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## Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society

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## MAKING RACE SALIENT: TRAYVON MARTIN AND IMPLICIT BIAS IN A NOT YET POST-RACIAL SOCIETY\*

CYNTHIA LEE\*\*

*This Article uses the Trayvon Martin shooting to examine the operation of implicit racial bias in cases involving self-defense claims. Judges and juries are often unaware that implicit racial bias can influence their perceptions of threat, danger, and suspicion in cases involving minority defendants and victims. Failure to recognize the effects of implicit racial bias is especially problematic in cases involving black male victims and claims of self-defense because such bias can make the defendant's fear of the victim and his decision to use deadly force seem reasonable. The effects of implicit racial bias are particularly likely to operate under the radar screen in a society like ours that views itself as post-racial.*

*Recent social science research on race salience by Samuel Sommers and Phoebe Ellsworth suggests that individuals are more likely to overcome their implicit biases if race is made salient than if race is simply a background factor—known but not highlighted. Making race salient or calling attention to the relevance of race in a given situation encourages individuals to suppress what would otherwise be automatic, stereotypic congruent responses in favor of acting in a more egalitarian manner. In the Trayvon Martin case, race was made salient by the huge public outcry over the Sanford Police Department's failure to arrest George Zimmerman and accusations of racial*

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*profiling, which received extensive media coverage. Most criminal cases, however, do not receive the kind of media attention received in the Trayvon Martin case. In most criminal cases involving a minority defendant or victim, race is a background factor but is not something either party tries to highlight. The parties may think race is not relevant, or they may fear that if they call attention to race, they will be accused of playing the race card. Race, however, often is relevant to questions about the reasonableness of fear, and calling attention to race may be the best way to defuse the adverse effects of implicit racial bias.*

*Building on these insights, this Article suggests that in the run-of-the-mill case, when an individual claims he shot a young black male in self-defense, the police, the prosecutor, the judge, and the jury are likely to find reasonable the individual's claim that he felt he was being threatened by the young Black male unless mechanisms are in place to make the operation of racial stereotypes in the creation of fear salient. The Article concludes with some suggestions as to how prosecutors and defense attorneys concerned about the operation of implicit racial bias can make race salient in the criminal courtroom.*

INTRODUCTION .....	1557
I. NOT YET POST-RACIAL .....	1564
II. AVERSIVE RACISM: BRIDGING THE GAP BETWEEN POSITIVE EGALITARIAN BELIEFS AND NEGATIVE IMPLICIT RACIAL BIAS.....	1569
III. RACE, SELF-DEFENSE, AND THE PERCEPTION OF FEAR .....	1580
IV. MAKING RACE SALIENT .....	1586
A. <i>Voir Dire</i> .....	1590
B. <i>Opening Statements</i> .....	1593
C. <i>Lay Witness Testimony</i> .....	1594
D. <i>Expert Witness Testimony</i> .....	1596
E. <i>Jury Instructions</i> .....	1597
F. <i>Closing Arguments</i> .....	1600
G. <i>Possible Objections to Making Race Salient</i> .....	1601
1. Objection 1: Unfair to Hold Zimmerman Liable for Acting on Implicit Biases.....	1602
2. Objection 2: Unfair to Hold Zimmerman Liable for Acting on an Honest but Unreasonable Belief in the Need to Use Deadly Force in Self-Defense.....	1604

2013]	<i>HUGHES V. JACKSON</i>	1557
	3. Objection 3: Making Race Salient Might Reinforce Racial Prejudice in Certain Jurors.....	1607
	4. Objection 4: Making Race Salient May Lead to Overcorrection.....	1608
	5. Objection 5: Making Race Salient Violates Our Constitutional Commitment to Color-Blindness.....	1609
	CONCLUSION .....	1610

#### INTRODUCTION

On February 26, 2012, at approximately 7:17 p.m., a seventeen-year-old Black teenager named Trayvon Martin was shot and killed by a twenty-eight-year-old Hispanic man named George Zimmerman, the Neighborhood Watch Captain for the Retreat at Twin Lakes Community.<sup>1</sup> Minutes earlier, Zimmerman had called 911 to report what he thought was suspicious activity. “Hey, we’ve had some break-ins in my neighborhood,” Zimmerman told the dispatcher.<sup>2</sup> “And there’s a real suspicious guy.”<sup>3</sup> Zimmerman told the 911 dispatcher that the suspicious guy looked like he was up to no good, or as if he was on drugs.<sup>4</sup> Zimmerman asked how long it would take the police to arrive because “[t]hese assholes, they always get away.”<sup>5</sup> Zimmerman then told the dispatcher that the individual was starting to run.<sup>6</sup> The dispatcher asked Zimmerman if he was following the suspicious person.<sup>7</sup> When Zimmerman responded affirmatively, the dispatcher told him, “O.K, we don’t need you to do that.”<sup>8</sup> Zimmerman’s call ended at about 7:15 p.m.<sup>9</sup>

What happened next is hotly disputed, but one thing is clear. At approximately 7:17 p.m., Zimmerman shot and killed Trayvon Martin.<sup>10</sup> Martin, who was unarmed,<sup>11</sup> had been walking and talking

1. Dan Barry et al., *In the Eye of a Firestorm: In Florida, an Intersection of Tragedy, Race and Outrage*, N.Y. TIMES, Apr. 2, 2012, at A1.

2. *Id.*

3. *Id.*

4. Melanie Jones, *Trayvon Martin Case: 911 Tapes ‘Not as Conclusive as People Think,’ Says Defense Attorney*, INT’L BUS. TIMES (Mar. 23, 2012, 2:56 PM), <http://www.ibtimes.com/trayvon-martin-case-911-tapes-not-conclusive-people-think-says-defense-attorney-429306>.

5. Barry et al., *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. Report of Investigation Prepared by Officer Christopher F. Serino, Sanford Police Dep’t 6 (Mar. 13, 2012) [hereinafter Mar. 13, 2012 Report of Investigation] (on file with the North Carolina Law Review).

