

University of California, Los Angeles

From the Selected Works of Dale K Larson

June 13, 2009

A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire

Dale K Larson, *University of California - Los Angeles*



Available at: https://works.bepress.com/dale_larson/1/

A FAIR AND IMPLICITLY IMPARTIAL JURY:
AN ARGUMENT FOR ADMINISTERING THE IMPLICIT
ASSOCIATION TEST DURING VOIR DIRE

Dale Larson

Abstract

While many refer to jury selection as a science, others—perhaps more accurately—liken the process to voodoo. The jury consulting industry has exploded over the last thirty years, with many attorneys paying large amounts for voir dire for erratic and unpredictable results and a general inability to detect bias accurately in potential jurors. One explanation for these poor results, even when using the latest findings in the scientific jury selection field, is that the tools currently available to attorneys and jury consultants give us only a partial picture of the individuals in question. Currently, voir dire consists of oral questioning and the occasional written questionnaires. These simple tools measure only the explicitly held and often filtered beliefs of the jurors, but we now know that our behavior and decisionmaking are influenced by more than our explicitly held and publically stated beliefs. To get a more accurate picture of an individual’s potential biases and a more effective predictor of future behavior and decisionmaking, our voir dire toolbox must be expanded to include measurements of implicit attitudes and implicit stereotypes. This Article examines the impact of implicit bias within the context of criminal trials in federal courts where the defendant’s race is different from that of some jurors, and advocates for the use of the Implicit Association Test (IAT) during voir dire to fill out the currently insufficient tool box available to attorneys and judges.

Table of Contents

Introduction	2
I. An Introduction to the Science of Implicit Bias	5
A. Basics of Implicit Bias	5
B. Implicit Bias is Pervasive.....	7
C. Implicit Bias Often Deviates from Explicitly Held Beliefs	9

D.	Mental Shortcuts such as Schemas Are More Likely to Occur Under Conditions of Uncertainty	10
E.	Implicit Bias Predicts Future Behavior	10
II.	The Likely Role that Implicit Bias Plays Within Juries.....	12
A.	The Cultural Significance of a Fair and Impartial Jury.....	13
B.	Influence of Defendant’s Race on a Jury in a Criminal Trial	14
C.	Effects of Individual Juror Race	15
D.	Racial Composition of Juries as Groups	17
III.	Use of the IAT During Voir Dire.....	17
A.	An Overview of the IAT Along With Criticism and Rebuttal	18
B.	Could the IAT Be Used During Jury Selection?.....	21
C.	Federal Statutes and Rules	21
D.	Cultural and Normative Barriers	23
E.	Benefits of Utilizing an IAT During Jury Selection	24
	Conclusion	26

INTRODUCTION

During my second year of law school, I had the opportunity to work on a trial involving an openly gay former police sergeant who had allegedly been discriminated against for his sexual orientation by a large, metropolitan police department. Because the trial had a high profile and was the culmination of many years of costly litigation, the lead attorneys representing the plaintiff—my bosses—decided that it would be wise to hire and fly in an experienced, very well respected, and very expensive jury consultant to assist with voir dire. The consultant was extremely active in the process, and appeared to bring in a wealth of knowledge and years of lessons learned to the process. This view was shared by the lead attorneys, two distinguished trial lawyers who had conducted countless voir dires of their own in their combined sixty-plus years of practice. As we left the courthouse at the end of the second and final day of voir dire, with a jury now slated, one of the lead attorneys told me that she had never been so pleased with a jury in her lengthy career. The consultant also

noted that the process had gone particularly well. There was a sense of certain optimism about the trial ahead.

Not only did we lose that trial, but the jury acted with such bias and animus towards homosexuals that our client was granted a retrial.¹ During deliberations, comments were made rendering it clear that no homosexual could have won this type of case with this jury, regardless of the facts. Homophobic remarks were commonplace in the deliberations and many jurors apparently refused to listen to fact-based or legal arguments by those showing less bias. This was despite the overwhelming feeling, by attorneys, jury consultant, and client, that we had crafted a fair and impartial jury that would give our client an unbiased trial. In fact, none of the final jurors had shown any signs of bias or animus towards homosexuals during the two-day voir dire process.

Why this result? How could experienced attorneys and an even more experienced jury consultant have misjudged so severely these twelve individuals? This result is far from unordinary. While many refer to jury selection as a science,² others—perhaps more accurately—liken the process to voodoo.³ The jury consulting industry has exploded over the last thirty years, with many attorneys paying large amounts for voir dire for erratic and unpredictable results.⁴

One explanation for our current inability to detect bias accurately in potential jurors, even when using the latest findings in the scientific jury selection field, is that the tools currently available to attorneys and jury consultants give us only a partial picture of the individuals in question. Currently, voir dire consists of oral questioning and the occasional written questionnaires. These simple tools measure only the explicitly held and often filtered beliefs of the jurors, but we now know that our behavior and

¹ The parties are currently involved in ongoing litigation, with the new trial still scheduled.

² A number of books have been written in the field of “scientific jury selection.” See, e.g., JOEL D. LIEBERMAN & BRUCE D. SALES, *SCIENTIFIC JURY SELECTION* (2007). It is important to note, however, that these books are generally not true science. They have no means of hypothesis testing and typically lack controlled experiments.

³ A Google search of *voir dire voodoo* returns over 58,800 results. See <http://www.google.com/search?sourceid=chrome&ie=UTF-8&q=voir+dire+voodoo> (last visited Mar. 31, 2009).

⁴ Because there are so many variables in a trial, it is impossible to know for sure whether a victory was the result of the work of a jury consultant or certain “scientific” jury selection methods. For an overview of the history and relative success rates of the jury consulting field, see JOEL D. LIEBERMAN & BRUCE D. SALES, *Chapter 1: History and Overview of the Scientific Jury Selection Process*, in *SCIENTIFIC JURY SELECTION* 3-16(2007).

decisionmaking are influenced by more than our explicitly held and publically stated beliefs. To get a more accurate picture of an individual's potential biases and a more effective predictor of future behavior and decisionmaking, our voir dire toolbox must be expanded to include measurements of implicit attitudes and implicit stereotypes.

This Article examines the impact of implicit bias within the context of criminal trials in federal courts where the defendant's race is different from that of some jurors,⁵ and advocates for the use of the Implicit Association Test (IAT) during voir dire to fill out the currently insufficient tool box available to attorneys and judges. Part I of this Article explores the science of implicit bias, using recent studies and findings to show that much of our behavior and decisionmaking is beyond our conscious control and awareness. Our unconscious bias, or implicit bias, made up of implicit attitudes and implicit stereotypes, is significant in the legal context for four main reasons: Implicit biases are pervasive; they frequently deviate from our conscious or explicit biases and beliefs, especially when dealing with issues sensitive in our culture such as race, ethnicity, gender, or sexual orientation; they may be even more prevalent within the uncertainty of a trial setting and they, like explicit biases, predict behavior.

Part II examines existing studies to determine whether race plays a significant role in the outcomes of jury trials, both from a theoretical perspective and under the actual existing voir dire standards. The part begins with an overview of the historical and cultural significance that we in the United States have placed on the right to a jury trial, and specifically on the right to a fair and impartial jury. Available studies generally indicate that race does seem to play a factor, but that the processes behind the observed outcomes are unclear. These outcomes are consistent with the theories behind implicit bias, namely that implicit biases are prevalent, cannot be measured through explicit questioning, and affect our behavior.

