expend its resources asking prospective jurors whether they are bigots apparently cannot afford to provide trials to the people it accuses of crime.").

[379] Levinson et al., *supra* note 52, at 201.

[380] *See* Benforado, *supra* note 16, at 28 (noting that African-Americans "receive harsher treatment from the moment they encounter a police officer all the way through sentencing"); Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW & SOC'Y REV. 69, 97 (2011) ("[T]inkering with the final stage of a process that disproportionately impacts poor and minority defendants at each prior stage will only have limited impact on racially disparate outcomes."); Sommers & Ellsworth, *supra* note 11, at 201–02 ("[R]esearch on prejudice in the legal system has examined racial biases other than those demonstrated by jurors (e.g., discrepancies in arrests, indictments, and plea bargaining).").

[381] *See* ALEXANDER, *supra* note 39, at 104 (stating that law enforcement officers "become increasingly harsh when an alleged criminal is darker and more 'stereotypically black' [while] . . . they are more lenient when the accused is lighter and appears more stereotypically white").

[382] *See* Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601, 629 (1992).

[383] *See* Benforado, *supra* note 30, at 1366–67 ("Every day, jurors, witnesses, defense attorneys, prosecutors, parole officers, and prison guards, among others, are also making vital judgments that may be influenced by implicit racial bias."); Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 413–14 (2011) (arguing that disparities in sentence length and incarceration rates between African-Americans and Caucasian-Americans are in part due to the plea bargains that defense attorneys recommend that these clients accept).

[384] *See* Ward et al., *supra* note 21, at 772 ("[J]udges harbor implicit biases much like others in the population, and these biases may have some bearing upon judgment.").

[385] *See* Tabak, *supra* note 52, at 254 (discussing studies raising doubt about the reliability of eyewitness testimony when race is implicated).

[386] *See* Jost et al., *supra* note 10 (discussing implicit bias in areas such as medicine and employment).

such as the likelihood that a defendant's fear of cross-examination on prior convictions might keep valuable testimony from the jury?[387] Why focus on proposing new protections, when existing anti-discrimination protections, such as *Batson*, are not yet working effectively?[388] Why argue about the meaning of "millisecond reaction-time differentials on computerized tests,"[389] when inequities beyond the workings of the individual brain are indisputable,[390] such as racial disparities in the foundational areas of life expectancy, health, food, schooling, and housing?[391]

Each of these questions has validity. Yet that does not mean that nothing should be done about implicit juror bias;[392] a rare opportunity exists with jurors in that as they prepare for jury service they *expect* and *hope* to be educated.[393] Judges, for example, may be less open to instruction.[394] In addition, there are several reasons why a focus on implicit juror bias would add resources to, rather than leaching them away from, these other projects. First, the proposal to engage prospective jurors in learning about implicit bias during orientation aims to expand the resource pie by harvesting civic enthusiasm, time, and energy that is otherwise likely to be wasted. It also aims to increase investment in the legal system[395] and comprehension of the law.[396] Second, an understanding

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[387] *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 492–97 (2008) (proposing restrictions on impeachment to encourage defendants to testify).

[388] *See, e.g.*, 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, 1077–78 (2011) (proposing a "fix to what ails Batson").

[389] Mitchell & Tetlock, *supra* note 369, at 738.

[390] *See* Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1557 (2004) (using the term "biographical racism" to capture "the accumulation of race-based obstacles, indignities, and criminogenic influences that characterizes the life histories of so many African-American capital defendants"); Lynch & Haney, *supra* note 380, at 69 (stating that sociolegal scholarship "has made clear that racial factors shape legal outcomes through a complex interaction of individual-level, group-level, situational, and structural forces").

[391] *See* Benforado, *supra* note 16, at 27 (providing statistics regarding the racial disparities in these foundational areas).

[392] *See* Lee, *supra* note 17, at 500 ("Efforts to minimize the influence of racial stereotypes, especially if the costs of such efforts are low, can and should be made if we wish to remain true to our ideals of fairness and equality.").

[393] *See* Ellsworth, *supra* note 264, at 1390 ("When people are chosen to serve on a jury, they are generally anxious to perform their task well, and eager for guidance on how to be a good jury.").

[394] *See* Rachlinski, *supra* note 1, at 1226 ("[J]udges are overconfident about their ability to avoid the influence of race and hence fail to engage in corrective processes on all occasions.").