10. Zimmerman called 911 at around 7:11 p.m. and Martin was shot at 7:17 p.m. *Id.*

on his cell phone with his girlfriend when Zimmerman first began following him in his car.<sup>12</sup> When Martin began running away from him, Zimmerman got out of his car to follow Martin on foot.<sup>13</sup> Apparently a scuffle ensued during which Zimmerman found himself face up on the ground with Martin on top of him.<sup>14</sup> Witnesses heard someone calling out for help before hearing the sound of gunfire.<sup>15</sup> Police arrived on the scene shortly after the shooting to find Martin, who was shot once in the chest, lying face down on the grass with his hands underneath his body.<sup>16</sup> Inside the front pocket of Martin's sweatshirt were a bag of Skittles and a large, cold can of Arizona iced tea.<sup>17</sup> A black cell phone was found at the scene near Martin's body.<sup>18</sup>

Zimmerman told police that he shot Martin in self-defense.<sup>19</sup> Zimmerman was handcuffed and taken to the local police station in Sanford, Florida, then released without charges.<sup>20</sup> The failure of the Sanford Police Department to arrest Zimmerman created a firestorm of protests. Across the country, thousands of people donned hoodies and held candlelight vigils to demand Zimmerman's arrest and show support for Martin, who was wearing a dark grey hoodie sweatshirt when he was shot.<sup>21</sup> Amidst the calls for justice, Florida's "Stand

11. Ovetta Wiggins, *A Rallying Cry for Justice in Teen's Death*, WASH. POST, Mar. 25, 2012, at A3 (reporting that Martin was unarmed and carrying a bag of Skittles and a can of iced tea at the time he was shot).

12. Barry et al., *supra* note 1; *see also* Wiggins, *supra* note 11 (noting that Zimmerman followed Martin as he walked through the gated community).

13. Barry et al., *supra* note 1 (reporting that Zimmerman jumped out of his car to pursue Martin on foot, after indicating to the 911 dispatcher that Martin was running).

14. Mar. 13, 2012 Report of Investigation, *supra* note 9, at 4; *see also* Offense Report, Sanford Police Dep't 14 (Feb. 27, 2012) [hereinafter Offense Report] (noting that Zimmerman's back appeared wet and covered in grass and Zimmerman was bleeding from the nose and the back of the head); Narrative Report, Sanford Police Dep't 1 (Feb. 26, 2012) (noting that the witness saw a man in a red sweatshirt on the ground getting hit by another man who was up on top of him in a straddle position).

15. Mar. 13, 2012 Report of Investigation, *supra* note 9, at 4–5 (noting that a review of the 911 calls reveals a male's voice, determined to be Zimmerman's, yelling "help" and "help me" fourteen times in approximately thirty-eight seconds); *see also* Report of Investigation Prepared by Officer Christopher F. Serino, Sanford Police Dep't 2 (Mar. 18, 2012) (noting that a witness saw her neighbor talking to someone and "the kid" lying on the ground, groaning, and saying "help me, help me"); Narrative Report, *supra* note 14, at 1 (Feb. 26, 2012) (stating that "[t]he guy on the bottom getting hit was yelling help").

16. Offense Report, *supra* note 14, at 14.

17. *Id.* at 16–17.

18. *Id.* at 16.

19. Sari Horwitz, *Zimmerman Claims Martin Started Confrontation*, WASH. POST, Mar. 27, 2012, at A2.

20. Barry et al., *supra* note 1.

21. NAACP Leads March on Sanford, WASH. POST, Apr. 1, 2012, at A3 (reporting that thousands joined a march through Sanford demanding that Zimmerman be arrested);

Your Ground” law, which was cited by the City of Sanford as the reason why Zimmerman could not be arrested, became the subject of intense scrutiny.<sup>22</sup>

This Article uses the Trayvon Martin shooting to examine the operation of implicit racial bias in interracial cases involving claims of self-defense. Implicit bias is unintended bias that operates without our conscious awareness.<sup>23</sup> Legal decision makers are often unaware of the extent to which implicit racial bias can influence perceptions of fear and reasonableness determinations in self-defense cases. The effects of implicit bias are particularly likely to operate under the radar in a society like ours that views itself as post-racial.<sup>24</sup> Many people today believe that race no longer matters, or that it matters too much to some people. Post-racialists, for example, view the 2008 election of Barack Obama, the nation’s first African American president, as proof that race no longer matters and that racial discrimination is a problem of the past.<sup>25</sup>

The notion that we have reached a post-racial moment in our history and therefore need not be as concerned with issues involving race as we have been in the past is popular among both conservatives and liberals, but is deeply misguided. Research on social cognition

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Wiggins, *supra* note 11 (reporting that thousands have demonstrated in major cities across the country wearing hoodies to show solidarity with Martin, who was wearing a hoodie the night he was killed).

22. Florida’s Stand Your Ground law provides immunity to a person who uses force in self-defense, FLA. STAT. ANN. § 776.032(1) (West 2012), and prohibits a law enforcement agency from arresting a person for using force “unless it determines that there is probable cause that the force that was used was unlawful.” *Id.* § 776.032(2). The city of Sanford released a letter on March 19, 2012, explaining that “law enforcement was PROHIBITED from making an arrest based on the facts and circumstances they had at the time.” Letter from Norton N. Bonaparte, Jr., ICMA-CM, City Manager (Mar. 19, 2012) (on file with the North Carolina Law Review). The city cited Florida Statute 776.032, the immunity provision of Florida’s self-defense statute, as support for its decision not to arrest Zimmerman.

23. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012). “Implicit” bias is unintentional bias arising from “attitudes or stereotypes that affect our understanding, decision-making, and behavior, without our even realizing it.” *Id.* at 1126.

24. This Article uses the term “post-racial” to refer to “the notion that the United States has reached a point where race is so infrequently salient that it no longer makes sense to organize around it or even acknowledge its presence.” Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 114 (2012).

25. Hua Hsu, *The End of White America?*, THE ATLANTIC, Jan./Feb. 2009, at 46, 55 (“At the moment, we can call this the triumph of multiculturalism, or post-racialism.”); Jonathan Rauch, *Coming to America*, THE ATLANTIC, July/Aug. 2003, at 30, 30 (“Increasingly, the Washington area is the post-racial America that we have all been told to expect.”).

suggests that race still matters today, although in different ways than it mattered in the past. As the Implicit Association Test<sup>26</sup> has shown over and over, race influences both our perceptions and behaviors, often without our even knowing it.<sup>27</sup> Even individuals who endorse egalitarian beliefs demonstrate implicit racial bias in favor of Whites and against Blacks.<sup>28</sup> Ironically, because racial bias today is largely implicit rather than explicit, attempts at being color-blind can exacerbate the problem of racial bias because ignoring race can result in the automatic engagement of stereotype-congruent responses.<sup>29</sup>

This Article proceeds in four parts. Part I examines the belief that our society has reached a point in history when it no longer makes sense to focus on race and racial discrimination—the notion that we are post-race or post-racial. The Article starts by explaining what is meant by the term “post-racial.” It then suggests that despite significant advances in civil rights laws and major shifts in attitudes about race, we are not yet beyond race. The shooting of Trayvon Martin is used as an example of how racially divided our society remains despite the election of President Obama.