Part III introduces the Implicit Association Test, starting with the theory behind the test and a discussion of the controversy of the tool as a measure of bias. The most persuasive arguments available conclude that the IAT is a very effective measure of implicit bias, and that the test has

⁵ The findings in this Article are not limited to the area of race. The issues and solutions discussed throughout would apply equally to any characteristic a criminal defendant or victim may have, such as age, body type, immigration status, nationality, occupation, sex, sexual orientation, or religion. Also, race does not have to be a salient issue in these trials. In fact, the issues presented in this Article are most important in cases where race is not explicitly mentioned at all during the trial.

real predictive qualities for our behavior and decisionmaking. The part continues by arguing that while administering the IAT during voir dire would not be contradictory to current federal statutes or case law, it may run contrary to existing normative and cultural conditions. These conditions can, and should, be updated. Finally, the part concludes by examining the practical pros and cons of using the IAT during voir dire, concluding that the benefits of the test render use of the IAT a wise idea.

This Article concludes by suggesting other ideas to limit the possible effects of implicit bias in criminal trials, with a focus on the use of debiasing agents, and advocates further study of these still theoretical possibilities. Given the importance placed on our right to a fair and impartial jury, and given that implicit bias plays a real role in the decisionmaking of jurors, steps should be taken to improve our ability to detect this bias in jurors and remove those who are unable to approach a trial with relative neutrality. The best possible way to accomplish this right now would be to use the IAT during voir dire.

I. AN INTRODUCTION TO THE SCIENCE OF IMPLICIT BIAS

The study of implicit bias has played a major role in behavioral science in recent years. Because of the implications of implicit bias on our behavior and on the way that we interact with one another, numerous legal academics have taken an interest in the findings, and have pondered the implications within our legal structure. This part introduces the science of implicit bias by exploring the difference between implicit and explicit bias and by contrasting stereotypes and attitudes. The part lays out four important implications of implicit bias in the legal framework: Implicit biases are pervasive; they frequently deviate from our conscious or explicit biases and beliefs, especially when dealing with issues sensitive in our culture such as race, ethnicity, gender, or sexual orientation; they may be even more prevalent within the uncertainty of a trial setting; and they, like explicit biases, predict behavior.

A. *Basics of Implicit Bias*

An explicit belief is one that is consciously endorsed by the individual.⁶ When an actor takes an action for a particular reason, that

⁶ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006).

intention is conscious.⁷ When asked, an actor acting out of a conscious intent can state what that intent is. The current tools available in voir dire—oral and written questioning—attempt to learn about the explicit beliefs of the potential jurors, but there are two major problems with this system. First, individuals can choose not to reveal their explicit beliefs, perhaps for fear of public embarrassment if the belief is not publically popular or acceptable.⁸ Second, actors “do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”⁹

This is not to say that explicit measures are not important, or that they do not predict behavior. They clearly do, as consciously held attitudes and stereotypes have been shown to predict behavior.¹⁰ It is important to stress that “explicit beliefs or biases are simply not the only ones to contend with as we understand human behavior and its vicissitudes.”¹¹ It is now accepted that many of our mental functions operate implicitly, or outside of conscious thought.¹² Among these are implicit memory, implicit perception, implicit attitudes, implicit stereotypes, implicit self-esteem, and implicit self-concept.¹³

Two of these in particular contribute to jury bias: implicit attitudes and implicit stereotypes.¹⁴ An attitude is an evaluative disposition, or simply, the tendency to like or dislike someone or something.¹⁵ Attitudes can be explicit—such as every time we consciously like or dislike something—but can also be implicit, such as when we do something to show a like or dislike for someone or something, but are unaware that we are in fact expressing that particular attitude.¹⁶ An example of an attitude would be a general dislike of tall people.

⁷ *Id.*

⁸ Bernd Wittenbrink, *Measuring Attitudes Through Priming*, in NORBERT SCHWARZ & BERND WITTENBRINK, *IMPLICIT MEASURES OF ATTITUDES* 17, 18 (2007) (“[P]eople do not necessarily tell the truth when asked about their attitudes towards socially sensitive issues.”).

⁹ Greenwald & Krieger, *supra* note 6, at 946.

¹⁰ Mahzarin R. Banaji, Jerry Kang, & Kristin A. Lane, *Implicit Social Cognition and Law*, 3 *ANNU. REV. LAW SOC. SCI.* 19.1, 19.4 (2007).

¹¹ *Id.*

¹² Greenwald & Krieger, *supra* note 6, at 947.

¹³ *Id.*

¹⁴ *Id.* at 948.

¹⁵ *Id.*

¹⁶ *Id.*

A stereotype, on the other hand, is a mental association between a group and a trait, and this trait can be favorable or unfavorable.¹⁷ With stereotypes, unlike with attitudes, we are less concerned with valence—that is, favorability or unfavorability—than we are with the content of the trait. The association between group and trait may be based on a statistical reality, but often is not.¹⁸ As with attitudes, a stereotype can be a consciously held belief, or it can be implicit, beneath our own awareness. An example of a stereotype would be a belief that tall people lack intelligence.

Implicit bias, then, can be thought of as our implicit attitudes and implicit stereotypes working together to create a range of possible judgments towards people, groups, or things.¹⁹ These judgments can be favorable or unfavorable. Implicit biases are interesting in the jury context for four reasons. First, implicit bias is pervasive in our society. Second, implicit bias often diverges from our explicit bias, especially when dealing with socially sensitive issues such as race, gender, ethnicity, or sexual orientation. Third, implicit bias may be even more prevalent within the uncertainty of a trial setting than elsewhere. Finally, and perhaps most importantly, implicit bias predicts future behavior including decisionmaking.

B. Implicit Bias is Pervasive

The fact that implicit bias is pervasive is not culturally driven, but instead is anatomically driven. In other words, we have many implicit attitudes and stereotypes because of the way that our brains work. It is helpful to briefly look at the science of schemas.²⁰ Schemas are “knowledge structures” that our brain creates to “represent[] knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes.”²¹ These schemas are employed out of necessity, because we must process, encode into memory, and respond to constant stimuli, and schemas help us to organize that data.²²

This process operates during human interaction: “When we encounter a person, we classify that person into numerous social categories, such as

¹⁷ *Id.* at 949-50.

¹⁸ *Id.* at 949.

¹⁹ *Id.* at 950-51.

²⁰ For an overview of the role of schemas in the legal context, see generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2003).

²¹ SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 98 (2d ed. 1991).

