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A Proposal to Properly Address Implicit Bias in the Jury

Anona Su

I. INTRODUCTION

Through the efforts of Legislators, the people, and courts, our judicial system has sought repeatedly to eliminate bias in the court system. From the actions of civil rights and women's rights advocates, the courts slowly changed its ways and opened its doors to more people than it did in the early days. Equal Protection paved the way for courts to overrule statutes that prevented people from serving on juries based on their race or color.¹ Since that breakthrough, the courts worked to create equal access to the system. These efforts, however, were primarily aimed at eliminating explicit or conscious biases.² Only outright expressions of discrimination or prejudice were barred from the court, but these were only surface-level fixes.³ As the average population becomes more educated and explicit biases become less and less socially accepted, the court system seemed to be approaching a fairer system.⁴ In some ways, people have general respect for each other.⁵ Courts now do not allow discriminatory actions on part of attorneys because of the movement towards eliminating biases in the courtroom. Thus, although not all explicit biases have been eliminated in the courts,⁶ they are

1. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880) (overruling state law that excluded jurors based on race or color based on Equal Protection principles); *Foster v. Chatman*, 136 S.Ct. 1737 (2016).

2. Conscious bias and explicit bias are the same phenomena. This paper will primarily label it as explicit bias.

3. See Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARVARD L. & POL'Y REV. 149 (2010); Suja A. Thomas, *What Judges Can Do About Implicit Bias*, JOTWELL (May 22, 2017) (reviewing ANDREW J. WISTRICH & JEFFREY J. RACHLINSKI, *IMPLICIT BIAS IN JUDICIAL DECISION MAKING: HOW IT AFFECTS JUDGMENT AND WHAT JUDGES CAN DO ABOUT IT*, IN *ENSURING JUSTICE: REDUCING BIAS* 87 (Sarah Redfield ed., forthcoming 2017), available at SSRN), <https://courtslaw.jotwell.com/what-judges-can-do-about-implicit-bias/> [<https://perma.cc/DRV9-CSCT>].

4. In recent years this point has been arguable as racial prejudice seems to be on the rise like explicit hate crimes. Michael Martin, *Is Racial Prejudice On The Rise?*, NAT'L PUB. RADIO (Oct. 31, 2012), <https://www.npr.org/2012/10/31/164029897/is-racial-prejudice-on-the-rise> [<https://perma.cc/R3QD-TQAP>].

5. See *id.* Politics and portrayal of these tensions in media emphasis the previous point that racial prejudice is on the rise. It is unclear just how far reaching the rise is.

6. See, e.g., *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE (Aug. 2010), <https://eji.org/reports/illegal-racial-discrimination-in-jury-selection> [<https://perma.cc/KMP2-JBQX>]; Kami Chavis, *The Supreme Court Didn't Fix Racist Jury Selection*, THE NATION (May 31, 2016), <https://www.thenation.com/article/the-supreme-court-didnt-fix-racist-jury-selection/> [<https://perma.cc/BME8-J4WX>].

now no longer at the forefront of issues that courts address since many mechanisms have been put in place to prevent such issues.⁷ Instead, as the science behind it becomes stronger, the court system has started to turn its head to confront issues of implicit bias within the courtroom.⁸

With the new developments and recent expansion by psychologists studying biases, some courts have taken steps to address implicit or unconscious biases.⁹ These efforts, admittedly, are limited and the steps taken to address it range across the board. Courts are faced with a myriad of issues including time constraints and a limited ability to educate jurors to fully combat the unwanted consequences of implicit bias. This effort to combat implicit biases may even come across improperly. Potential jurors may feel hostility to the idea that they have implicit bias due to a lack of exposure to the topic and time given to digest the idea.¹⁰ Moreover, courts may not be in the best position themselves to educate jurors on this complicated matter simply because of its own lack of understanding.¹¹ Nevertheless, it is crucial to take the steps to start educating jurors on the proper steps to eliminate implicit biases from their decision making process. With the wide range of methods that are currently used by the limited number of courts trying to address the problem, there have been only a few studies conducted on the effectiveness of these methods.¹²

7. See, e.g., U.S. CONST. amend. VI.; *Challenge for Cause*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/challenge_for_cause [<https://perma.cc/5C6L-2KA9>] (for cause challenges); *Right to Trial by Impartial Jury*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/constitution-conan/amendment-6/right-to-trial-by-impartial-jury> [<https://perma.cc/S9F5-2U3L>] (discussing generally the impartial jury requirement set forth by the Sixth Amendment).

8. See, e.g., Press Release, American Civil Liberties Union, Washington Supreme Court is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection (Apr. 9, 2018) <https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection>.

9. Unconscious bias and implicit bias are the same phenomena. This paper will primarily label it as implicit bias.

10. The term "bias" can create hostility as people do not like to think of themselves as having biases especially since it reveals hard and difficult aspects of the human nature. See, *Education: Ethical Considerations*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/ethics.html> [<https://perma.cc/4UX9-4KVC>]. When articles address bias, there tends to be a first justification that helps distinguish good and bad biases. See, e.g., Community Relations Services Toolkit for Policing, *Understanding Bias: A Resource Guide*, THE DEPT OF JUSTICE, <https://www.justice.gov/crs/file/836431/download>.

11. With the understanding of implicit bias expanding, so has recent training developments of judges and lawyers. Pamel M. Casey, et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, <http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1Casey.pdf>. Nonetheless, the trainings are still limited and vary state to state in the acceptance of the phenomena and how to address the issue. *Id.* Thus judges and attorneys are still in the process of learning how to address their own implicit biases.

12. See generally Mike Noon, *Pointless Diversity Training: Unconscious Bias*, *New Racism and Agency*, 31 QUEEN MARY U. OF LONDON 198 (2018); Dr. Janice Gassam, *Does Unconscious Bias Training Really Work?*, FORBES (Oct. 29, 2018), <https://www.forbes.com/sites/janicegassam/2018/10/29/does-unconscious-bias-training-really-work/#105b646db8a2> [<https://perma.cc/6M93-DXRG>]; Jessica Nordell, *Does Starbucks Understand the Science of*

This article first addresses what implicit bias entails and why increasing education and exposure about it is important. More specifically, it addresses why implicit bias education of jurors is critical in order for a fairer court system—particularly for the criminal justice system. It then analyzes the main efforts currently utilized by courts and attorneys across the United States to inform jury members of implicit bias. This article also analyzes some of the more peculiar methods certain courtrooms have been using. With this all-in mind, I propose a methodology that courts should use that is based on the methodologies already in place and scientific research on what effective implicit bias training looks like. I hope that this note leads to more courts employing effective implicit bias trainings to lead to long-term reduction of systematic bias.