Part II examines the wide gulf between the largely egalitarian racial attitudes that most Americans explicitly hold today and the negative implicit racial biases that persist beneath the surface. John Dovidio and Samuel Gaertner’s theory of aversive racism offers one way to explain this puzzling inconsistency.<sup>30</sup> Under their theory, many, if not most, Americans sincerely believe in equal treatment for Blacks and Whites.<sup>31</sup> Yet despite these egalitarian beliefs, Americans are constantly exposed to negative stereotypes about Blacks. These stereotypes include the idea that Blacks are lazy people who would

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26. See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited May 7, 2013); *infra* notes 85–86 and accompanying text.

27. See *infra* Part II.

28. See *infra* Part II. Like many scholars of color, I capitalize the words “White” and “Black” to highlight the fact that Whites and Blacks are members of socially constructed racial categories in American society. See IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, at xiii–xiv (Richard Delgado & Jean Stefancic eds., 1996) (discussing the social construction of race); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 53–76 (2d ed. 1994).

29. See *infra* notes 193–222 and accompanying text.

30. See generally Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in *PREJUDICE, DISCRIMINATION, AND RACISM* 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

31. *Id.* at 65–66.

rather live on or cheat welfare than work<sup>32</sup> and that Blacks are often involved in criminal activity.<sup>33</sup>

Dovidio and Gaertner posit that in situations where the racial nature of a particular course of action is clear—in other words, if it would be clear that one is acting in a racially biased manner—Americans will usually choose to act in non-biased ways.<sup>34</sup> In cases where one's actions can be attributed to either racial or nonracial factors, however, Americans will more often than not act in racially biased ways.<sup>35</sup>

32. During the 2012 presidential campaign, *Washington Post* writer Ezra Klein noted that presidential candidate Mitt Romney ran more campaign ads about welfare than any other issue. Ezra Klein, *Race and the 2012 Election*, WASH. POST, Aug. 28, 2012, at A12. Romney's ads claimed that “[u]nder Obama's plan, you wouldn't have to work[;] . . . they would just send you your welfare check.” Jamelle Bouie, *In New Ad, Mitt Romney Repeats False Attack on Obama's Welfare Policy*, THE PLUM LINE, WASHINGTONPOST.COM (Aug. 13, 2012, 9:45 AM), [http://www.washingtonpost.com/blogs/plum-line/post/in-new-ad-mitt-romney-repeats-false-attack-on-obamas-welfare-policy/2012/08/13/92cda562-e547-11e1-9739-eef99c5fb285\\_blog.html](http://www.washingtonpost.com/blogs/plum-line/post/in-new-ad-mitt-romney-repeats-false-attack-on-obamas-welfare-policy/2012/08/13/92cda562-e547-11e1-9739-eef99c5fb285_blog.html). Klein observed that this focus on welfare was puzzling because few people at the time believed there was a problem with poor people not wanting to work. Klein, *supra*. The problem in 2012, most people realized, was that millions of Americans could not find work, no matter how hard they tried. *Id.* “In modern politics, however, when a campaign begins doubling and tripling down on an unusual line of attack, it's because it has reams of data showing the attack is working.” *Id.* Political scientist Michael Tesler found that Romney's welfare ads primed racial resentment, finding that the ads worked particularly well “if the viewer [was] racist, or at least ‘racially resentful.’” *Id.* The Romney campaign may have thought this would be a good way of encouraging racially resentful White voters to vote for Romney rather than Obama. By focusing on welfare, the Romney campaign could play on racial stereotypes about lazy Black people and “welfare queens.” See generally Franklin D. Gilliam, Jr., *The ‘Welfare Queen’ Experiment: How Viewers React to Images of African-American Mothers on Welfare*, NIEMAN REPORTS, Summer 1999, at 49, <http://www.nieman.harvard.edu/assets/pdf/Nieman%20Reports/backissues/99summer.pdf> (discussing the stereotype of welfare mothers as mostly poor African American women who choose to be on welfare because they fail to adhere to a set of core American values). As long as the Romney campaign could run these ads ostensibly about welfare and not explicitly about race, they could encourage racial resentment against Blacks in general and the President in particular.

33. The media frequently depicts young Black and Brown men as the ones who are mugging other people, scamming people, burglarizing homes, selling drugs, and engaging in drive-by shootings. See ROBERT M. ENTMAN, *YOUNG MEN OF COLOR IN THE MEDIA: IMAGES AND IMPACTS* 13 (2006); Adeno Addis, *Hell Man, They Did Invent Us: The Mass Media, Law, and African Americans*, 41 BUFF. L. REV. 523, 555 (1993) (“The image of young black males conveyed by the mainstream media is one associated with drugs, crime, and violence.”); Leonard M. Baynes, *A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L. REV. 549, 550 (1997) (“[T]he image of young violent Black men is very prevalent in the media.”); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 512 (1994) (noting that Blacks are often depicted as “violent muggers and burglars”).

34. Gaertner & Dovidio, *supra* note 30, at 85.

35. *Id.*



Building on Dovidio and Gaertner's work, I suggest that the initial decision by the Florida State Attorney's Office not to charge Zimmerman was made at a time when the racialized nature of the case was not yet evident, and when factors other than race—such as Florida's Stand Your Ground law, the grass stains on Zimmerman's back, Zimmerman's injuries, and Zimmerman's status as the Neighborhood Watch Captain—could explain the decision not to charge George Zimmerman in the death of Trayvon Martin. Indeed, weeks passed before the case received any significant attention in the press.<sup>36</sup> Then race quickly became salient in various ways, from the public protests over the shooting to Zimmerman's parents' efforts to prove their son was not a racist.<sup>37</sup> Only after race became painfully salient did the State Attorney's Office appoint a different prosecutor to handle the case, who then decided to charge Zimmerman with second degree murder.<sup>38</sup>

Part III focuses on the operation of racial stereotypes and implicit racial bias in the self-defense context. It examines social science studies showing that individuals are more likely to perceive an action as aggressive, violent, and dangerous when committed by a Black person than when the same action is committed by a White person.<sup>39</sup> This Part also examines social science studies showing that individuals are more likely to "see" a weapon in the hands of a Black person than in the hands of a White person, even when the Black person is actually unarmed.<sup>40</sup> This Part suggests that these studies have disturbing implications for criminal cases involving claims of self-defense against Black and Brown victims given the reasonableness requirement in self-defense law. The defendant claiming self-defense in the use of deadly force does not have to be correct that he was being threatened with an imminent, unlawful attack threatening death or serious bodily injury as long as his belief in the need to use deadly force in self-defense was both honest and