²² Kang, *supra* note 20 at 1498.

gender, (dis)ability, age, race, and role.”²³ Within the context of race, our society has created categories into which we map individuals whom we perceive as fitting into those categories.²⁴ An important byproduct of this system of racial schemas is that the categories we have in our brains carry with them implicit and explicit racial meanings, which we can think of as attitudes and stereotypes, and that we activate these racial meanings when we map an individual into a given category.²⁵ The triggering of these racial meanings then influences our behavior towards the individual.²⁶ This process of creating schemas and mapping individuals is not something we control. “In sum, schemas automatically, efficiently, and adaptively parse the raw data pushed to our senses.”²⁷ Another writes that “stereotyping . . . is nothing special. It is simply a form of categorization, . . . that all people, not just ‘prejudiced’ ones, use to simplify the task of perceiving, processing, and retaining information about people in memory. They are central, and indeed essential to normal cognitive functioning.”²⁸

To emphasize how ingrained these processes are within our brains, it is worth noting that causal influences on our attitudes come from “early (even preverbal) experiences, affective experiences, [and] cultural biases.”²⁹ Another writes that our stereotypic expectancies “may arise from one’s own experiences with members of other social groups . . . [and may result from] vicarious experiences of stories, television shows, movies, newspaper reports, and so forth.”³⁰ The associations in our brain have been forming for nearly our entire lives, and come from sources surrounding us daily.

Studies and testing support the theory that implicit bias is prevalent. In a review of more than 2.5 million completed IATs, it was found that “implicit and explicit comparative preferences and stereotypes were widespread across gender, ethnicity, age, political orientation, and region.”³¹ Two very common forms of implicit bias as found in testing are

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1504.

²⁸ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187-88 (1995).

²⁹ Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 79, 79 (2004).

³⁰ Krieger, *supra* note 28, at 1198.

³¹ Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUROPEAN REV. SOC. PSYCHOL. 36, *40 (2007).

that “socially dominant groups have implicit bias against subordinate groups (White over non-White, for example),” and ingroup bias, or a preference for members of a category to which you belong, which are both discussed in greater detail in the next section.³²

C. Implicit Bias Often Deviates from Explicitly Held Beliefs

An important characteristic of attitudes is that our implicit attitudes often diverge from our explicitly held attitudes.³³ Many studies have shown that that implicit bias measures are dissociated from explicit bias measures,³⁴ and that implicit bias operates absent any intent to favor or disfavor members of a particular social group.³⁵ A meta-analysis of 126 individual studies indicated that there is substantial variability in the strength of the relationship between implicit and explicit cognitions, and concluded that statistical analysis of both measures shows that implicit and explicit measures rely on separate processes.³⁶

As noted above, two common types of implicit bias are a preference of socially dominant groups over subordinate groups and ingroup preference, or favoritism towards a group to which one is a member.³⁷ In fact, implicit bias measures show much more ingroup and socially valued group favoritism than do explicit measures.³⁸ This phenomenon carries over the reverse situation, known as outgroup degradation: people implicitly tend to "associate negative characteristics with outgroups more easily than ingroups."³⁹ While these ingroup preferences permeate both explicit and implicit biases,⁴⁰ when it comes to favoritism for socially dominant

³² Kang, *supra* note 20, at 1512.

³³ Greenwald & Krieger, *supra* note 6, at 949.

³⁴ Kang, *supra* note 20, at 1512.

³⁵ Krieger, *supra* note 28, at 1188.

³⁶ Banaji, Kang, & Lane, *supra* note 10, at 431-32. For a detailed scientific explanation of dissociation, see Brian A. Nosek, *Moderators of the Relationship Between Implicit and Explicit Evaluation*, 134 J. EXPERIMENTAL PSYCHOL. 565 (2005).

³⁷ Greenwald & Krieger, *supra* note 6, at 951.

³⁸ Nearly one hundred studies have documented "people's tendency to automatically associate positive characteristics with their ingroups more easily than outgroups," - a phenomenon known as "ingroup favoritism." See Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004).

³⁹ *Id.*

⁴⁰ Ingroup favoritism is so strong that people report a preference to a group even when randomly assigned to that group. See Banaji, Kang, & Lane, *supra* note 10, at 431-33.

groups, attitudes are much stronger at the implicit level than at the explicit level.⁴¹

D. Mental Shortcuts such as Schemas Are More Likely to Occur Under Conditions of Uncertainty

Trials are situations filled with uncertainty. If a case were not uncertain, it would not make it to trial. Also, much information necessary to know what truly happened in a situation being tried is either unavailable or is presented to the jury in a voluminous and ambiguous way. It is significant, then, that mental shortcuts such as schemas are especially relied upon during conditions of uncertainty.

Social scientists have found that mental shortcuts “are used under conditions of uncertainty, or the unavailability or indeterminacy of important information.”⁴² This includes situations in which “the appropriate factual material may be inaccessible, it may not be gathered together in time to bear on the decision, or it may be too voluminous to be properly organized and utilized in a judgment task,”⁴³ which could arguably describe the conditions in a trial. Not only is information in trial often unavailable, too voluminous, or ambiguous, but that information is ultimately about human behavior, which itself is inherently ambiguous: “Given that most significant social actions can be committed for a variety of reasons and will produce a variety of consequences, the meaning of social action is fundamentally ambiguous.”⁴⁴ The result from this incompleteness and ambiguity is that “people adopt [mental shortcuts] that enable them to make inferences and predictions from what scanty and unreliable data are available.”⁴⁵ Not only is implicit bias prevalent, but it may play an even larger role in a trial setting than outside a courthouse.

E. Implicit Bias Predicts Future Behavior

⁴¹ *Id.* at 433-35.

⁴² Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 191 (Daniel Kahneman et al. eds., 1982).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

An abundance of evidence from studies and research support the idea that implicit bias predicts disparate behavior towards individuals.⁴⁶ This behavior may or may not be consistent with explicitly reported biases.⁴⁷ In other words, not only might a person's implicit biases potentially diverge from that person's explicitly stated biases, but those biases can result in behavior inconsistent with the individual's explicit beliefs.⁴⁸ This consequence may be amplified in a situation such as a race-salient criminal trial: Some studies emphasize that implicit bias is a greater predictor of behavior "in situations that are socially sensitive, like racial interactions, where impression-management processes might inhibit people from expressing negative attitudes or unattractive stereotypes."⁴⁹

Through studies, implicit bias has been shown to have an effect on the way we interpret data,⁵⁰ which is especially significant in a criminal trial in which a jury's primary task is to interpret information to come to a conclusion about a given situation. Implicit bias has also been shown to have an effect on how we perform on objectively measured tests,⁵¹ and how we interact with others.⁵² The latter of these is also relevant in a criminal jury trial, as it could affect both non-verbal interpretations of a defendant in the courtroom, as well as intra-jury interaction during deliberation.

The flip side of this is that individuals have the capacity to not let implicit bias affect their behavior, but this proves to be both difficult and uncommon. One way that this could happen is through exposure to counterstereotypical group members.⁵³ Perhaps more relevant to this analysis is that "[c]onscious exertion to be unbiased may—at least temporarily—reduce implicit bias."⁵⁴ One thing that might trigger this conscious exertion is a public declaration to act fairly during traditional

⁴⁶ For a succinct overview of many interesting studies on this topic, see Kang, *supra* note 20, at 1514-28.

⁴⁷ *See id.* at 1514.

⁴⁸ Greenwald & Krieger, *supra* note 6, at 951 ("Theoretically, implicit biases "can produce behavior that diverges from a person's avowed or endorsed beliefs or principles.").

⁴⁹ *Id.* at 954-55.

⁵⁰ *See* Kang, *supra* note 20, at 1515-19.

⁵¹ *Id.* at 1519-23.