[395] For a parallel effort to make even those who are not selected feel included, see Richard W. Creswell, *Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 MERCER L. REV. 1, 20 (2001) ("[I]t is important that the jurors be addressed in person by at least one judge during the time of their service. Since many jurors may never leave the jury assembly room, the personal presence of a judge at the beginning of the process

of implicit bias need not be seen as a distraction from substantive inequalities, but rather as a crucial component of substantive inequality that needs to be understood.[397] Indeed, by including a public education component, the proposal responds to the desire for cultural change that leads many to view the implicit bias project as incomplete.[398] Third, a focus on implicit bias may help address other deficiencies within the judicial system.[399] If those arguing for stronger protections against the use of prior convictions on cross-examination continue to make little headway, they may wish to draw on the implicit bias research that indicates that presenting more information about an individual—perhaps through that individual's testimony[400]—reduces both implicit and explicit bias relating to that individual.[401] And while this proposal focuses on the implicit bias of jurors, it may have effects on the implicit and explicit bias of judges and attorneys that have the potential to address some of *Batson*'s failings.[402]

It remains true, however, that there is no substitute for increased diversity among jurors, an additional issue of substantive fairness that will be addressed in the next subsection.

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makes those jurors more willing to accept that their presence is, indeed, important to the court's ability to administer justice.").

[396] *See supra* note 324 and accompanying text.

[397] *See* Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1147 (2010) (concluding that implicit biases "add an additional explanatory layer to the deepest understanding of persistent inequalities among social groups"); Lawrence, *supra* note 27, at 965 (explaining that implicit bias research "is directed primarily at demonstrating the prevalence of forms of bias that motivate and justify behavior that creates and perpetuates racial hierarchy and other conditions of dominance and subordination").

[398] *See* Lawrence, *supra* note 27, at 959 (stating that in his seminal earlier piece on unconscious racism he "called attention to unconscious racism not so much to make the case that each of us as *individuals* harbored unconscious racist thoughts as to make the case for the continued ubiquity of racism in our culture"); Levinson, *supra* note 18, at 417–20 (proposing cultural change as the ultimate goal in response to implicit bias findings).

[399] *See* Kang, *supra* note 397, at 1139 ("Instead of trading off knowledge, for example, at the cognitive layer for the sociological layer (or vice versa), we should seek understanding at each layer, and then interpenetrate the entire stack."); *id.* at 1147 ("The deepest understanding of any process such as racialization comes from multiple levels of analysis that can and should be integrated together."). For an argument that tackling implicit bias may be *essential* to achieving broader structural reforms, see Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV 849, 907–08 (2010) ("[U]nless [cognitive] pathologies are accounted for and surmounted, the broader structural reforms [that academics like Ralph Richard Banks, Richard Thompson Ford, and Olatunde C.A. Johnson] seek . . . may never even get off the ground.").

[400] *See* Arterton, *supra* note 4, at 1029 (describing her efforts as a judge to address racial bias during voir dire, once she realized that if the African-American defendants did not testify the jurors "would have no firsthand measure of the men on trial beyond their appearances").

[401] *See* Mitchell & Tetlock, *supra* note 141, at 1114 ("[S]tereotype effects recede as people learn more about each other as individuals, with individuating information often overwhelming stereotype information.").

[402] *See supra* Sections II.A.2–B.2.

C. *No Substitute for Juror Diversity*

The lack of diversity within the jury, as within the ranks of judges and attorneys, remains a problem that implicit bias initiatives do not solve.[403] Increased awareness of implicit bias cannot change one's experiences, and the notion that diversity of experience can increase the fairness of the jury is well supported.[404]

Yet extensive obstacles exist to juror diversity.[405] Jury service is financially and logistically impracticable for many.[406] In addition, the practice of drawing juror names from the voter rolls has a racially disparate

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[403] *See* Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403, 408 (1994) ("It is misguided to believe that White folks can discard strongly held negative attitudes about Blacks when Whites act as police, jurors, lawyers, or judges in criminal cases with a Black criminal defendant."); Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 181 (2007) ("[R]acially diverse juries deliberated longer, discussed more trial evidence, and made fewer factually inaccurate statements in discussing the evidence than did all-White juries. Interestingly, these effects, too, cannot be explained solely in terms of the performance of Black jurors, as White jurors were more thorough and accurate during deliberations on diverse vs. all-White juries. A potential implication of these findings is that one process through which a diverse jury composition exerts its effects is by leading White jurors to process evidence more thoroughly."); Ward, *supra* note 21, at 771 ("[R]acial apathy, and its potential disadvantage to black crime victims, witnesses, jurors, or defendants, for example, may be mitigated by black representation among decision makers, insofar as these court actors are more likely to engage racial issues.").