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36. Julia Dahl, *Trayvon Martin Shooting: A Timeline of Events*, CBS NEWS (Apr. 11, 2012), [http://www.cbsnews.com/8301-504083\\_162-57412417-504083/trayvon-martin-shooting-a-timeline-of-events](http://www.cbsnews.com/8301-504083_162-57412417-504083/trayvon-martin-shooting-a-timeline-of-events) (noting that Zimmerman shot Martin on February 26, 2012, but the story did not receive national attention until March 13, 2012); Charita Goshay, Opinion, *Stark Needs Your Anger More Than Sanford, Fla.*, CANTONREP.COM (Apr. 21, 2012), <http://www.cantonrep.com/opinion/x221026909/Charita-Goshay-Stark-needs-your-anger-more-than-Sanford-Fla> ("It took the national media a full month to catch up to the shooting of Trayvon Martin because a young minority male being shot long ago stopped being news.").

37. See *supra* text accompanying note 21; *infra* text accompanying notes 127–28.

38. Sari Horwitz, *Charge Filed in Martin Killing*, WASH. POST, Apr. 12, 2012, at A1.

39. See *infra* note 157 and accompanying text.

40. See *infra* notes 164–185 and accompanying text.

reasonable.<sup>41</sup> If most people assume that young Black males are armed and dangerous, then a defendant claiming that he shot a young Black male in self-defense is more likely to be seen by the judge and jury as having acted reasonably, even if the young Black male in question was not in fact a threat.

Part IV relies on recent social science research on race salience to suggest some possible reforms. Samuel Sommers, Phoebe Ellsworth, and others have shown through empirical research that making race salient or calling attention to the operation of racial stereotypes encourages individuals to suppress what would otherwise be automatic, stereotype-congruent responses and instead act in a more egalitarian manner.<sup>42</sup> These studies suggest that when race is made salient, individuals tend to treat White and Black defendants the same.<sup>43</sup> When race is not made salient, individuals tend to favor White defendants over Black defendants.<sup>44</sup>

Building on these insights, this Part suggests that in the run-of-the-mill case, when an individual claims he shot and killed a Black person in self-defense, legal decision makers are likely to find reasonable the individual's claim that he felt his life was being threatened unless mechanisms are in place to make the operation of racial stereotypes in the creation of fear salient. This is especially true if the victim is a young Black male dressed in a certain way. In the Trayvon Martin case, race was made salient by the extensive media coverage and the huge public outcry over the Sanford Police Department's failure to arrest. Most criminal cases, however, do not receive the kind of media attention received by the Trayvon Martin case. In most criminal cases involving a Black defendant or victim, race is a background factor that is not highlighted by either party. The parties may think race is irrelevant or they may fear that if they call attention to race, they will be accused of "playing the race card."<sup>45</sup>

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41. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.01[E] (6th ed. 2012) ("A defendant is justified in killing a supposed aggressor if the defendant's belief in this regard is objectively reasonable, *even if appearances prove to be false*, i.e., even if the decedent did *not* represent an imminent threat to the defendant.").

42. See *infra* text accompanying notes 193–222.

43. See *infra* text accompanying notes 193–222.

44. See *infra* text accompanying notes 193–222. The race salience studies that have been conducted thus far have focused on whether making race salient affects jury decision-making when the race of the defendant is manipulated. They have not yet focused on whether making race salient affects results when the victim's race is manipulated. Given the results of the race salience studies thus far, it seems reasonable to infer that race salience should have race-neutralizing effects in cases where the victim's race is manipulated just as it does in cases where the defendant's race is manipulated.

45. See RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT

Race, however, is often relevant to questions about the reasonableness of fear, and the recent social science research on race salience suggests that calling attention to race may be the best way to defuse the adverse effects of implicit racial bias.

Accordingly, this Article proposes that prosecutors and criminal defense attorneys who are concerned about the operation of implicit racial bias should attempt to make race salient in the criminal courtroom. The Article provides a few concrete suggestions as to how race can be made salient and concludes by addressing possible objections to its proposal.

### I. NOT YET POST-RACIAL

Attitudes about race in the United States today are very complex. The country has made tremendous strides away from the racism that was pervasive in the days of slavery, segregation, and Jim Crow laws.<sup>46</sup> Oprah Winfrey, Denzel Washington, Eddie Murphy, and countless other successful Blacks in business, law, medicine, and politics are reminders that many Blacks have made it to the top of American society in terms of wealth, power, and fame.<sup>47</sup> In 2008, Barack Obama was elected to become the nation's first African American president.<sup>48</sup> In 2012, President Obama was re-elected to a second term in office.<sup>49</sup> These developments have led many people to

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BIAS MAKES RACE RELATIONS WORSE 7 (2008) (explaining that playing the race card involves making "dubious and questionable accusations of racism").

46. See *id.* at 76–79.

47. See Neubia Williams, *A Post Racial Era?: How the Election of President Obama and Recent Supreme Court Jurisprudence Illustrate that the United States Is Not Beyond the Centrality of Race*, 4 S. REGION BLACK L. STUDENTS ASS'N L.J. 1, 3 (2010) ("Post-racialists point to the historic achievement of prominent figures such as Thurgood Marshall, Condoleezza Rice, Shelia Jackson Lee, Eric Holder, Oprah Winfrey, Colin Powell, and, of course, President Obama, as evidence that racism no longer exists."). But see Mario L. Barnes, *Reflections on a Dream World: Race, Post-Race and the Question of Making It Over*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 6, 17 (2009) (arguing that the focus on individual examples of Black success is ill-conceived given the number of Blacks still at the bottom of the socioeconomic ladder). Barnes also notes that "[p]rior to Obama, other prominent Blacks such as Oprah Winfrey and Bill Cosby were often referenced to prove that with hard work anyone could achieve the American dream." *Id.* at 12.

48. See Barnes, *supra* note 47, at 12 ("Barack Obama becomes the latest and penultimate black success story, which proves that unsuccessful Blacks merely do not work hard enough."); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1024 (2010) ("The election of Barack Obama to the presidency has inspired many to marvel at the seeming evaporation of race as a basis for social ordering in the United States, a euphoria often expressed in proclamations that we now live in a 'post-racial' America.")