⁵² *Id.* at 1523-35.

⁵³ Banaji, Kang, & Lane, *supra* note 10, at 19.12. Both Part III and the Conclusion of this Article, *infra*, discuss this idea of debiasing in slightly greater depth.

⁵⁴ *Id.*

voir dire questioning.⁵⁵ Even if true, however, voir dire questioning testing only explicit bias still overlooks the very existence of implicit bias and any debiasing or neutral-behavior inducing effects of explicit questioning “are typically modest, taking the form of reduction, but not elimination, of implicit bias.”⁵⁶

* * *

Does implicit bias, then, represent the actual or true beliefs of an individual more than explicitly held beliefs do? Most do not believe so, but instead believe that the two utilize separate mental constructs that each influence behavior and must be taken into account jointly to get an accurate assessment of an individual’s total attitudes and stereotypes, which can then be used to predict behavior.⁵⁷ Given that current testing in voir dire only gets at a person’s explicit bias and that trials sometimes involve individuals from the stigmatized groups prone to dissociation, current voir dire procedures are problematic and insufficient.

II. THE LIKELY ROLE THAT IMPLICIT BIAS PLAYS WITHIN JURIES

Now that we have a foundation of how implicit bias works at the individual level, we can explore the effects that implicit bias might have on a jury. The part examines the historical and cultural significance of the

⁵⁵ JOEL D. LIEBERMAN & BRUCE D. SALES, *SCIENTIFIC JURY SELECTION* 27 (2007) (“Research on persuasion and attitude change has shown that individual who make public commitments to behave in a certain manner are more likely to ultimately behave in that way.”).

⁵⁶ Greenwald & Kreeger, *supra* note 6, at 964.

⁵⁷ Banaji, Kang, & Lane, *supra* note 10, at 19.6 (“Most experts . . . do not believe that measures of implicit social cognition reflect the ‘true’ attitude any more than do measures of explicit social cognition such as questionnaire responses. Implicit and explicit measures appear to tap separate constructs that operate differently: They both predict behavior Privileging one over the other would be scientifically misguided.”). There is, in fact, an entire field of cognitive science called Dual Process Theory that examines the relationship between implicit and explicit processes. *See, e.g.*, R. BAUMEISTER, *THE CULTURAL ANIMAL* (2005); A. PAIVIO, *MIND AND ITS EVOLUTION: A DUAL CODING THEORETICAL APPROACH* (2007); R. SUN, *DUALITY OF THE MIND* (2002); L. F. Barrett, M. M. Tugade, & R.W. Engle, *Individual Differences in Working Memory Capacity and Dual-Process Theories of the Mind*, 130 *PSYCHOL. BULLETIN* 553 (2004); D. Khaneman, *A Perspective on Judgement and Choice*, 58 *AM. PSYCHOLOGIST* 697 (2003); S.A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 *PSYCHOL. BULLETIN* 3 (1996).

right to trial by a fair and impartial jury, with a focus on case law. It then surveys existing studies and writings regarding the effect that race plays in jury trials, examining the race of the defendant, the race of the individual juror, and the collective racial composition of a jury. This part concludes that race plays a real role in race-salient jury trials, and that the documented effects of race are consistent with the science of implicit bias.

A. *The Cultural Significance of a Fair and Impartial Jury*

The United States places a great deal of importance on trials before impartial juries, especially in criminal cases. The American Bar Association estimates that 95 percent of all jury trials in the world take place in the American judiciary.⁵⁸ The Sixth Amendment states that the criminally accused shall enjoy the right to a trial “by an impartial jury.”⁵⁹ The Supreme Court has held that this amendment applies to state criminal cases through the due process clause of the Fourteenth Amendment.⁶⁰ Even before this, however, impartiality was paramount as the Court held that when states did use jury trials, the juries must be impartial.⁶¹

The use of *voir dire* in our country as a tool to select a fair and impartial jury dates back to the 1760 Massachusetts Jury Selection Law.⁶² Since that time, the Supreme Court has repeatedly expressed concern over juries being impartial.⁶³ In *Sheppard v. Maxwell*,⁶⁴ the Court ordered a new trial over concerns that pretrial publicity had jeopardized the accused’s ability to “receive a trial by an impartial jury free from outside

⁵⁸ American Bar Association, *ABA Talking Points: Trial by Jury*, <http://www.abanet.org/publiced/lawday/talking/jurytalk.html>.

⁵⁹ U.S. CONST. amend. VI.

⁶⁰ See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁶¹ See *Turner v. Louisiana*, 379 U.S. 466 (1965).

⁶² LIEBERMAN & SALES, *supra* note 4, at 18.

⁶³ See, e.g., *United States v. Burr*, 25 Fed. Cas. 49, no. 14,692b (C.C.D. Va. 1807) (Marshall, C.J., sitting) (“Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. Is there less reason to suspect him who has prejudged the case, and has deliberately formed and delivered an opinion upon it? Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.”).

⁶⁴ 384 U.S. 333 (1966).

influences.”⁶⁵ Since then, the Court has defined impartiality as a two-fold requirement. First, “the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment.”⁶⁶ The second, and more important to this Article, is that there must be assurance that the selected jurors are not biased.

A line of cases, as described in Part III of this Article, has set out the types and extent of questioning allowed towards this second requirement. Even in cases where the Court found no violation of rights upon rejecting questioning of juries,⁶⁷ the Court was careful to frame the situation as being one where the important right to a fair and impartial jury could not be infringed even with the denial of questioning. It is not difficult to find commentary by judges outside of judicial decisions reiterating the basic goal of voir dire: a fair and impartial jury. Judge David Baker of the Middle District of Florida, in an overview of Federal Civil Voir Dire began with what he considered to be obvious: “*Stating the Obvious*: The purpose of voir dire and the process of selecting a jury is to assure that the jury is free of prejudice and capable of rendering a free and fair verdict based on the trial proceedings.”⁶⁸ Another judge wrote that “[i]t is well settled that the purpose of voir dire is to secure an impartial jury, and ‘impartiality requires not only freedom from jury bias against the accused and for the prosecution but also freedom from jury bias against the prosecution and for the accused.’”⁶⁹ It is clear that courts are committed to using voir dire to secure impartial juries.

B. Influence of Defendant’s Race on a Jury in a Criminal Trial

We have seen that implicit bias against socially underprivileged groups and outgroups is prevalent in our culture. As a result, there is a chance that implicit bias is present anytime a member of such a group is the defendant in a criminal trial. While no research has looked specifically at this question to determine the presence of implicit bias in actual trials involving minority defendants, many studies have been done examining whether the race or ethnicity of a defendant affects the outcome of the jury trial. These studies have mixed results, but those mixed results tend to be consistent with the theory behind implicit bias.

⁶⁵ 384 U.S. at 362.

⁶⁶ Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

⁶⁷ For examples of such cases, see Part III, *infra*.

⁶⁸ The Honorable David Baker, *Overview of Federal Civil Voir Dire*, 1998 FED. CTS. L. REV. 3, available at <http://www.fclr.org/articles/1998fedctslrev3.pdf>.

⁶⁹ The Honorable Mark King Leban, *Guidelines for Voir Dire Examination in Jury Trials*, <http://www.judges.com/articles/lebanv1.htm>.