II. THE SCIENCE BEHIND IMPLICIT BIAS AND THE TACTICS USED IN IMPLICIT BIAS EDUCATION

Implicit bias is a phenomenon coined by two psychologists to describe the stereotypes our brains have built to help us navigate the world. These implicit biases are something that humans generally do not realize exist and is outside of their control.¹³ Many people do not realize they are even acting on these stereotypes, hence the term implicit or unconscious. On one side, these innerworkings and shortcuts provide our brains with faster ways to process information and to limit having to rebuild connections repeatedly.¹⁴ This, on its face, is not negative. The fault these mental shortcuts have is that the connections we build in our brains lead us to make broad overgeneralizations about individuals.¹⁵ These connections are our brains stereotyping individuals and making assumptions about them implicitly based off of cultural and social cues that we have learned through various

Racial Bias?, THE ATLANTIC (May 2, 2018), <https://www.theatlantic.com/science/archive/2018/05/starbucks-unconscious-bias-training/559415/> [<https://perma.cc/5U7P-NCUS>]; Lee Jussim, Ph.D., *Mandatory Implicit Bias Training is a Bad Idea*, PSYCHOLOGY TODAY (Dec. 2, 2017), <https://www.psychologytoday.com/us/blog/rabble-rouser/201712/mandatory-implicit-bias-training-is-bad-idea> [<https://perma.cc/3N9M-K3E2>].

13. See generally *Education: Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html#faq1> [<https://perma.cc/EV7Y-V2PQ>]; Renee Montagne, David Greene, & Mahzarin Banaji, *How the Concept of Implicit Bias Came Into Being*, NAT'L PUB. RADIO (Oct. 17, 2016), <https://www.npr.org/2016/10/17/498219482/how-the-concept-of-implicit-bias-came-into-being> [<https://perma.cc/RH49-DCSY>].

14. For example, our brains are generally able to understand words even if there are misspellings so long as the first and last letter are correctly in order. What happens in the middle does little in helping our brain process the word in front of us. See generally MRC COGNITION AND BRAIN SCIENCE UNIT, <https://www.mrc-cbu.cam.ac.uk/people/matt.davis/cmabridge/> [<https://perma.cc/QK64-QJY7>] (compiling studies done at the University of Cambridge over the years about mix letters and the ability to read them and examples).

15. Charles Stagnor, Dr. Rajiv Jhangiani, & Dr. Hammond Terry, *Social Categorization and Stereotyping: The Negative Outcomes of Social Categorization*, PRINCIPLES OF SOCIAL PSYCHOLOGY (2011), <https://opentextbc.ca/socialpsychology/chapter/social-categorization-and-stereotyping/>.

interactions with the world.¹⁶ While implicit biases can help us in our everyday lives by eliminating extra mental connections our brains would have to make, these mental “shortcuts” can also be a hinderance to fully assessing an individual based on what they have actually shown us rather than what we think they are like.¹⁷

An example constantly used to illustrate implicit bias is a color association test—otherwise known as the Stroop Effect.¹⁸ The color association test presents the name of colors in their color and asks individuals to name the color of the word. It then switches up the test by changing the name of the colors to something not associated with the color the word is displayed in.¹⁹ This is a short test to show that the brain develops mental shortcuts and these shortcuts can be hard to shut down even when we are explicitly asked to do so. These shortcuts are what creates the implicit biases people hold.

The idea of implicit bias is deeply convoluted. Implicit bias is difficult to access because individuals do not know when they are using these connections or biases. Thus, in order to continue to develop research and studies on implicit bias, researchers in 1998 began Project Implicit.²⁰ Project Implicit is a vast database of articles stemming from the data collected which helps provide better lectures and workshops on implicit bias that can be used in various workplaces or the education system.²¹ The project also provides lectures and workshops to help individuals learn what implicit bias is, learn about their own biases, and learn the best ways they can manage their biases.²² Other organizations also realize the importance of implicit bias training. Police officers in various states have had extensive training on the

16. For example, a person may believe that women belong in supervisory roles but define their own female supervisors as “emotional” or “bossy” when these words would not be associated with a male supervisor doing the same exact action.

17. See Stagnor *supra*, note 15.

18. The Stroop Effect is named after J. Ridley Stroop in the 1930s. See *Colors, Colors, NEUROSCIENCE FOR KIDS*, <https://faculty.washington.edu/chudler/words.html> [https://perma.cc/8FV9-32XU].

19. For example, RED is **RED** and then later on in the test where participants are supposed to name just the color of the word rather than the word itself RED is **RED**. A sample of test is located at INTERACTIVE STROOP EFFECT EXPERIMENT, <https://faculty.washington.edu/chudler/java/ready.html>.

20. See PROJECT IMPLICIT, <https://www.projectimplicit.net/index.html> [https://perma.cc/97FL-H4WA] (last visited Mar. 10, 2019).

21. See *About Us*, PROJECT IMPLICIT, <https://www.projectimplicit.net/about.html> [https://perma.cc/8YUL-Y78P].

22. See *Products and Services: Lectures and Workshops*, PROJECT IMPLICIT, <https://www.projectimplicit.net/lectures.html> [https://perma.cc/YW94-VAXC].

subject.²³ In the legal world, attorneys in all type of law firms²⁴ and judges are starting to recognize their own implicit bias in the courtroom,²⁵ and, most importantly, training for jurors has been proposed.

What these efforts have come to show is that managing one's implicit bias is important in order to be able to fully assess others without having the mental block of a falsely connected stereotype. Most importantly, it indicates that by going through trainings on the subject, the people who come out on the other side were, at the least, more aware of what implicit bias is and, if the trainings were comprehensive enough, just how to combat it.²⁶ Education of the public on understanding implicit bias can further reduce all types of bias in the world and hopefully lead to a much more equal and just place where people can be who they are without being subjected to unsupported presumptions.

III. THE IMPORTANCE OF EDUCATING JURORS ON IMPLICIT BIAS

The risks of implicit biases run deep in the courtroom. Educating jurors on implicit bias is critical to further elimination of bias in the courtroom.²⁷ Implicit bias may be seen in the jury deliberation process because jurors may harbor stereotypes and not realize they are employing them towards witnesses and defendants. Jurors then run the risk of improperly evaluating these individuals based on stereotypes rather than taking in the whole picture of how they presented themselves at the stand. This becomes a critical issue because jurors evaluate the credibility of witnesses. While it is true that the jury, in evaluating the witness, may consider the whole picture, the whole picture should not include any implicit biases that they are bringing into the courtroom. These are their own beliefs that are separate from what they have

23. See, e.g., Al Baker, *Confronting Implicit Bias in the New York Police Department*, N.Y. TIMES (July 15, 2018), <https://www.nytimes.com/2018/07/15/nyregion/bias-training-police.html> [<https://perma.cc/8QSD-SN3Z>] (NYPD implicit bias training); Tom James, *Can Cops Unlearn Their Unconscious Bias*, THE ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/12/implicit-bias-training-salt-lake/548996/> [<https://perma.cc/M2WM-5GKC>] (Salt Lake PD implicit bias training); Elizabeth Chuck, *Can 'Implicit Bias' Training Stop Police Officers From Acting on Hidden Prejudice?*, NBC NEWS (Oct. 1, 2016), <https://www.nbcnews.com/news/us-news/can-implicit-bias-training-stop-police-officers-acting-hidden-prejudice-n656071> [<https://perma.cc/A8PW-TP52>] (Charlotte PD).