[404] *See* Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL'Y & L. 445, 449 (1994) (stating that jury impartiality is necessarily premised upon diversity of juror backgrounds); Pamela R. Garfield, Comment, J.E.B. v. Alabama ex rel T.B.*: Discrimination by Any Other Name . . .* , 72 DENV. U. L. REV 169, 180 (1994) ("[W]ithout the broad range of social experiences often found in groups comprised of both sexes, juries may be ill-equipped to evaluate the facts presented. For example, all male juries may not understand the fear and helplessness felt by battered wives who, in self defense, wound or murder their batterers. Misunderstanding important testimony relating to gender issues, such as spousal abuse, can create the opportunity for unconscious prejudice.") (internal footnotes omitted); *Race and the Criminal Jury*, 101 HARV. L. REV. 1557, 1559 (1998) ("[T]he fact-finding ability of underrepresentative juries is impaired in a way that hurts minority defendants. Without the broad range of social experiences that a group of diverse individuals can provide, juries are often ill-equipped to evaluate the facts presented.").

[405] *See The Civil Jury: Jury Selection and Composition*, 110 HARV. L. REV. 1443, 1456 (1997) ("Low juror fees and lack of support from employers further contribute to hardships for some potential jurors.").

[406] *See* Eveleth, *supra* note 309, at 44 (citing "[f]amily and economic hardships brought on by jury duty, and juror compensation" as big issues among jurors); *Frequently Asked Questions,* CIRCUIT COURT FOR BALTIMORE CITY, http://www.baltocts.state.md.us/jury/juryFAQ.htm (last visited Oct. 22, 2011) (noting that in the Circuit Court for Baltimore City child and elder care are not available). Proposals for measures to reduce or remove these constraints have generally been unsuccessful. *See* Evan R. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 367 (2002) ("[M]ost [states] sidestep the issue of increasing fees for the same reason as the ABA and the Congress, imagining the task to be overly difficult and confusing."); Debra Duncan, *Civil Litigation Section Creates County Juror Instruction Video*, LAWYERS J. (J. of Allegheny County Bar Ass'n, Pittsburgh, Pa.), Nov. 19, 2010, at 11 (citing claim that juror pay in Pennsylvania has not changed in more than twenty-five years, and that "every year, lawmakers introduce legislation to increase the fee, but the bills never seem to pass").

impact,[407] as does the exclusion of those who have been involved with the criminal justice system.[408] As a series of racially disparate filters are applied, the jury pool frequently loses all its color.[409]

For these reasons, even though implicit bias initiatives offer potential that diversity does not,[410] they should not overshadow the need for diverse juries. And they need not; indeed, a focus on implicit bias can inform the push for diverse juries, since one of the benefits of a diverse jury is that the implicit bias of its members may be reduced.[411]

Thus, this proposal should not unduly concern those who worry about the breadth of the influence of social science on law, or those who worry about the narrowness of a focus on implicit bias as it affects jurors. It must, however, be combined with continued efforts to diversify the jury, and it can perhaps illuminate those efforts.

VII. CONCLUSION

The proposals to use the IAT to address jury bias are to be welcomed. They take seriously the fact that decision-makers on whom life and liberty depend have been shown to harbor pervasive racial bias—both explicit and implicit. They raise awareness within the legal community of an area of social science research that offers a way to expose some of that bias. Now their potential must be realized—by careful winnowing away of those ideas that are too ambitious, such as juror screening, and careful research into the effectiveness of an educational model such as the model proposed in this Article. The potential advantages justify the research, since they offer the possibility of jurors who, while waiting to serve, no longer languish in bored neglect, their civic enthusiasm ebbing away, but who are instead welcomed into an interactive process, shown how difficult fairness can be, and oriented into an active learning mindset that will maximize

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[407] *See* Kang et al., *supra* note 133, at 906–07.

[408] *See, e.g.*, Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 88 (2003).

[409] *See* Sommers & Ellsworth, *supra* note 11, at 202 (noting that all-white juries are "not uncommon," and "juries with a majority of White people are the rule").

[410] Implicit biases are unlikely to "cancel each other out" in a diverse jury. *See* Wiley, *supra* note 129, at 231 ("[Counterbalancing] approaches fail . . . when all people share the same overt or covert bias."); Vedantam, *supra* note 158, at W12 ("Some 48 percent of blacks showed a pro-white or anti-black bias [on the IAT]; 36 percent of Arab Muslims showed an anti-Muslim bias; and 38 percent of gays and lesbians showed a bias for straight people over homosexuals.").

[411] *See* Lee, *supra* note 17, at 465 ("Having more juries comprised of jurors with different perspectives on the significance of race would probably educate jurors about racial bias more effectively than limiting instructions."); Levinson, *supra* note 18, at 414 ("Studies have linked culture and diversity to the reduction of implicit biases. These studies indicate that racially diverse juries, for example, may make fewer cognitive errors than homogenous jurors, and that learning about or experiencing diversity and multicultural ideologies in general can reduce implicit bias."); *Race and the Criminal Jury*, *supra* note 404, at 1559.

their satisfaction, their comprehension, and their performance.