Upon an analysis of existing studies and study reviews covering tens of thousands of participants, two observers conclude that “[c]ertainly, there are enough published studies to permit the conclusion that [the race of victim and race of defendant] can exert an independent influence on jurors in a given case, though theoretically speaking, ingroup/outgroup biases seem most likely when a juror and victim are of the same race and the defendant is not.”⁷⁰ These broad results are clearly not inconsistent with the science of implicit bias. We have seen that two common forms of implicit bias are ingroup preference, which we can see in the results when a juror is more likely to find against a defendant who has allegedly committed a crime against a member of the juror’s own race, and outgroup degradation, which we see in the results when a juror is more likely to find against a defendant who is a member of a group separate from the juror’s group.

C. *Effects of Individual Juror Race*

It is difficult to find conclusive results from studies that have examined the relative influence of a defendant’s race on white versus black mock jurors because very few studies have examined non-white jurors, and even fewer have examined jurors outside of the white-black dichotomy.⁷¹ From the available data, “one might reasonably conclude that black and white individuals have different race-related motivations when they serve as jurors.”⁷² Unfortunately, there is a lack of studies available to determine the causes and processes behind these differing motivations, but the science of implicit bias is not inconsistent with the findings of these theories.

One study, for example, presented white and black mock jurors with the summary of an assault trial.⁷³ In one version of the interracial case, the altercation was racially charged and in the other it was race-neutral, meaning that the defendant and the victim were of different racial groups, but the issue of race played no apparent role in the incident, and racial

⁷⁰ Omoniyi O. Adekanmbi & Samuel R. Sommers, *Race and Juries: An Experimental Psychology Perspective*, in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, & LAW (W. Jonathan Card, Shayne Jones, & Gregory S. Parks eds. 2008).

⁷¹ *Id.* at 86.

⁷² *Id.*

⁷³ *Id.* citing Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000).

issues were not made salient during the trial.⁷⁴ The response in this variation differed between white and black jurors. When the issue of race was made salient, whites became much less influenced by defendant's race.⁷⁵ Black jurors, however, were much less influenced by the race-saliency changes.⁷⁶

While the authors of this study do not address it, a possible two-part explanation for these results can be found in implicit bias findings. First, as noted earlier, the science suggests that implicit bias can be mitigated or overcome through conscious motivation to overcome our own biases.⁷⁷ Another noted that “low- and high-prejudiced people have given very different responses when they have had to think consciously about what their responses imply about their self-image.”⁷⁸ Second, studies have shown that because of the potentially contradictory forces of preference for socially favored groups and ingroup preference, blacks show much less implicit racial bias than do whites.⁷⁹ A black individual may have some ingroup bias operating to show preference for blacks, but also have socially privileged group bias operating to show implicit preference for whites, arguably cancelling each other out. At the same time, however, studies show that blacks show greater explicit anti-white outgroup degradation than whites do about blacks.⁸⁰ All of this taken together might explain the results: because white jurors start off with greater dissociation between their explicit and implicit racial bias, triggering motivation to overcome implicit bias—such as in the form of making the issue of race salient at trial—will have a stronger effect than with black jurors, where the dissociation is less pronounced.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* For much more on how whites and blacks perceive race in the discrimination context, see Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

⁷⁷ Banaji, Kang, & Lane, *supra* note 10, at 19.12 (“Conscious exertion to be unbiased may—at least temporarily—reduce implicit bias.”).

⁷⁸ Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, & LAW 17 (W. Jonathan Cardi, Shayne Jones, & Gregory S. Parks eds. 2008)).

⁷⁹ Nosek, et al., *supra* note 31, at 20 (“Blacks show no preference between Black and White on average whereas other groups, and especially Whites, show strong White preferences.”).

⁸⁰ *Id.* at 29, citing C.M. Judd et al., *Stereotypes and Ethnocentrism: Diverging Interethnic Perceptions of African American and White American Youth*, 69 J. PERSONALITY & SOC. PSYCHOL. 460 (1995) (“Blacks report more negativity towards Whites than Whites report towards Blacks.”).

Unfortunately, there are examples showing that the courts are not aware of some of these important findings. For example, the Sixth Circuit upheld a trial court's decision to refuse voir dire questioning on the issue of racial prejudice in a violent-crime case where both the defendant and victim were black.⁸¹ There were many types of implicit bias that could have occurred within jurors of all races that the courts ignored in this case, such as bias against socially underprivileged groups. While this section only catalogs a few examples, there are many studies examining individual juror behavior that are consistent with the findings of implicit bias.

D. Racial Composition of Juries as Groups

Juries, while made up of individuals, operate as a group and are asked to make a group decision in trial. It is not enough, therefore, to examine the individual behavior of jurors. We must also understand the racial composition of a jury and how that composition might affect decisionmaking. Studies, as one would expect with such a complex issue, tend to show mixed results and tend to lack explanations for outcomes.

In one experiment, the “mere expectation of deliberating on a racially diverse jury was influential, in this instance by leading both white and black mock jurors to be more punitive toward a same-race defendant when they expected to be in the racial minority of their jury.”⁸² This result could be seen as an example of a situation triggering motivating factors to be aware of and overcome possible implicit bias. It might also be evidence of the fact that implicit biases affect the way that individuals interact with others.

* * *

Our legal system takes the goal of a fair and impartial jury very seriously. Studies exist to show that race plays a role in jury trials in three ways. The race of the defendant, the race of individual jurors, and jury's racial composition all play a role. The findings of studies looking at these different issues are generally quite consistent with, and can often be explained by, the science of implicit bias.

III. USE OF THE IAT DURING VOIR DIRE

⁸¹ See *Daniels v. Burke*, 83 F.3d 760 (6th Cir. 1996), *cert. denied* 519 U.S. 942 (1996).

⁸² Adekanmbi & Sommers, *supra* note 70, at 89.

It would be disturbing for the legal community if implicit bias was prevalent, distinct from explicit bias, especially significant in a trial setting, affected behavior and was undetectable through accessible testing. Fortunately this is not the case. The Implicit Association Test (IAT)⁸³ has become a valid and extremely accessible tool for measuring implicit attitudes and stereotypes.⁸⁴ While the test is not without controversy,⁸⁵ it is currently recognized as an effective gauge of an individual's implicit bias,⁸⁶ and the creators of the test have posted extensive research claiming that the test has predictive,⁸⁷ construct,⁸⁸ internal,⁸⁹ and statistical-conclusion validity.⁹⁰ This part begins with an overview of the theory behind the IAT, discusses the current controversies surrounding the test, and examines the two primary benefits of using the IAT during voir: eliminating individuals showing substantial implicit bias against a defendant's category and the debiasing effects of simply administering the test.

A. *An Overview of the IAT Along With Criticism and Rebuttal*

The IAT, developed in 1998, can test either implicit attitudes or implicit stereotypes by measuring automatic group-valence (implicit attitudes) and group-trait (implicit stereotypes) associations. It works by measuring response time to various stimuli. The amount of time it takes to make an association between two stimuli corresponds to their

⁸³ Anyone can take a range of IATs online to test the strength of one's own implicit biases. The tests are available at <http://www.projectimplicit.org> or at <https://implicit.harvard.edu/implicit/>.