24. See, e.g., *Implicit Bias Initiative*, AM. BAR ASS'N, <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/> (last visited Mar. 10, 2019); Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 THE COLO. LAW. 45, 46–50 (2016).

25. See, e.g., Justin D. Levinson, Mark W. Bennett, & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017); Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

26. See Doyin Atewologun, Tinu Cornish, & Fatima Tresh, *Unconscious Bias Training: An Assessment of the Evidence for Effectiveness*, EQUAL. AND HUMAN RIGHTS COMM'N 113 (2018). Effective implicit bias training is also a critical aspect in all of the above-mentioned programs for the police department, law firms, and judges.

27. This paper does not address the implicit bias of judges which is equally as important.

learned about the witness on the stand.²⁸ If they off-handedly dismiss a witness simply because of some implicit bias they did not realize they were employing—or even the opposite, overly trust a witness that needs to be evaluated just like any other—the trial process becomes less fair. While it is true that a trial will not be perfect, it should at least be reasonable to ask for a trial that is free from biases and prejudice. Being able to take the extra time and steps necessary to understand the implicit biases jurors possess could be, at the very least, a simple check on the jurors to ensure they properly evaluate the evidence presented to them.²⁹

The risk implicit bias imposes extends beyond evaluating evidence. Attorneys may also be subject to implicit biases and have to be wary about how they present themselves to jurors. Jurors may feel certain litigators are less effective because of their race or gender. There could even be an overcorrection on a litigator's effectiveness by the jurors because of stereotypes the jurors hold.³⁰ While an attorney's credibility should not speak to the evidence that is presented in the court, it is without a doubt something that plays into how a jury analyzes what is in front of it in the deliberation room. Bias should not be the determinative factor of any case.³¹ The courts need to take active measures to reduce implicit bias issues in the jury to eliminate it as a whole.

While some may argue that this limited exposure to implicit bias will not bring about cultural change, it is a step in the right direction. Implementing educational programs in the courtroom would act as an official recognition of the need to address implicit bias issues all around. Moreover, these changes are part of a larger and highly impactful system that will eventually lead to reducing bias over time. What is important for now is to create a

28. See, e.g., CACI No. 113 Bias.

29. See Paul Bisceglia, *Your Stories of Battling Unconscious Bias*, THE ATLANTIC (June 7, 2017), <https://www.theatlantic.com/notes/2017/06/unconscious-bias/529464/> [<https://perma.cc/M2MD-8DXR>].

30. See Lara Bazelon, *What it Takes to be a Trial Lawyer If You're Not a Man*, THE ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/> [<https://perma.cc/Z5DD-4TDC>]; Women in the Courtroom Committee, *Women in the Courtroom: Best Practices Guides*, THE VOICE OF THE DEFENSE BAR (2007), [https://www.dri.org/docs/default-source/dri-white-papers-and-reports/women-in-the-courtroom-best-practices-guide-\(2007\).pdf](https://www.dri.org/docs/default-source/dri-white-papers-and-reports/women-in-the-courtroom-best-practices-guide-(2007).pdf); Claire Zillman, *How Ruth Bader Ginsburg Called Out a Man's Unconscious Bias Against Her*, FORTUNE (Sept. 29, 2017), <http://fortune.com/2017/09/29/ruth-bader-ginsburg-supreme-court-discrimination/> [<https://perma.cc/9XX3-GYGN>]; *Justice Ginsburg on Unconscious Bias and Discrimination*, C-SPAN (Sept. 13, 2018), <https://www.c-span.org/video/?c4749212/justice-ginsburg-unconscious-bias-discrimination> [<https://perma.cc/M85S-MEA2>]; Julia Edwards, *Justice Dept. Mandates "Implicit Bias" Training for Agents and Lawyers*, REUTERS (June 27, 2016), <https://www.reuters.com/article/us-usa-justice-bias-exclusive-idUSKCN0ZD251> [<https://perma.cc/4MMK-A9Z4>].

31. See generally *TX Dep't of Hous. and Cmty. Affairs v. The Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507, 2512 (recognizing that implicit biases can be just as damaging as explicit biases); *Turner v. Murray*, 476 U.S. 28, 36–37 (determining it is minimally intrusive to discuss issues of racial bias in a capital case).

system that will showcase how critical it is to address the issue and what actions can be taken to solve it. Thus, the specific goals courts should have concerning educating jurors is two-fold: (1) educate them properly on what implicit bias is and how impacts their duties as a juror and (2) what actions they can take as a juror to manage their unconscious bias.

IV. METHODOLOGIES COURTS HAVE ATTEMPTED TO USE

A. Individual Attorneys' Usage of Voir Dire to Draw Out Concerning Implicit Biases Potential Jurors May Have

In both federal and state courts, attorneys and judges alike have the opportunity to conduct a preliminary examination of potential jurors. Individuals who express racial or sex-based prejudice or any other type of prejudice towards a specific group are excused from serving on the jury through a for cause challenge. This, however, only addresses explicit biases. Peremptory challenges are used by attorneys to strike potential jurors and the attorneys do not have to provide a reason why. Both for cause challenges and peremptory challenges are part of voir dire. Voir dire is critical to identifying jurors who can be fair and impartial for both sides of the case even if the desired outcome is different for each side. Attorneys take this opportunity to dive deeper into the minds of the jury and ensure that they are fair and impartial; and when challenges arise, for cause and peremptory challenges may be used.

Opponents to educating jurors on implicit bias believe that it is the job of attorneys to control bias in the courtroom through the usage of peremptory challenges.³² Attorneys, in a sense, are already given an opportunity to eliminate any unwanted implicit bias. However, this is not as easy as it sounds. Explicit bias is easier to identify than implicit bias. Even then, there is the risk that a potential juror can conceal their explicit bias by answering in the negative to confrontational questions regarding bias; so, attorneys' identification of bias rests on the fact that a potential juror will openly reveal it. When it comes to implicit bias, the issue becomes even more complicated. Implicit bias by its definition is already concealed to the beholder. Thus, for attorneys to be effective at identifying implicit bias they have to somehow be able to inquire into something the juror does not even realize they have. Requiring attorneys to do their best and draw out the implicit bias would be ineffective, especially since they do not even know what they are looking for.