49. David A. Fahrenthold, *Obama Wins, Defying Doubts About Economy*, WASH. POST, Nov. 7, 2012, at A1.

believe that we are beyond race and living in a “post-racial” society.<sup>50</sup> Post-racialists, those who believe that race is no longer relevant and should not be acknowledged,<sup>51</sup> point to these and other achievements by Black Americans as a reason to stop focusing on race and racial discrimination in America.<sup>52</sup>

Sumi Cho describes post-racialism as “a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action.”<sup>53</sup> Post-racialists believe “race does not matter, and should not be taken into account or even noticed.”<sup>54</sup> Central to post-racialism is the idea that “racial thinking and racial remedies are no longer needed because the nation has . . . transcended racial divisions of past generations.”<sup>55</sup> For post-racialists, race-based remedies are divisive and partial to special interests.<sup>56</sup> Moreover, post-racialists discourage the contemplation of race even if the intent is to remedy past discrimination.<sup>57</sup> Post-racialists think we should stop obsessing over race and recognize that we have come a long way from the days when bigotry and racially discriminatory acts were accepted.<sup>58</sup> Many post-racialists think we currently live in a meritocratic color-blind society.<sup>59</sup>

The shooting of Trayvon Martin belies this claim of post-racial triumph. It is unlikely that Zimmerman would have thought Martin was “real suspicious,” “up to no good,” and “on drugs or something” if Martin had been White. Race likely influenced Zimmerman’s

50. For critiques of this view, see generally Barnes, *supra* note 47; Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); López, *supra* note 48; John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785 (2009).

51. Cooper, *supra* note 24, at 119.

52. See Barnes, *supra* note 47, at 12.

53. Cho, *supra* note 50, at 1594.

54. *Id.* at 1595.

55. *Id.* at 1601.

56. *Id.* at 1602.

57. *Id.* at 1603 (noting that “post-racialism draws a *moral equivalence* between ‘racialism’ under Jim Crow which subordinated racial minorities, and the ‘racialism’ of the civil-rights era, which sought to remedy minority subordination”).

58. Indeed, a person “who points out racial inequities risks being characterized [by post-racialists] as an obsessed-with-race racist.” *Id.* at 1595.

59. Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1140 (2010). While Kang is referring to the attitudes of the politically conservative post-racialists, i.e., the Right, in this part of his paper, he acknowledges that post-racialists include both liberal and conservative Americans. *Id.* at 1141–42.

perception that Martin posed a threat of criminality, whether Zimmerman was aware of this or not.

Race may have also influenced the government's decision not to arrest Zimmerman. Had Zimmerman been an African American man who followed and then shot an unarmed Caucasian teenager during a fist-fight, it is unlikely that police would have released Zimmerman without any charges.<sup>60</sup> When there is a dead victim and police know who killed the victim, they usually arrest the obvious perpetrator of the homicide and then investigate.<sup>61</sup>

Florida's "Stand Your Ground" law, which prohibits Florida law enforcement personnel from arresting a person for using force unless they first determine that there is probable cause to believe that the force used was unlawful,<sup>62</sup> should not have prevented an arrest in this case.<sup>63</sup> Arguably, there was probable cause to believe that

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60. Benjamin Crump, the attorney hired by Trayvon Martin's family, questioned the impartiality of the police investigation, noting that the police ran a background check on Trayvon Martin but did not run a background check on George Zimmerman, even though Martin was dead. *CNN Special Report with Soledad O'Brien, Beyond Trayvon: Race and Justice in America* (CNN television broadcast Mar. 31, 2012) [hereinafter *CNN Special Report with Soledad O'Brien*], transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1203/31/se.01.html>. Crump told Soledad O'Brien,

They ran a background check on Trayvon who is dead on the ground. They don't run a background check on the guy who just shot and killed the kid in cold blood. In essence, what they did, they said that Zimmerman, your word is more credible, and we're going to accept that, . . . [and] this little thug on the ground, . . . he really doesn't deserve a fair and impartial investigation.

*Id.*; see also Ta-Nehisi Coates, *Focusing on What's Important in the Trayvon Martin Case*, THE ATLANTIC (Apr. 9, 2012 1:00 PM), [www.theatlantic.com/national/print/2012/04/focusing-on-whats-important-in-the-trayvon-martin-case/255629/](http://www.theatlantic.com/national/print/2012/04/focusing-on-whats-important-in-the-trayvon-martin-case/255629/) (reporting that Zimmerman was not subjected to a background check until after he was released from custody).

61. *'I Used to Be Him,': Former Federal Prosecutor Paul Butler on Why the Trayvon Martin Case Resonates with Him*, *Countdown with Keith Olberman* (Current TV broadcast Mar. 29, 2012), available at <http://current.com/shows/countdown/videos/i-used-to-be-him-former-federal-prosecutor-paul-butler-on-why-the-trayvon-martin-case-resonates-with-him> (featuring former federal prosecutor Paul Butler, noting that it was surprising that the police did not arrest Zimmerman after finding him standing over Martin with a gun, given the fairly low standard of probable cause needed to arrest). In this case, perhaps because of his work as the Neighborhood Watch Captain, police trusted Zimmerman enough to release him pending their investigation.

62. FLA. STAT. ANN. § 776.032(2) (West 2012).

63. While Florida's Stand Your Ground law should not have prevented an arrest, the fact that it gives a person claiming self-defense the benefit of the doubt may have helped Zimmerman avoid arrest. A Florida newspaper studied nearly 200 cases involving people who had invoked the state's Stand Your Ground law, and found that nearly seventy percent of defendants claiming self-defense "went free." Kris Hundley et al., *Florida 'Stand Your Ground' Law Yields Some Shocking Outcomes Depending on How Law Is Applied*, TAMPA BAY TIMES (June 3, 2012, 10:25 AM),

Zimmerman's use of deadly force was unlawful.<sup>64</sup> Martin was at least twenty pounds lighter than Zimmerman.<sup>65</sup> Moreover, Zimmerman used a gun against Martin, who was unarmed.<sup>66</sup>

The public's reaction to the shooting was sharply divided along racial lines, hardly what one would expect in a post-racial society where race does not, or should not, matter. A Washington Post-ABC News poll conducted on April 5, 2012, reported a huge divide between Blacks and Whites over whether the shooting was justified.<sup>67</sup> Eighty percent of Blacks surveyed said they thought the killing of Martin was unjustified, while only thirty-eight percent of Whites surveyed felt the same way.<sup>68</sup>