⁸⁴ The IAT is one of only many measures of implicit bias that have been used, but because of its qualities as discussed in this section, it now stands out as the best known measure.

⁸⁵ See Section III.A, *infra*, for an evaluation of the controversies surrounding the IAT.

⁸⁶ Bruce Bower, *The Bias Finders: A Test of Unconscious Attitudes Polarizes Psychologists*, SCIENCE NEWS ONLINE, (Apr. 22, 2006).

⁸⁷ For articles detailing the predictive validity of the IAT, see http://faculty.washington.edu/agg/iat_validity.htm#predictive.

⁸⁸ For articles detailing the construct validity of the IAT, see http://faculty.washington.edu/agg/iat_validity.htm#construct.

⁸⁹ For articles detailing the internal validity of the IAT, see http://faculty.washington.edu/agg/iat_validity.htm#Internal.

⁹⁰ For articles detailing the statistical conclusion validity of the IAT, see http://faculty.washington.edu/agg/iat_validity.htm#statistical.

associational strength.⁹¹ We can examine this theory by applying it to an example.

An IAT configured to measure automatic associations between white or black faces and positive or negative concepts is measuring race-based implicit attitudinal preference.⁹² The test asks the examinee to pair two concepts, such as a black face and “good,” or a white face and “good,” and measures the speed at which the examinee is able to make the pairings.⁹³ Response time is crucial because faster responses equate to pairings that are more strongly associated in memory. If an examinee associates white faces with positive words more quickly than black faces, then that examinee likely has a closer implicit attitudinal association between whites and positive thoughts than blacks and positive thoughts, thus indicating an implicit bias in favor of whites. In other words, if the stimuli pair is schema-consistent, one expects a faster response, and if inconsistent, one expects a slower response.⁹⁴

The test is not without its detractors. As of April of 2006, over 250 IAT-related studies had been published, engendering a lively debate as to the full meaning of the test.⁹⁵ Some critics argue that the IAT uses arbitrary metrics, which makes any real-world use of the test meaningless.⁹⁶ The argument is that a metric is arbitrary “when it is not known where a given score locates an individual on the underlying psychological dimension or how a one-unit change on the observed score reflects the magnitude of change on the underlying dimension.”⁹⁷ Because the IAT relies on a fixed unit of measurement—the millisecond—the measurement lacks real-world meaning when used as a measurement of actual attitudinal preference.⁹⁸ It is dangerous, the argument concludes, to

⁹¹ Banaji, Kang, & Lane, *supra* note 10, at 19.5.

⁹² Kang, *supra* note 20, at 1509-10.

⁹³ *Id.* at 1509-12.

⁹⁴ *Id.* at 1509.

⁹⁵ See generally Hart Blanton & James Jaccard, Arbitrary Metrics in Psychology, 61 AM. PSYCHOLOGIST 27 (2006); Bower, *supra* note 86; Klaus Rothermund & Dirk Wentura, Underlying Processes in the Implicit Association Test: Dissociating Salience From Associations, 133 J. EXPERIMENTAL PSYCHOL. 139 (2004); Anthony G. Greenwald, Implicit Association Test: Validity Debates,

http://faculty.washington.edu/agg/iat_validity.htm#famil (last visited Feb. 18, 2008). One observer noted that “rarely has a methodological tool garnered such strong adherents and detractors.” Bower, *supra* note 84, at 250.

⁹⁶ Blanton & Jaccard, *supra* note 95, at 27.

⁹⁷ *Id.* at 28.

⁹⁸ *Id.* at 32.

examine a person's IAT score and “imbue these values with meaning” about the individual's implicit cognition.⁹⁹

IAT creators and advocates respond by arguing that their normalizing process makes the data metrically meaningful and gives it consequential validity.¹⁰⁰ Furthermore, the advocates point to the wealth of published findings that show an accurate linkage between IAT scores and actual behavior, at least in a laboratory setting.¹⁰¹ The advocates also speculate that because the IAT is accessible and provides immediate (and often undesirable) feedback, it creates a “palpable and possibly unsettling” experience, thus making it prone to attack.¹⁰²

Others have challenged the IAT's construct validity,¹⁰³ arguing that rather than measuring positive or negative attitudes, the IAT instead possibly measures familiarity with a certain group, empathy or sympathy towards a group, performance anxiety for “fear of being labeled a bigot,” or awareness of stereotypes and socio-demographic facts.¹⁰⁴ First, IAT advocates have directly combated the claim that the IAT lacks construct validity through a number of studies and articles.¹⁰⁵ Second, even if the critics' claims that the IAT was measuring something other than negative attitudes,¹⁰⁶ the fact would remain that IAT results predict behavior, so whatever it is that the IAT was measuring would still be acting as a type of bias in a jury setting.¹⁰⁷ Similarly, critics have attacked the IAT's

⁹⁹ *Id.*

¹⁰⁰ See Anthony G. Greenwald, Brian A. Nosek & N. Sriram, *Consequential Validity of the Implicit Association Test*, 61 AM. PSYCHOLOGIST 56, 57 (2006).

¹⁰¹ *Id.* at 59.

¹⁰² *Id.* at 60.

¹⁰³ “Construct validity refers to the degree to which inferences can legitimately be made from the operationalizations in your study to the theoretical constructs on which those operationalizations were based.” Web Center for Social Research Methods, *Construct Validity*, <http://www.socialresearchmethods.net/kb/constval.php>.

¹⁰⁴ Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1031 (2006).

¹⁰⁵ See Anthony Greenwald, *IAT Materials: Construct Validity*, http://faculty.washington.edu/agg/iat_validity.htm#construct.

¹⁰⁶ Much science suggests that this is simply not the case. See, e.g., Anthony G. Greenwald, *IAT Studies Showing Validity With "Real-World" Subject Populations* (July 21, 2008), http://faculty.washington.edu/agg/IATmaterials/PDFs/Real-world_samples.pdf.

¹⁰⁷ For a compelling argument that this and most other critiques of the IAT are not, in fact, attacks on the science of the IAT, but instead are actually normative attacks that go beyond the scientific merit of the test, see Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007).

internal,¹⁰⁸ external,¹⁰⁹ and statistical-conclusion validity.¹¹⁰ IAT advocates have refuted these claims with their own research.¹¹¹

B. *Could the IAT Be Used During Jury Selection?*

The threshold question is whether attorneys would be allowed to administer the IAT to potential jurors during voir dire. A secondary question would be whether voir dire would play a role in dismissals for cause, peremptory challenges, or both. To answer these questions, we can start with statutes, rules, and the case law interpreting those statutes and rules. While federal statutes and rules on the issue of voir dire are not conclusive as to the admissibility of the IAT, there is no clear statutory basis to bar the use of the IAT. Nor is case law a direct bar to its use. A more likely obstacle to its inception into voir dire would be cultural and normative barriers within the judiciary.

C. *Federal Statutes and Rules*¹¹²

At the federal level, Federal Rule of Criminal Procedure 24 states that “[t]he court may examine prospective jurors or may permit the attorneys for the parties to do so”¹¹³ in criminal cases, and that “[i]f the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further

¹⁰⁸ Mitchell & Tetlock, *supra* note 102, at 1032-33. The argument is that the IAT lacks internal validity because IAT researchers rely entirely on correlational evidence to find a relationship between implicit bias and discriminatory behavior, while not controlling for other possible variables such as discomfort or shame.