Peremptory challenges theoretically can be made based on implicit biases if the attorney conducts proper voir dire to draw out the issues.³³ This

32. See *United States v. Adkinson*, 916 F.3d 605 (7th Cir. 2019).

33. See Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 158–161 (2010).

is very challenging considering the time limitations of how long voir dire tends to last. Even assuming attorneys can be effective in detecting implicit bias and proper voir dire questioning can be developed to draw out this specific concern, this process does little to serve the goal, set out previously, of reducing implicit bias in the long-term. It neither explains to the jurors what implicit bias nor how they should take it into consideration for the decision-making process of the case. Moreover, the countless studies that have delved into implicit bias show that everyone has some, making it nearly impossible to completely eliminate implicit bias without any action by the individual who has the unconscious bias.³⁴

B. Where the *Batson* Challenge Comes In

The *Batson* objection arises when an attorney objects to the validity of a peremptory challenge of the opposing attorney.³⁵ The objecting attorney must make a prima facie case that the peremptory challenges are being used discriminatorily by the opposing counsel.³⁶ Attorneys may use a peremptory challenge to strike down a juror they do not want on the jury, however, the reason must not be based on race, gender, or ethnicity.³⁷ Thus, when a *Batson* challenge is raised, the attorney whose peremptory challenges are being questioned must provide a race, gender, and ethnicity neutral reason for the challenged strike.³⁸ Finally, the objecting attorney has the burden of proof of demonstrating intentional discrimination.³⁹

Batson challenges are questions on attorneys' actions and do not address juror implicit biases. Attorneys theoretically have the opportunity to challenge issues of implicit bias, but this type of objection addresses only the opposing attorney. Thus, *Batson* clearly falls short of being able to address implicit bias of the jurors'.⁴⁰ Judges also tend not to reject the explanations proffered by attorneys and appellate courts defer to these trial court findings.⁴¹ Moreover, even Supreme Court Justices have called for it to come to an end as it is ineffective.⁴² It also fails to educate jurors on being able to identify their own issues for the decision-making in the case they will serve on. This argument implies that the attorneys themselves are readily

34. See Adam Benforado & John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L.J. 311, 325–326 (2007).

35. See *Batson v. Kentucky*, 476 U.S. 79.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. See Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 161–162 (2010).

41. See Bennett, *supra* note 40 at 162–165.

42. See *Rice v. Collins*, 546 U.S. 333, 342–44 (2006) (Breyer, J., concurring); *Miller-El v. Dretke*, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring); *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

armed to overcome their own implicit biases and then be able to strike jurors for implicit biases that are concerning for the case at hand. The argument that attorneys can fix issues of implicit bias completely overlooks the fact that *Batson* challenges only address explicit biases.

C. Presenting Expert Witnesses on Implicit Bias as it Relates to the Case at Hand

Several courts have addressed the issue of implicit bias by using expert witnesses to educate jurors on the subject. Attorneys that present the witness want to remind jurors what unconscious bias is and how it can relate to their decision-making duties in the case at hand.⁴³ The attorneys must argue in order to be able offer experts who describe what implicit bias is to the jurors.⁴⁴ Jurors are then supposed to be able to better analyze the case as a whole when they go into deliberation.

This method, unfortunately, has been largely unsuccessful. The primary roadblock attorneys run into is relevancy. Expert witnesses can either testify about ultimate facts or present scientific evidence.⁴⁵ Evidence regarding implicit bias typically falls under scientific evidence. Rarely would experts be able to qualify to testify about ultimate facts that somehow present implicit bias too.⁴⁶ The same problem still stands. Opposing counsel have a relatively strong argument that expert testimony on implicit bias is irrelevant. Expert testimony on implicit bias does not speak to an element of the crime and neither is it fact of consequence.⁴⁷ Courts have generally seen it only as a far drawn connection that is not necessary for the jury's decision making process and that has no bearing on the facts of the case at hand.⁴⁸ What most experts offer on implicit bias are generalizations.⁴⁹ Their testimony tends to have little to no connection to the facts of the case, especially because implicit bias is theoretical.⁵⁰ The expert is not considering the facts of the case by applying it to the generalized theory of implicit bias. Instead, the experts can only speak to what implicit bias does as a whole and make theoretical assumptions about what could have been happening in the particular case.

The courts that have addressed this tend not to allow the expert to testify

43. See, e.g., *Karlo v. Pittsburgh Glass Works*, 849 F.3d 61 (3d Cir. 2017) (psychologist offered); *Pippen v. State*, 854 N.W.2d 1, 6–8 (Iowa 2014) (two psychologists offered); *Samaha v. Wash. State DOT*, 2012 WL 11091843 (E.D. Wash. 2012) (psychologist offered).

44. *Id.*

45. Fed. R. Evid. 702.

46. See, e.g., *Karlo*, 849 F.3d at 84 (“[L]acks fit to this case because his population-wide statistics have only speculative application.”).

47. *Id.*

48. *Id.*

49. See *Karlo*, *supra* note 46.

50. For example, there is no way to ask what someone was thinking about at that time and if there was a bias underlying that thought process especially if the particular bias in question was implicit thus unknown to the person in question. Experts would only be testifying about some theoretical implicit bias that they could have had.

because expert testimony on implicit bias is too far removed and irrelevant.⁵¹ The *Daubert* standard provides that when considering the admission of expert testimony, the judge must consider “whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”⁵² The Court also included other key questions and considerations for the trial court to determine the admissibility of expert testimony:

(1) whether the expert’s technique or theory can be or has been tested—that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.⁵³

Moreover, if the trial court finds that there is “too great of an analytical gap between the data and the opinion proffered,” the expert testimony can be excluded in order to prevent unfounded conclusions.⁵⁴

Courts have used the *Daubert* standard or reasoning based off of the standard to reject expert testimony on implicit bias.⁵⁵ In *Darbin v. Nourse*, the court reiterated the need for a “district court to probe the jury adequately for bias or prejudice about material matters on request of counsel.”⁵⁶ The court found that the trial court should have made a specific inquiry into biases rather than simply posing general questions to the prospective jurors.⁵⁷ In fact, the court states that these specific inquiries could not be substituted by general questions, even though district courts have broad discretion in formulating voir dire questions.⁵⁸ Simply allowing potential jurors to make broad denials of bias prevented an informed exercise of peremptory challenges.⁵⁹

51. See generally Fed. R. Evid. 702(a); see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993) (superseded by Fed. R. Evid. 702(a) in 2000 but the committee notes 2 illustrate the principles that the new rules were made were amended in response to *Daubert* and that the standard of review was still appropriate).

52. See *Daubert*, 509 U.S. at 592.

53. See Fed. R. Evid. 702; see also *Daubert*, 509 U.S. 580.

54. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

55. See *White v. BNSF Ry. Co.*, No. C09-5188RJB, 2010 WL 1186197 (W.D. Wash. 2010).

56. See *Darbin v. Nourse*, 664 F.2d 1109, 1114 (9th Cir. 1981) (quoting *United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir. 1979), a criminal case, to address how the district court needs to ask questions in order to not limit the scope of voir dire specifically when important testimony is anticipated from government officials even in civil cases).

57. *Id.* at 1115–16.

58. *Id.*

59. *Id.*

If courts were to set aside the issue of admissibility, presenting expert witnesses on implicit bias would theoretically educate jurors on the perils of implicit bias or at least inform them of what implicit bias is. However, using an expert testimony approach would mean that there is no further instruction to the jurors on how it should be applied to the case before them—raising the same issue as before where the expert witness testimony would seem far reaching. Just like any other witness, jurors have to evaluate the expert witness on a whole. Jurors could completely dismiss the expert witness's testimony. The jurors could simply assume that implicit bias does not apply to them. Using the expert witness approach, generally leaves no guidance to the jury to consider their own biases in the case. The goal is not only to let the jury know what implicit bias is, but also for the jury to be able to apply their newly gained awareness to the case they are sitting on.