Even more telling was the racial divide in the reaction to President Obama's comments on the shooting. President Obama's remark—"I can only imagine what these parents are going through . . . If I had a son, he'd look like Trayvon"<sup>69</sup>—triggered harsh reaction from conservatives. Then-presidential candidate Rick

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[www.tampabay.com/news/publicsafety/crime/article1233133.ece](http://www.tampabay.com/news/publicsafety/crime/article1233133.ece). Disturbingly, the race of the victim appears to have some effect on whether a person claiming self-defense faces criminal punishment for his acts. Seventy-three percent of Floridians who killed a Black person faced no penalty under Florida's Stand Your Ground law compared to fifty-nine percent of those who killed a White person. *Id.*

64. Probable cause to arrest is usually defined as reasonable grounds to believe that a crime has been committed and that *A*, the arrestee, committed it. *See* *People v. Roach*, 253 N.Y.S.2d 24, 29 (1964) (noting that probable cause to arrest exists if an officer has reasonable grounds for believing both that a felony has been committed and that the person arrested committed it); *see also* BLACK'S LAW DICTIONARY 1321 (9th ed. 2009) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime"). Ordinarily, as long as police have probable cause to arrest, they may arrest an individual. Florida's self-defense statute, however, requires reasonable grounds to believe that the force used by an individual claiming self-defense was unlawful before police can arrest that individual. § 776.032(2).

65. While some sources indicate that Martin weighed 150 pounds and Zimmerman weighed 170 pounds, *see* Barry et al., *supra* note 1, the police report depicted an even wider range in the men's physical sizes, stating that Martin weighed 160 pounds and Zimmerman weighed 200 pounds. Offense Report, *supra* note 14, at 2, 4.

66. Barry et al., *supra* note 1. Apparently, the lead investigator on the scene wanted to arrest Zimmerman, but was instructed by the State Attorney's Office that there was not enough evidence to pursue a conviction. Matt Gutman, *Trayvon Martin Investigator Wanted Manslaughter Charge*, ABC NEWS (Mar. 27, 2012), <http://abcnews.go.com/US/trayvon-martin-investigator-wanted-charge-george-zimmerman-manslaughter/story?id=16011674>.

67. Krissah Thompson & Jon Cohen, *Poll Finds Sharp Racial Divides over Martin Case*, WASH. POST, Apr. 11, 2012, at A3.

68. *Id.* Most Whites said they did not have enough information about the shooting to say whether it was unjustified. *Id.*

69. Krissah Thompson & Scott Wilson, *'If I Had a Son, He'd Look Like Trayvon'*, WASH. POST, Mar. 24, 2012, at A1.

Santorum accused the President of employing “divisive rhetoric.”<sup>70</sup> Former Speaker of the House Newt Gingrich, another candidate for president at the time, went so far as to suggest that the President’s words meant he would not care if a White child had been shot.<sup>71</sup> Even though President Obama was careful not to criticize the Sanford Police Department for failing to arrest Zimmerman, having faced the bite of public criticism for his comments after the Cambridge Police Department’s arrest of Harvard professor Henry Louis Gates, Jr.,<sup>72</sup> a Newsweek poll taken shortly after President Obama’s remarks found that a majority of Whites disapproved of the way President Obama handled the shooting of Martin.<sup>73</sup>

In sharp contrast, Black leaders praised the President’s comments. The Reverend Al Sharpton remarked, “It really brings home to people that this kid is not some potential thug in a hoodie.”<sup>74</sup> Benjamin Crump, the attorney representing Trayvon Martin’s parents, said his clients were “humbled by Obama’s comments.”<sup>75</sup> Similarly, Benjamin Jealous, President of the NAACP, commented, “Obama’s words spoke both to the universal pain felt about this case, and the specific pain felt by the family and the need for our nation to look at itself in the mirror.”<sup>76</sup>

Post-racialists may be right that we have come a long way, but they are not correct when they claim that race no longer matters and

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70. Andrew Romano & Allison Samuels, *Is Obama Making It Worse? An Exclusive Newsweek Poll Reveals the Persistence of America’s Stark Racial Divide*, NEWSWEEK, Apr. 16, 2012, at 40, 42.

71. *Id.*

72. Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Citizen*, 11 NEV. L.J. 1, 12 n.116 (2010) (noting that President Obama suffered a significant drop in his poll numbers after he remarked that the Cambridge police acted stupidly in arresting Gates). Professor Henry Louis Gates, Jr., is an African American professor who has been on the Harvard faculty for nearly two decades. CHARLES J. OGLETREE, JR., *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA* 15, 37 (2010). He was arrested for disorderly conduct by Sgt. James Crowley, a Cambridge, Massachusetts police officer, after forcibly entering his own home because of a jammed door. See Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES, July 21, 2009, at A13, available at <http://www.nytimes.com/2009/07/21/us/21gates.html>. Professor Gates was arrested even though he provided Sgt. Crowley with his Harvard ID card and his driver’s license, which confirmed that he was a Harvard professor and that he lived at the house, apparently because Professor Gates refused to step outside onto the porch when Sgt. Crowley requested that he do so. See OGLETREE, *supra*, at 33, 37.

73. Romano & Samuels, *supra* note 70, at 42 (“According to the Newsweek poll, a majority of whites now disapprove of Obama’s handling of the Martin tragedy.”).

74. Thompson & Wilson, *supra* note 69.

75. *Id.*

76. *Id.*

thus should not be acknowledged.<sup>77</sup> The nation's response to the shooting of Trayvon Martin reinforces the fact that even today, Blacks and Whites can experience and perceive the same exact events in vastly different ways. The events leading up to and following the shooting of Trayvon Martin also suggest that we have not yet achieved a post-racial society.<sup>78</sup> Indeed, race still matters, even to people who do not wish for it to matter. As discussed in the next Section, while many Americans today believe it is wrong to intentionally discriminate on the basis of race and to treat people differently based on the color of their skin, implicit racial bias in favor of Whites and against Blacks persists.<sup>79</sup> Our implicit biases can be and often are completely the opposite of our consciously held beliefs.<sup>80</sup>

## II. AVERSIVE RACISM: BRIDGING THE GAP BETWEEN POSITIVE EGALITARIAN BELIEFS AND NEGATIVE IMPLICIT RACIAL BIAS

Racial norms in American society today are very different from the racial norms of days past when it was socially acceptable to express negative views about Blacks.<sup>81</sup> Historically, many Whites viewed Blacks as inferior and were not afraid to express prejudicial attitudes in the company of others. Today, most Americans know that

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77. As Mario Barnes notes, "If African Americans have, indeed, finally made it over, there are many in our community that have not received the notice." Barnes, *supra* note 47, at 11.