¹⁰⁹ *Id.* Critics contend that the IAT lacks external validity because researchers have not shown that correlations between IAT scores and discriminatory conduct observed in laboratory settings reliably predict behavior in non-laboratory settings where “institutionalized layers of safeguards against the expression of prejudice” exist.

¹¹⁰ *Id.* at 1033. Critics argue that the IAT lacks statistical-conclusion validity because of “psychometric flaws and an alarmingly high false alarm rate,” indicating that many factors other than association strength can affect reaction time.

¹¹¹ For articles detailing the predictive validity of the IAT, see http://faculty.washington.edu/agg/iat_validity.htm#predictive. For articles detailing the internal validity of the IAT, see http://faculty.washington.edu/agg/iat_validity.htm#Internal. For articles detailing the statistical conclusion validity of the IAT, see http://faculty.washington.edu/agg/iat_validity.htm#statistical.

¹¹² Given that most criminal cases take place in state courts, it would perhaps be more worthwhile to examine state and local voir dire rules. Given the differences from state to state, however, this task is beyond the scope of this Article.

¹¹³ FED. R. CRIM. PROC. 24.

questions that the court may ask if it considers them proper.”¹¹⁴ Similarly, on the civil side, Federal Rule of Civil Procedure 47 states that “[t]he court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.”¹¹⁵ The question, then, is whether use of the IAT could be considered “proper” in the eyes of a judge, either for establishing cause or for gathering information to make peremptory challenges. Unfortunately, no case is directly on point. There are cases, however, that deal with the question of whether additional questions are proper.

The Court held in *Ham v. South Carolina*¹¹⁶ that the due process clause of the Fourteenth Amendment requires a judge to interrogate potential jurors on the subject of racial prejudice where race is a salient factor in case:

Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these ‘essential demands of fairness,’ . . . , and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race . . . , we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice.”¹¹⁷

It soon became clear, however, that this would not be a universal rule in all criminal cases involving parties of different races and different ethnic origins.

In *Ristaino v. Ross*,¹¹⁸ the Court stated that “*Ham* did not announce a requirement of universal applicability” and interpreted *Ham* to mean that there must be “a significant likelihood that racial prejudice might infect [the] trial”¹¹⁹ before the constitutional requirement of questioning was triggered. In the case, the Court upheld a district court decision to not allow black defendants accused of violent crimes against a white man to question potential jurors on the subject of racial prejudice because “[t]he mere fact that the victim of the crimes alleged was a white man and the

¹¹⁴ *Id.*

¹¹⁵ FED. R. CIV. PROC. 47.

¹¹⁶ 409 U.S. 524 (1973).

¹¹⁷ 409 U.S. at 526-527.

¹¹⁸ 424 U.S. 589 (1976).

¹¹⁹ *Id.* at 598; see also *United States v Brown*, 938 F2d 1482 (1st Cir. 1991), cert. denied 502 US 992 (1991).

defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*.”¹²⁰

Generally, courts are left with a great deal of discretion in determining whether questioning on the subject of racial bias is necessary, but there are a few restrictions designed to protect our right to a fair and impartial jury in select circumstances. First, federal district courts must allow inquiry into possible racial bias whenever requested by a defendant in cases where the defendant and victim are members of different racial groups.¹²¹ Furthermore, defendants in capital cases in which the defendant and victim are members of different racial groups have the right to question potential jurors on the question of racial prejudice.¹²² In these cases, it appears to be sufficient for a judge to do the questioning into these matters, with no guarantee that the defendant’s counsel can conduct its own questioning.¹²³ It is not sufficient, however, for the judge to direct general questions to the jury as a whole on these matters.¹²⁴

D. Cultural and Normative Barriers

Perhaps more substantial barriers to adopting the IAT in *voir dire* would be cultural and normative in nature. A survey of published federal and state cases finds almost no mention of the IAT.¹²⁵ Despite its apparent importance, it is simply not a part of current judicial practice. Similarly, a

¹²⁰ 424 U.S. at 597 (“The circumstances in *Ham* strongly suggested the need for *voir dire* to include specific questioning about racial prejudice. Ham’s defense was that he had been framed because of his civil rights activities. His prominence in the community as a civil rights activist, if not already known to veniremen, inevitably would have been revealed to the members of the jury in the course of his presentation of that defense. Racial issues therefore were inextricably bound up with the conduct of the trial. Further, Ham’s reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor. In such circumstances we deemed a *voir dire* that included questioning specifically directed to racial prejudice, when sought by Ham, necessary to meet the constitutional requirement that an impartial jury be impaneled.”).

¹²¹ See *Rosales-Lopez v United States*, 451 US 182 (1981).

¹²² See *Turner v Murray*, 476 US 28 (1986).

¹²³ See *United States v Powers*, 482 F2d 941 (8th Cir. 1973), *cert. denied* 415 US 923 (1974).

¹²⁴ See *United States v Bear Runner*, 502 F2d 908 (8th Cir. 1974).

¹²⁵ A Lexis search of “implicit associations test” among all Federal and State Cases Combined returned only the unpublished case *Jaffe v. Morgan Stanley & Co.*, 2008 U.S. Dist. LEXIS 12208 (N.D. Cal. Feb. 7, 2008) (detailed a settlement agreement as part of which “Morgan Stanley agrees to provide diversity related training to field sales branch management which incorporates elements of the Implicit Association Test or similar tool agreed upon by the parties.”).

Lexis search for “implicit bias” among all published federal and state cases returned only eleven results, only two of which are published.

In one of the extremely rare occasions where a court did attempt to assess the possibility of a juror being affected by implicit bias, the court showed a very shallow and incomplete understanding of how implicit bias works. In *United States v. McConnell*,¹²⁶ the Tenth Circuit attempted to determine whether a juror had any implicit bias by considering only that the juror may have failed to disclose that he had been involved in a previous criminal matter, a question he was asked during voir dire,¹²⁷ ignoring the myriad other influences that could have contributed to the existence of implicit bias. Based on their inquiry, the court found that the juror did not have any implicit bias.¹²⁸ The judges analysis, of course, was not at all consistent with what is now known about implicit bias.

In a recent criminal trial in New Hampshire,¹²⁹ the state tried to block an attempt by the defense to use a leading expert in implicit bias, Professor Mahzarin Banaji, from testifying in trial as an expert witness “to demonstrate the link between [implicit bias research] and death penalty decision-making.”¹³⁰ The court in that case did grant funds for and allow Professor Banaji’s testimony, which may be a sign that at least some courts will begin to consider the effects of implicit bias in criminal cases. Currently, however, the American judiciary does not appear ready to listen to arguments that use implicit bias despite the fact that these arguments are consistent with the stated and revered goals of voir dire.

E. Benefits of Utilizing an IAT During Jury Selection

¹²⁶ 464 F.3d 1152 (10th Cir. 2006), *cert. denied* 2007 U.S. LEXIS 4280 (U.S., Apr. 16, 2007).

¹²⁷ *Id.* at 1157.