Lastly, again setting aside admissibility issues, presenting expert witnesses on implicit bias will likely run into an awkward timing issue. Studies show that implicit bias training is most effective when it primes the audience to think about it throughout their interactions.⁶⁰ By using the expert testimony route, there is no specificity as to when the testimony would come in. If it comes into the case late, jurors are not going to remember how they evaluated prior witnesses before the expert witness testimony and whether or not there was bias in how they evaluated the previous witnesses. Even if the testimony comes in earlier in the presentation of evidence, it would be ill-advised for a plaintiff to start without first trying to get the jury to understand the underlying facts of the case. Tactically speaking it seems unlikely that it would be offered first; thus, its effectiveness is already diminished.⁶¹

D. A Jury Instruction on Implicit Bias

Some courts have developed specific jury instructions on implicit bias, much like the bias eliminating instructions. These instructions, like any other jury instruction, are provided to the jurors at the end of trial before they enter into the jury deliberation room. However, they are not required to be given.⁶² Most jury instructions are incorporated into the fair and just trial instructions that already inform jurors to make their decisions free from bias.⁶³ The more specific implicit bias instructions only add an additional

60. See, e.g., David Rock, Khalil Smith, and Heidi Grant, *What Science Says About Effective Racial Bias Training*, QUARTZ (Apr. 20, 2018), <https://qz.com/work/1258494/starbucks-racial-bias-training-what-the-science-says-about-effective-anti-bias-efforts/> [<https://perma.cc/DA6E-BYBF>]; Joelle Emerson, *Don't Give up on Unconscious Bias Training – Make it Better*, HARVARD BUSINESS REVIEW (Apr. 28, 2017), <https://hbr.org/2017/04/dont-give-up-on-unconscious-bias-training-make-it-better> [<https://perma.cc/6QG7-5SYQ>]; Jesse Singal, *Awareness is Overrated*, NEW YORK: THE CUT (July 17, 2014), <https://www.thecut.com/2014/07/awareness-is-overrated.html> [<https://perma.cc/7QNK-UA3V>].

61. See *supra* note 60.

62. See *United States v. Sawyers*, 740 F. App'x 585 (9th Cir. 2018) (no law requiring jury instruction on implicit bias).

63. See CACI No. 113 Bias; WASH. REV. CODE ANN. § GR 37 (West 2018) <https://www.washcourts.org/caci/>.

factor that requires jurors to also make their decisions free of implicit bias. Some instructions also include a short definition of what implicit bias is.⁶⁴

The fair and just trial instructions are not enough to specifically address implicit biases. The original bias eliminating instructions only remind jurors to evaluate evidence without taking into consideration biases that they have.⁶⁵ Even then, when courts do have the option of given the instruction, it is not automatically given to jurors.⁶⁶ Instead, attorneys must request for that the instructions to be presented to the jury or propose the instruction themselves.⁶⁷ Moreover, the instructions only mention the explicit biases that the jurors need to avoid.⁶⁸ Without direct reference to implicit bias in the instructions, the system relies on assuming that the court and attorneys did their part in eliminating jurors that are clearly biased. Such efforts require no consideration of implicit bias at all.

Implicit bias jury instructions take bias elimination an extra step and remind the jury to specifically check their implicit biases. Many instructions include a short definition of what implicit bias is.⁶⁹ This type of jury instruction would provide a meaningful basis for jurors to, at the very least, get a slight grasp on what implicit bias is. All jury instructions are meant to provide guidance to the jury on the law and what to do with the facts.⁷⁰ A simple guideline that incorporates eliminating implicit bias from the decision-making process could provide some much-needed information. Like other jury instructions, it expects jurors to be able to take in an instruction on paper and be able to apply it to all of the information given during trial. However, implicit bias is different because it is not about the law specifically but more so conduct by the jurors themselves that they need to check. It is unlikely that there will be a great effect on how jurors may take their implicit biases into consideration when reanalyzing the evidence. Typically, the short definition given in jury instructions is not enough, but it is a start to getting jurors to think about implicit bias. The main issue is that they would have to apply what they learned retroactively. Thus, because these instructions are “after the fact,” they can come much too late for jurors

courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr37
[<https://perma.cc/359Y-928H>].

64. See *Proposed Model Ninth Circuit Criminal Instruction 1.1 (modified)*, <https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf>; *infra* note 68.

65. See CACI No. 113 Bias; *cf.* *Proposed Model Ninth Circuit Criminal Instruction 1.1 (modified)*, *supra* note 64.

66. See *Sawyers*, 740 F. App'x 585 (no law requiring jury instruction on implicit bias).

67. *Id.* Even then, it is not required for it to be given.

68. See CACI No. 113 Bias.

69. For example, the definition that Washington provides is: “Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.” *Model Ninth Circuit Criminal Instruction 1.1*.

70. See *Jury Instruction and Their Purpose*, USLEGAL.COM, <https://courts.uslegal.com/jury-system/jury-instructions-and-their-purpose/> [<https://perma.cc/9JBY-YLPE>].

to rethink their initial impressions of the witnesses they saw.⁷¹

Even if the jury instructions are as detailed as they can be, the two main goals of educating jurors are not realized. First, there is not reflection on whether or not the jurors would fully understand what implicit bias is. This is because a very complicated subject has to be reduced down to a simple definition. It is difficult to believe that jurors, without prior knowledge of implicit bias, would understand what it is or how it pertains to their decision making. They would be applying something they just learned to a long trial and would likely forget the information that creates implicit biases. Second, even assuming that the jurors can fully understand the perils of implicit bias as imperative considerations for the case, the instructions also does not provide any information to the jurors as to how to apply their implicit bias training to the case. It simply instructs jurors to not use implicit bias when making their decision. Implicit bias jury instructions alone are not enough to combat the full effect of these biases.⁷²

E. Methodologies by Courts that are Outside of the Box – More Recent Developments

1. Washington Courts' Approach to Implicit Bias Checks on Attorneys – General Rule 37

Washington is the first state to implement a comprehensive program that all courts in the state must apply.⁷³ The Washington Supreme Court adopted a court rule, General Rule 37,⁷⁴ that applies to both civil and criminal trials in the state.⁷⁵ This rule is aimed at stopping attorneys from using race-based peremptory challenges at not only a conscious and explicit bias level, but also at an implicit, unconscious, and systematic bias level. Washington is the first state to put these challenges in the forefront to be constantly addressed by attorneys and judges alike.⁷⁶ It is extremely innovative and should help reduce jury selection bias issues.⁷⁷

This statewide rule is revolutionary. It addresses implicit bias in a way unlike courts have in the past and attempts to address what *Batson* did not.

71. See Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 292 (2013).

72. See Jennifer K. Elek & Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions Following a Test of a Specialized Jury Instruction*, NATIONAL CENTER FOR STATE COURTS, April 2014, <http://www.ncsc-jury-studies.org/~media/Microsites/Files/CJS/What%20We%20Do/Can%20Explicit%20Instructions%20Reduce%20Expressions%20of%20Implicit%20Bias.ashx> [https://perma.cc/9FSE-DVYG].