78. This Article does not claim that the reaction to the shooting and President Obama's remarks "proves" that the United States is not a post-racial society. Others have devoted entire law review articles to demonstrating that the United States is not post-racial. See *supra* note 50. This Article merely uses the reaction to the Trayvon Martin shooting as an example of American society not yet being post-race.

79. See *infra* notes 84–106 and accompanying text. An Associated Press poll found that racial prejudice against Blacks has increased since 2008, the year that Barack Obama was elected president, with a majority of Americans today expressing negative views about Blacks. Sonya Ross & Jennifer Agiesta, *AP Poll: Majority Harbor Prejudice Against Blacks*, THE BIG STORY (Oct. 27, 2012, 4:13 AM), <http://bigstory.ap.org/article/ap-poll-majority-harbor-prejudice-against-blacks>. Fifty-one percent of Americans today openly express anti-Black attitudes, compared to forty-eight percent in a similar 2008 survey. *Id.* When racial bias was measured implicitly, the poll found that fifty-six percent of Americans demonstrated implicit racial bias against Blacks, compared to forty-nine percent in 2008. *Id.* Anti-Hispanic bias today is quite pronounced as well. A 2011 survey found that fifty-two percent of non-Hispanics surveyed openly expressed anti-Hispanic attitudes. *Id.* When measured implicitly, that figure rose to fifty-seven percent. *Id.*

80. See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE 69, 158 (2013); *supra* note 23 and accompanying text.

81. See Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 202 (2001) (noting that "racial norms in society have shifted dramatically").



it is socially unacceptable to say things that appear to manifest prejudice or bias against Blacks.<sup>82</sup> Americans of many different political stripes and colors sincerely believe it is wrong to discriminate on the basis of race and that Blacks should be treated the same as Whites. By and large, Americans embrace the egalitarian race norms that are enunciated in the Equal Protection Clause of the Fourteenth Amendment.<sup>83</sup> If we are talking about the social norms that many, if not most, Americans believe *ought* to be embraced, race norms today are decidedly more egalitarian than discriminatory.

Despite our largely egalitarian attitudes and beliefs, social science research over the past decade has shown that a majority of Americans are implicitly biased against Blacks.<sup>84</sup> Researchers have demonstrated the existence of implicit bias through the Implicit Association Test (“IAT”),<sup>85</sup> a simple test that measures the amount of time individuals take to make an association with an image or word they view on a computer screen.<sup>86</sup> When individuals are asked to pair words and images that are consistent with widely held attitudes or stereotypes, i.e. schema-consistent words and images, their response times are fairly quick.<sup>87</sup> When they are asked to pair words and images that are inconsistent with widely known stereotypes, i.e., schema-inconsistent words and images, their response times become noticeably slower.<sup>88</sup>

One of the initial tests measuring implicit bias was completely race neutral. Individuals were shown various words representing flowers, insects, pleasant words, and unpleasant words, and asked to sort these words into the appropriate category.<sup>89</sup> For example, if the individual saw the word “rose,” the individual would hit the key corresponding with the label “flower.”<sup>90</sup> If the individual saw the

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82. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1011 (2003).

83. U.S. CONST. amend. XIV, § 1.

84. See *infra* notes 85–106.

85. See generally Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101 (2002) (discussing results of over 600,000 IAT tasks that demonstrate implicit preferences for White over Black and young over old and stereotypical associations linking males with science and career and females with liberal arts and family).

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

87. See Kang et al., *supra* note 23, at 1130.

88. *Id.*

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

90. *Id.*

word “rotten,” the individual would hit the key corresponding with the label “unpleasant word.”<sup>91</sup>

In the second phase of the experiment, individuals were again shown various words representing flowers, insects, pleasant words, and unpleasant words, and were told to hit one key on the computer if the word on the screen fell into the category of “flower” or “pleasant word” and to hit another key on the computer if the word on the screen fell into the category of “insect” or “unpleasant word.”<sup>92</sup> Their response times were measured and most individuals were able to quickly complete the first two parts of the experiment.<sup>93</sup>

In the third phase of the experiment, the same individuals were again shown words representing flowers, insects, pleasant words, and unpleasant words. This time, they were told to hit one key if the word on the screen fell into the category of “flower” or “unpleasant word” and to hit another key on the keyboard if the word on the screen fell into the category of “insect” or “pleasant word.”<sup>94</sup> This time, their response times were much slower. Researchers theorized that response times were slower in the third experiment because people are accustomed to associating flowers with pleasant things and insects with dirty or negative things.<sup>95</sup>

The experiment prompted researchers to test whether individuals would react similarly if instead of flowers and insects, they were shown White-sounding names, such as Katie and Meredith, and Black-sounding names, such as LaTonya and Ebony.<sup>96</sup> Individuals in this experiment were asked to hit one key if they saw either a White-sounding name or a word reflecting something pleasant or nice and to hit another key if they saw either a Black-sounding name or a word reflecting something unpleasant or negative.<sup>97</sup> Response times in this condition were fairly quick.<sup>98</sup> In the next phase of this experiment, individuals were asked to hit one key if they saw either a White-sounding name or an unpleasant word and to hit another key if they saw either a Black-sounding name or a pleasant word.<sup>99</sup> This time, just as in the previous experiment when individuals were asked to

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91. *Id.*

92. *Id.* at 1466–67.

93. *Id.* at 1465–68.

94. *Id.*

95. *Id.* at 1469–70.

96. *Id.* at 1473–74.

97. *Id.* at 1465.

98. *See id.* at 1467.

99. *Id.* at 1473–74.

pair insects with pleasant words and flowers with unpleasant words, response times were much slower.<sup>100</sup> Even individuals who self-reported non-prejudiced beliefs manifested implicit racial bias in favor of Whites and against Blacks.<sup>101</sup>

Numerous other experiments have been conducted since these initial experiments, confirming that implicit racial bias against Blacks is pervasive.<sup>102</sup> Over fourteen million IATs, measuring various kinds of biases, including bias based on gender, sexuality, and age, have been completed.<sup>103</sup> Seventy-five percent of those who have taken the race IAT have demonstrated implicit racial bias in favor of Whites.<sup>104</sup> Even African Americans manifested implicit bias in favor of Whites over Blacks.<sup>105</sup>

John Dovidio and Samuel Gaertner suggest one way to understand the disparity between the largely positive, explicit and the largely negative, implicit racial attitudes toward Blacks. Under their theory of aversive racism, individuals in today's society are averse to explicit manifestations of racism, but they are nonetheless still racially biased against Blacks.<sup>106</sup> "Whites are socialized to believe that racism

100. *Id.* at 1474.