¹²⁸ *Id.*

¹²⁹ *State v. Michael Addison*, No. 07-S-0254 (N.H. Super. 2008).

¹³⁰ Reply to State’s Objection to Defendant’s Motion for Services Other Than Counsel: Expert on Implicit Racial Bias, *State v. Michael Addison*, No. 07-S-0254, 3-4 (N.H. Super. 2008) (“Professor Banaji will first testify that the concept of implicit bias [has] been extensively tested and demonstrated by psychologists for the past twenty years. She will testify regarding her own research, using an instrument called the Implicit Association Test (IAT), that has produced data from over six million respondents to demonstrate that implicit bias is a phenomenon observed in ordinary people. Professor Banaji will also testify that the theory of implicit bias has been subjected to peer review and numerous publications Finally, Professor Banaji has represented to counsel that the evidence regarding implicit racial bias . . . has been generally and widely accepted in the relevant scientific community both in the United States and internationally.”)

Even if the IAT were permissible, we still must determine whether it would be beneficial. If one's goal is to reduce the effects of implicit bias on jury members in trial, then there are two primary benefits to using an IAT during jury selection. The first, and more obvious, is to remove from the jury those individuals whose IAT results indicate strong implicit bias. The second benefit stems from the debiasing properties of the IAT itself.

1. Removing Individuals Showing High Levels of Bias

The most obvious benefit of using the IAT during voir dire is that a strongly biased juror could be removed from the final jury. While it would be unclear where a cutoff point could be to remove a juror for cause based on an IAT result, or even whether such a result is enough to show cause at all, an IAT result showing strong bias against a relevant category of people would be an important factor in an attorney's determination to use a peremptory challenge on that individual. This raises one problem that in certain states, a test such as this could only be used for determinations of cause,¹³¹ and not for peremptory challenges, but that it would be unlikely sufficient to establish that cause on its own.

In these states, the best-case use of the test might be as one factor of many used to support a general finding of cause for removal by a judge, and in turn to act as a factor in a decision by an attorney to use a peremptory challenge. If the resulting jury consisted of individuals free from strong levels of implicit bias as measured by an IAT, it is likely that that jury would be closer to the ideal envisioned in the primary goal of fair and impartial.

2. Debiasing Properties of the IAT

One positive fact about implicit bias is that it is malleable.¹³² "Implicit biases are sensitive to features of the local situation. Exposure to counterstereotypical outgroup members often reduces implicit bias."¹³³ Relatedly, a conscious motivation to act unbiased may reduce implicit bias, at least temporarily.¹³⁴ From this it follows that the greater a situation creates self-awareness about possible bias, such as by exposing an individual to a mirror, the more likely a person will be to overcome any

¹³¹ See, e.g., CAL. CIV. PROC. CODE § 223 (West 2007) ("Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.").

¹³² Banaji, Kang, & Lane, *supra* note 10, at 19.11-12.

¹³³ *Id.* at 19.12.

¹³⁴ *Id.*

negative effects of that implicit bias.¹³⁵ In some ways, the IAT acts as a mirror, but perhaps even as a more probing mirror than an external, physical mirror. Once people take the IAT and are aware of the existence of their own implicit biases, they will be better situated to overcome negative effects of that bias, at least theoretically. Of course each individual is different, both in terms of motivation to be nonprejudiced and in terms of cognitive styles, and taking the IAT will have a different effect on different test takers.¹³⁶

Aside from individual variation, administering the IAT would not ensure a less biased jury because some studies have shown that debiasing agents can result in a “rebounding” effect, where those individuals subject to these agents feel greater animus to a certain group than before.¹³⁷ It is possible, then, that an individual could take an IAT, and then feel negative emotions for having been subjected to the test. This raises questions about the methodology of administering the IAT, which must be resolved before it could be used. If the test were given to a jury panel for a specific case on a specific category such as race, for example, then the jurors would likely know what the test was about, which would increase the likelihood of a rebounding effect. It would probably be wiser to make the IAT universal in jury assembly rooms, and to 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, and for different types of relevant professions such as police officers or corporate executives. The results of these tests could then be accessible to the judge and to attorneys within specific court rooms during voir dire. Administering it blindly in this fashion would surely decrease any negative rebounding effects and help the benefits of administering the test outweigh possible consequences.¹³⁸

CONCLUSION

¹³⁵ *Id.*

¹³⁶ *Id.* at 19.13 (“Some people are more dispositionally motivated to be nonprejudiced People motivated to be nonprejudiced for personal (or internal) reasons, but not social (or external) reasons showed reduced implicit racial bias Implicit bias is also related to more general cognitive styles, such that people with highly rigid thinking styles or strongly right-wing ideologies exhibit stronger implicit bias.”).

¹³⁷ *Id.* at 19.12.

¹³⁸ For more on general jury debiasing, aside from use of the IAT as a debiasing agent, see Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Psychology*, 49 UCLA L. REV. 1241 (2002).

Our legal system places great emphasis on the right to fair and impartial jury in criminal cases. Current voir dire tools only assess potential jurors' publicly admitted, explicit biases. We all necessarily have implicit attitudes and implicit stereotypes, and these implicit attitudes and stereotypes often deviate from our explicit beliefs and influence our behavior and decisionmaking. The Implicit Association Test is an effective way to measure an individual's implicit bias, and has been shown to have predictive, internal, external, construct and statistical-conclusion validity. For all of these reasons, administering the IAT during voir dire would get us closer to our primary goal of having fair and impartial juries.

Statutory and case law would seemingly not be an absolute bar to implementing this solution, but current norms and judicial culture might. If the IAT were allowed in voir dire, its primary benefit would be to eliminate individuals who show strong implicit bias against a category to which a defendant in a criminal trial belongs. A secondary benefit would be the debiasing effect of the test itself on all jurors.

The field of implicit bias has provided a wealth of information about how the brain works and about the implications of those brain processes. The legal community is currently in a position to apply those findings towards the goals of the judiciary. If, during this endeavor, it is found that certain cultural norms need to be reevaluated and updated, then this author argues that this should be done.

Even within the small piece of the pie dealing with voir dire in race-salient criminal jury trials, there is much more about implicit bias to explore than what is discussed during this Article. For example, it would be useful to explore the benefits of using debiasing agents beyond the test itself to counteract the negative effects of implicit bias in criminal trials. This would include the use of objects in the courtroom, objects in jury pool waiting rooms, objects in jury deliberation rooms; the use of individuals who might provide a debiasing effect; and techniques to raise awareness of possible bias including pre-jury selection videos, the use of mirrors or closed-circuit video cameras in jury deliberation rooms. Such a discussion would have to evaluate the effectiveness of these still theoretical solutions, and would have to consider the possible "rebound" effect of debiasing agents, which ultimately could result in even more bias. It would also be useful to explore the difficulties of implementing these solutions and the possible need for a regulatory system to ensure compliance and promote best practices in courtrooms around the country.

These ideas may just be the tip of the iceberg. In addition to promoting the use of the IAT during voir dire, this Article also hopes to serve as an example to show the complexities involved in implementing a real-world solution to the concerns raised by the science of implicit bias. Most of all, this Article hopes to persuade readers that despite these complex obstacles, the science is compelling enough to begin a process to overcome those obstacles and to fill in a few gaping holes in our current jury regime.