73. See WASH. REV. CODE ANN. § GR 37, *supra* note 63.

74. See WASH. REV. CODE ANN. § GR 37, *supra* note 63.

75. See *id.* at (b).

76. See ACLU, *supra* note 8; Sydney Brownstone, *Washington Courts Now Have the Country's First Rule for Tackling Implicit Bias in Jury Selection*, THE STRANGER (Apr. 10, 2018), <https://www.thestranger.com/slog/2018/04/10/26024644/washington-courts-now-have-the-countrys-first-rule-for-tackling-implicit-bias-in-jury-selection> [https://perma.cc/PZ2E-P6VS].

77. See Brownstone, *supra* note 76.

However, this, like any other voir dire challenge, does nothing to educate jurors about implicit bias.⁷⁸ Instead, it is a check on the attorneys' and judges' implicit biases when they address the jury for jury selection. To truly eliminate implicit bias in the courtroom, it should also involve the decisionmakers of the courtroom—the jury. That is yet to be addressed by General Rule 37.

2. Western District Court of Washington's Dual Method: Video and Jury Instruction on Unconscious Bias

The United States District Court, Western District Court of Washington released a video and jury instructions on the topic of unconscious bias.⁷⁹ It is used at the district court level in all of the Western District of Washington. It is the first of its type to be used in federal courts and other districts have proposed to adopt it as well.⁸⁰ The video, however, has not been accepted by all courts.⁸¹

The video opens with the Honorable Judge John C. Coughenour reminding the court's goal of finding jurors "who will decide cases without prejudice or bias."⁸² Then, without much context, Judge Coughenour goes on to say that "it has been proven that most biases happen at an unconscious level," and that "researchers have found that unconscious bias is part of how we all think and process information."⁸³

Next, the video transitions to Attorney Jeffery Robinson who discusses the fact that "biases can be both positive and negative."⁸⁴ Robinson gives a variety of examples of unconscious biases and explains the harmful effects they can have by preventing a person from receiving a fair trial.⁸⁵ Yet again, it is pointed out that "unconscious bias is something we all have simply because we are human."⁸⁶ The jurors watching the video are repeatedly remind that the process is "deep in our brains" and that they are "automatic

78. See WASH. REV. CODE ANN. § GR 37, *supra* note 73 (used in all jury trials and aim to increase jury diversity and cut down on implicit bias).

79. See Western Wash. Dist. Ct., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), <https://www.youtube.com/watch?v=hdjBbfdRLkA> [<https://perma.cc/MU2R-R3CA>].

80. See *id.*; see also *Unconscious Bias Juror Video*, UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON, <https://www.wawd.uscourts.gov/jury/unconscious-bias> [<https://perma.cc/T6MR-YEUQ>].

81. See, e.g., *State v. Yeck*, 2017 Wash. Super. LEXIS 12872, 10 (Wash. Sup. Ct. King Cty. Ct. Dec. 6, 2017); *United States v. Binford*, 2015 U.S. Dist. LEXIS 190192, E. (E.D. Wash. Feb. 5, 2015); *Lancaster County Judge Denies Request to Show Implicit Bias Video to Prospective Jurors*, INNOCENCE PROJECT (June 29, 2018), <https://www.innocenceproject.org/judge-denies-request-to-show-implicit-bias-video/> [<https://perma.cc/K6KW-4D9C>] (still questioning if judges should intervene on implicit bias topics).

82. See *supra* note 79.

83. *Id.*

84. See Western Wash. Dist. Ct., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), <https://www.youtube.com/watch?v=hdjBbfdRLkA> [<https://perma.cc/MU2R-R3CA>].

85. See *supra* note 84.

86. *Id.*

preferences.”⁸⁷ Attorney Robinson then tells the jury to “consciously think about it,” warning about the discrepancies between initial impressions and “what we really know to be fair.”⁸⁸

Attorney Robinson then discusses examples of unconscious bias in an attempt to present to the jurors a first-hand experience of somehow realizing their unconscious bias.⁸⁹ As an example, the video uses possible inferences the jurors may have had about Judge Coughenour versus a “biker.”⁹⁰ Again, it is reiterated that “through unconscious bias, our minds make quick decisions that we are not aware of.”⁹¹ Next, the video uses the visual test by psychologist John Ridley Stroop regarding processing colors and the words associated with them.⁹²

Finally, the video ends with Attorney Annette Hayes discussing how unconscious bias affects day-to-day decision makings and reiterating that we are “not always aware” biases are working.⁹³ Again, the jurors are told generalized statements to “check” their unconscious bias without giving context to the decisions that they have to make at hand and how to consider the video during jury deliberations.⁹⁴

The focal point of the video is to educate potential jurors and bring to their attention the topic of implicit bias. It also specifically instructs the juror to not be biased, including specific checks on unconscious bias.⁹⁵ While it serves the two goals defined prior, it is questionable whether or not the end results will actually be achieved. The video is relatively broad and fails to provide any specificity to applicable situations for the jury to consider. Arguably, the video will only serve to confuse the jurors since it is so far removed from the evidence and facts that they are supposed to be considering—just like how expert testimony has been viewed.

What the video is successful at doing is defining unconscious bias for the jury. The definition of unconscious bias is straight-forward and easy to understand—even though the underlying concept is difficult. It also successfully explains that there are two sides to these underlying processes and that only one of them is the issue—the stereotyping that results for the process. Following the much more technical discussion of the subject, something that the video does well, it goes on to provide an example that gives the jurors something to relate to.⁹⁶ This example does not attack the

87. *Id.*

88. *Id.*

89. *Id.*

90. See Western Wash. Dist. Ct., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), <https://www.youtube.com/watch?v=hdjBbfdRLkA> [<https://perma.cc/MU2R-R3CA>].

91. *Id.*

92. *Id.*; see also, *supra* note 18.

93. See Western Wash. Dist. Ct., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), <https://www.youtube.com/watch?v=hdjBbfdRLkA> [<https://perma.cc/MU2R-R3CA>].

94. *Id.*

95. See Western Wash. Dist. Ct., *supra* note 84.

96. The video uses a biker versus a judge example without addressing where unconscious bias really comes from. Especially since the issue with the bias is not just about what they

deeper issues with implicit bias. Instead, it is a surface level discussion and is less in-depth than what is necessary to create meaningful understanding by the jurors. Plus, aren't the factors mentioned precisely something we do want the jury to consider? For example, what is it about the person presenting themselves in court that makes them believable? Did they take the extra time to dress in a suit to make themselves appear more believable? How is the witness talking? What we do not want the jurors to do is draw inferences that are based on the witness's race or other immutable characteristics, explicitly or implicitly.⁹⁷ These are the stereotypes that are damaging and hurtful to fair proceedings.

The examples should be something more than an example that a juror can easily brush off. While the biker and judge examples can be easier to "stomach," they do not address the more critical issues of racial and sex or gender-based biases. It is these immutable characteristics that tend to lead to the worst and most long-lasting systematic discrimination and this video reduces them implicit bias considerations only to a changeable appearance.⁹⁸ Presenting a strong example that the jurors can reflect on fully would give them the tools to further this process when they are in trial.⁹⁹ Providing just surface-level discussions is holding back an effective discussion.¹⁰⁰ Jurors are not given an opportunity to apply what they just learned to the things that they have to be wary of during the trial—implicit stereotyping based on gender, race, or sex, and not simply just what the person is wearing.

Combining the video with a jury instruction is a way to get jurors to consider their implicit biases both at the beginning of the trial and at the end of the trial. A reminder of what they learned in the video by a later jury instruction is more effective than just a jury instruction, as discussed before.¹⁰¹ The jury instruction reaffirms what the jurors should have taken away from the video and how they should analyze the evidence in the deliberation room. Moreover, it serves as a reminder to the jurors how important it is to not be biased, including implicit biases. The simple jury instruction as discussed before lacked context and did not allow the jurors to have a full understanding of implicit bias before they needed to apply it to their thought processes in the case they are deciding. This process of playing a video first at jury voir dire would slightly alleviate this concern since jurors

wear and their appearance, but in fact, it is when the individuals are judged for their race, gender, or sex—a myriad of characteristics outside of their control. It is immutable characteristics which result in implicit biases that courts should be primarily concerned about.

97. See *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.") (citations omitted).

98. See *id.*

99. See *infra* Section III (D)(c).

100. There is also the issue of the jurors just simply dismissing this because they feel attacked when someone says they have a bias and feel that they have to justify that they do not. See *Education: Ethical Considerations*, *supra* note 10.

101. See *supra* III (C).

are already taught about implicit bias, and it gives them a reminder at the end of trial to see if they can “check” themselves for these behaviors.

3. Judge Mark W. Bennett’s Unconscious Bias Course with the Jury and Jury Instruction

Recently retired Judge Mark W. Bennett of the United States District Court in the Northern District of Iowa took an active role in educating jurors on implicit bias. Judge Bennett served on the bench for over twenty years and during that time would educate jurors on implicit bias. During his own legal training and practice he felt that his background made him extremely diverse and not biased at all.¹⁰² Yet, when he took the Implicit Association Test, multiple times, his results showed that he had a bias against blacks.¹⁰³

During the jury selection process for both criminal and civil cases, Judge Bennett would take approximately an hour or so to educate jurors on implicit bias by doing a training lesson himself. While the jury selection process varies from cases to case, he covers the same material about implicit bias and what it means for the case they will be hearing.¹⁰⁴ Following the lesson, he let the jurors know that at the end of the trial they will have to sign a statement that certifies the decision they reached is free from bias and is fair and just.¹⁰⁵ And finally, even before opening statements by the attorneys, Judge Bennett would give a final jury instruction to the jurors on implicit bias.¹⁰⁶

For criminal trials with a minority defendant, Judge Bennett began with the usual jury selection procedure seen in all courtrooms. When the jury instruction for presumption of innocence was shown, the implicit bias training began. Judge Bennett would show the potential jurors the presumption of innocence¹⁰⁷ instruction and ask the potential jurors whether or not the defendant that they see beforehand is innocent. What Judge Bennett often gets from jurors is that they do not know whether or not the defendant is innocent because they have heard nothing about the case at hand. While this is a fair answer, Judge Bennett believes that this answer is the underlying reason to many minority defendants’ downfall and the rise of

102. See Wis. SPD Training, *Judge Mark Bennett – Addressing Unconscious Implicit Bias in Voir Dire*, VIMEO (2016), <https://vimeo.com/163018292> [<https://perma.cc/CC7B-5LPH>].

103. *Id.*

104. If it is a minority defendant in a criminal case, Judge Bennett takes more time to discuss the issue because it is more important with more issues prevailing in society. See *id.*

105. This act is to reaffirm that they will apply what they had just learned. *Id.*

106. See *Addressing Unconscious and Implicit Bias in Voir Dire supra* note 102; Judge Mark Bennett, Instruction No. 16: Conduct of Jurors During Trial, N.D. IOWA, <https://northern-district-practice-program.org/wp-content/uploads/2017/09/Bennett-Conduct-of-Jury-Instructions.pdf> [<https://perma.cc/E386-FH6E>]. This methodology is different than most trial judges because the instructions are given at the beginning of the trial rather than the end.

107. This is critical because the presumption of innocence indicates that the jurors coming into the trial should fully believe that the defendant is innocent even though they are on trial. Simply questioning the innocence is already setting up the defendant for failure. See *Addressing Unconscious and Implicit Bias in Voir Dire, supra* note 102

unconscious bias issues. Judge Bennett would literally get off the bench and walk over to the defendant and shake their hand; he then proceeded to announce to the jurors that he believed that the defendant was innocent. He then told the jurors that if they do not believe the defendant is completely innocent, they can be excused. By incorporating the presumption of innocence into the jury selection proceedings in a way in which the judge is extensively involved, the implicit biases that potential jurors may have that would hinder them from giving the defendant the full benefit of the presumption of innocence to the forefront of their minds.

Judge Bennett would then proceed to show one or more videos to the potential jurors regarding implicit bias. One of the videos is from a television show called *What Would You Do?* from ABC.¹⁰⁸ This video segues into a deeper conversation about implicit bias and how that affects peoples' judgments and decision making. Judge Bennett even went as far as to discuss with the jurors the implicit bias studies that show explicitly that for minority defendants, when the evidence is ambiguous, the jury tends to draw negative conclusions about them, but for white defendants' ambiguous evidence is not drawn unfavorably.

To humanize himself even more, Judge Bennett then discusses the Implicit Association Test (IAT).¹⁰⁹ He even goes on to discuss his own results and how his explicit bias tests all show that he has none, but implicit biases linger. His aim is to get bias out of the courtroom.

Clearly the process that Judge Bennett would go through is extensive and extremely comprehensive. The judge hit the hard topic of implicit bias by raising examples of race and gender stereotypes that people make. This allows the jurors to connect with the examples in a way that is meaningful to the historical discrimination those groups have faced more so than the examples provided by the Western District of Washington's videos. Moreover, by affirming the need for a presumption of innocence no matter what, the jury is yet again reminded that they are supposed to come into the courtroom with a blank canvas for the defendant and that implicit biases must be left outside the court's doors. Finally, by sharing his own experiences with implicit bias, the jurors are able to see that everyone has biases and it is only through an active effort to be aware of them will they be able to minimize the interference bias has with their decision making in the courtroom. The final step of the jurors signing an affirmation to conduct a

108. In this video, three different individuals attempt to steal a bike—one white male, white female, and one black male. All three of them are set up in the same situation with the same tools out in broad daylight. As people walk by, they ask questions and the person says, "I have always wanted a bike like this." The results between how the people react based on the bike thief's race and gender vary drastically. For the white male, people tend to just ignore him after he provides his explanation. For the white female, there were multiple people who actually came and help her steal the bike to. But for the black male, people videotaped him and even went as far as to call the police on him.

109. Jurors are not allowed to take the IAT test till after the trial. See *Addressing Unconscious and Implicit Bias in Voir Dire*, *supra* note 102.

fair trial only reinforces one more time the jurors' lesson to be wary of implicit bias throughout the trial process.¹¹⁰

During criminal trials, Judge Bennett would give one last final warning after closing arguments. The implicit bias and fair and just trial jury instruction based on evidence that Judge Bennett relayed to juries was very similar to the initial instruction that they heard. However, this extra reminder was likely very beneficial. The jury was already aware of the implicit bias issue and likely had been keeping it in the back of their minds throughout the trial. Being reminded one extra time would help reaffirm the importance of keeping bias out of the decision-making process for the defendant. At the very end of the case, whether the verdict is guilty or not guilty, the jurors have to sign a certification. This certification states specifically that biases were not involved in reaching the jurors' decision.

Having both the jury instruction and extensive jury selection process, Judge Bennett successfully hit both of the goals as laid out at the beginning of this paper. The jurors got an extensive lesson on implicit bias. The judge also provided various examples that were aimed specifically at the racial, ethnic, sex, and gendered issues of implicit bias issues, which are at the most critical ones. By homing in on these critical issues without skimming over it by providing a more "digestible" version, the court is able to then indicate how critical the whole issue is. It is not just about the way witnesses dress that define who they are but instead it is also their race, gender, ethnicity, and all other immutable characteristics which make them who they are. The jury can see that, and it is important to bring it up and confront it directly. Even more impactful is the judge addressing his own history as a civil rights attorney and how he even still has implicit biases. It reminds the jurors that even the judge is susceptible to implicit bias and that even he needs to check his decision-making process for implicit bias downfalls. The last affirmation of the jurors signing the certification is another useful tool in ensuring the jurors will not use implicit bias, or at least that they will be wary about their own implicit biases. And finally, the jury instruction that is repeated right before the jury decision making processes begins reminds the jurors one last time of all they have learned about implicit bias and why it is important to eliminate it in their deliberation.

Here, even if the jury instruction is similar to the other ones proposed before, the jurors have already received the extensive education needed about what implicit bias is. Additionally, the instructions are meant to serve as another reminder. The only issue is that this is not presented in every case. The last jury instruction is only provided to jurors if it is a criminal trial or if it is requested. The issue with not reminding the jurors with this final jury

110. The Judge even acknowledged the fact that through this extensive jury selection, even at the point of signing the certification, that "invariably they could not sign the certification." Usually one or two people, who at this point have reflected much more on their thought processes, will realize that they could not do it. See *Addressing Unconscious and Implicit Bias in Voir Dire*, *supra* note 102.

instruction is that jurors might forget what has happened at the beginning of the trial. The trial might have begun days or even weeks ago. Having the extra reminder is a good way to reaffirm these important lessons on implicit biases, as said before.

Unfortunately, while this process is very detailed and necessary for jurors to fully understand implicit bias and its dangers in the courtroom, it is long and tedious and requires attorneys to give up time for the trial and their own voir dire process. Attorneys may or may not object to this time usage, but the judge is the one who controls the courtroom. This also assumes that the jurors will be fully engaged in this process. Jurors are already subjected to a long voir dire process even without the judge taking over an hour just to relay to them information about implicit bias. Arguably, this usage of time is necessary because of how complicated implicit bias is and because there is presently no other way to educate jurors on the subject. Implicit bias trainings for police officers, attorneys, teachers, or other professionals typically take much longer and can fill up even several days. What is presented here may be the most time sensitive way to do this sort of training and still cover all the necessary materials to make the jurors' decision making impacted by the information they received.

V. SUGGESTED METHOD – A COMBINATION OF JURY SELECTION IMPLICIT BIAS TRAINING AND JURY INSTRUCTIONS

As the studies reveal, priming jurors to think about implicit bias before the trial gives them the opportunity to process the information they receive.¹¹¹ This at the very least means that the jurors need to be informed about implicit bias during jury selection or voir dire. This suggests that a video or instruction by the judge, like what Washington has moved to or what Judge Mark Bennett did, would be the most effective means to raising juror awareness about implicit bias. However, as criticized above, the Washington video is much too short and gives little direction as to why implicit bias is so critical to check. Moreover, the video's confusing information should be adjusted to reflect the critical implicit bias issues. On the other hand, Judge Bennett's implicit bias jury training, while the most detailed of what has been used in courts, takes up a huge amount of time.

A balance between Judge Bennett's course and Washington's videos would be the most ideal. Instead of the judge versus biker list, the video should include examples similar to those that Judge Bennett gives.¹¹² Judges can also get involved as Judge Bennett did by personalizing implicit bias lessons by showing it is something they experience as well. Based on the

111. See Heather M. Claypool, Kurt Hugenberg & Jennifer Miller, *Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem*, 43 J. EXPERIMENTAL SOC. PSYCH. 334 (2007).

112. Like the example of how people react to the bike theft.

arguments raised previously, I believe it is critical to connect to the jurors and emphasize that it is something that happens to everyone. Common objections that people may have to implicit bias are things that actually stem from explicit biases. People may feel that they do not have explicit biases and by telling them they have implicit biases, when they might not really understand the nature of the topic, would make them defensive. Having the judge admitting to them that they too have implicit biases could help the jurors realize that this is something that they really have to take a second to think about.

Finally, by also including the jury instruction, the jurors get to see on paper a final reminder of the details of implicit bias. The jury instruction should include a detailed definition of implicit bias, a reminder of what the jurors learned in the beginning, and a reminder of the importance of leaving out any type of biases, including implicit biases, when deliberating. The court should also expect to read and present it to them like the other jury instructions. Jurors rely on jury instructions and follow them to make the decisions and findings that they need. Even if they are uncertain of some of the evidence presented to them throughout trial, the jury instruction is a way to redirect them down the right path to help them come to a conclusion. This is what the implicit bias instruction should accomplish. The issues about jury instructions that were raised prior are lessened here. The jurors would theoretically have already been educated once about what implicit bias is and how it works. This would be their second time seeing what implicit bias is, at least in the courtroom, and it would serve as a reminder to leave biased judgments behind.

VI. WHERE DO WE GO FROM HERE?

The first step to eliminating implicit bias issues in jury decision making is to impose some type of training—whether that be jury instructions or an implicit bias course—to allow the jurors to reflect on what was presented to them over the course of trial. The method proposed here would be the most effective, not only in educating the jurors properly, but also in terms of time efficiency. With how busy courts are generally this is likely an important concern. Moreover, having the combination of jury training and a jury instruction before deliberation would accomplish both the goals of educating the jurors fully on implicit bias and helping them to apply it to the case at hand. Both, hopefully, will lead to decisions that are free of biases and reflect the judicial systems goals of fairness and equality.

What is clear from all the implicit bias research regarding courts, workplace, education, and more, is that the training is important but relatively ineffective to impose long-term change, especially if the training itself focuses only on awareness. Long lasting effects take more time and active participation by the individual. It is important to continue these efforts outside of the courtroom as suggested here. Those who receive the training must be consciously working to change the way they act or think about things

that stem from those implicit biases. Recognizing how often and just generally being more aware of their actions, combined with the steps taken to stop relying on those implicit biases, is the only way for long-term change to come. With the implicit bias training of jurors that I am recommending here, perhaps long-term change may be achievable. In the future, this type of instruction may be no longer necessary because people will already take this into consideration and recognize it as something that should not be in the courtroom. The best outcome would be for jurors to take the implicit bias training they receive in the courtroom outside to their own life.