101. *See id.* at 1475.

102. *See* Kang et al., *supra* note 23, at 1139, 1144–45; Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 19–24 (Justin D. Levinson & Robert J. Smith eds., 2012).

103. BANAJI & GREENWALD, *supra* note 80, at 69; *see also* Melinda Henneberger, *Beware the 'Mindbugs' that Infect You with Prejudices*, WASH. POST, Feb. 8, 2013, at A2 (noting that some 14 million people have taken the IATs developed by scholars Mahzarin Banaji, Anthony Greenwald, and Brian Nosek to measure implicit racial bias). This is double the number of IATs completed just three years earlier. *See* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010) ("With over seven million completed tests, Project Implicit comprises the largest available repository of implicit social cognition data.").

104. BANAJI & GREENWALD, *supra* note 80, at 47.

105. *See* Henneberger, *supra* note 103 (noting that Banaji and Greenwald's research found that about forty percent of African Americans have a pro-White bias, forty percent have a pro-Black bias, and twenty percent are neutral); *see also* Robert W. Livingston, *The Role of Perceived Negativity in the Moderation of African Americans' Implicit and Explicit Racial Attitudes*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 405, 411 (2002) (discussing the relationship between Blacks' implicit and explicit racial attitudes and finding that Blacks who perceived negativity from Whites showed a positive correlation with in-group explicit bias and a negative correlation with in-group implicit bias); Nosek et al., *supra* note 85, at 105 (analyzing the overall IAT effect revealing respondents' "automatic preference for White relative to Black").

106. *See generally* Gaertner & Dovidio, *supra* note 30 (introducing empirical support for the concept of aversive racism as ambivalent, complex feelings toward racial minorities marked by unacknowledged negative feelings and beliefs); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1 (2004) [hereinafter Dovidio & Gaertner, *Aversive Racism*] (demonstrating how aversive racism affects racial minorities and influences interracial relations).

and discrimination are wrong, but society reinforces and maintains negative stereotypes regarding Blacks.”<sup>107</sup> To match the egalitarian race norms that are prevalent in today’s society, most Americans will try to avoid appearing racist in situations when it would be obvious to others that they are acting in a racially biased manner.<sup>108</sup> When the racial nature of the situation is salient or obvious, individuals are reminded that their actions could be seen as racist, and they are more likely to try to act in accordance with egalitarian principles.<sup>109</sup> If, however, there is some ambiguity about whether their actions would appear to others to be biased, they are more likely to respond in biased ways.<sup>110</sup>

The Florida State Attorney’s Office’s reaction to the shooting of Trayvon Martin provides support for Dovidio and Gaertner’s theory of aversive racism. Just after the shooting, there was ambiguity about whether the decision not to arrest Zimmerman would appear to the public to be a racially biased decision. Many young Black men are shot and killed in both intra-racial and interracial disputes that never make the evening news. Whether the perpetrators are caught and arrested rarely catches the attention of anyone besides the victim’s friends and family. The initial decision by the State Attorney’s Office not to arrest Zimmerman was probably made without much thought to the racially charged nature of the shooting.<sup>111</sup> Zimmerman, as the Neighborhood Watch captain, was likely viewed by police at the time as an upstanding citizen.<sup>112</sup> Florida’s law on self-defense largely

107. Donald O. Bucolo & Ellen S. Cohn, *Playing the Race Card: Making Race Salient in Defence Opening and Closing Statements*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 293, 295 (2010).

108. *Id.*

109. Dovidio & Gaertner, *Aversive Racism*, *supra* note 106, at 7.

110. Bucolo & Cohn, *supra* note 107, at 295.

111. Law professor Tamara Lawson, a former prosecutor, notes that due to the “proof challenges and procedural obstacles” involved in Stand Your Ground cases, “it would be normal for a prosecutor to be cautious before charging this type of case, and it may even be reasonable for the prosecutor to elect not to charge it after weighing all the factors.” Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutor’s Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL’Y 271 (forthcoming 2013) (manuscript at 20) (on file with the North Carolina Law Review).

112. Barry et al., *supra* note 1 (providing biographical information on Trayvon Martin and George Zimmerman). According to one source, Zimmerman was not subjected to a criminal background check until after he was released from custody. See Coates, *supra* note 60. The assumption that Zimmerman was an upright, honest citizen was called into question after Zimmerman was charged and then released on bond. In July 2012, a Florida judge found that “Zimmerman misled the court about his finances during an initial April 2012 bond hearing.” Lizette Alvarez, *New Bond of \$1 Million in Trayvon Martin Killing*,

avored citizens claiming self-defense.<sup>113</sup> There was also evidence suggesting Zimmerman and Martin were in a physical altercation before Martin was shot.<sup>114</sup> Whoever made the initial decision not to charge Zimmerman probably did not think this was a case that would ignite racial protest. As we now know, however, that assumption turned out to be incorrect.

Zimmerman's shooting of Martin quickly became a symbol of racial profiling run amok. Racial profiling is a term of art usually used to describe police or government action that appears to be racially biased.<sup>115</sup> When a police officer pulls over a Black driver ostensibly for a minor traffic violation, but actually pulls the driver over because the officer has a hunch, based on the driver's race or ethnicity, that the driver is engaged in some kind of criminal activity, the officer has engaged in racial profiling.<sup>116</sup> The practice has become so common, it

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N.Y. TIMES, July 6, 2012, at A15, available at [http://www.nytimes.com/2012/07/06/us/zimmerman-granted-1-million-bond.html?\\_r=0](http://www.nytimes.com/2012/07/06/us/zimmerman-granted-1-million-bond.html?_r=0). The judge also found evidence suggesting that Zimmerman was preparing to flee the United States to avoid prosecution. *Id.*

113. See *supra* note 22. While racially neutral on its face, the law apparently has been applied in racially disparate ways. See *supra* note 63 and accompanying text.

114. See *supra* note 14.

115. David Harris, one of the nation's leading experts on racial profiling, defines racial profiling "as law enforcement's use of racial, ethnic, or religious appearance as one factor, among others, to decide who to stop, question, search, or otherwise investigate." *Ending Racial Profiling in America": Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Judiciary Comm.*, 112th Cong. 2 (2012), available at <http://www.judiciary.senate.gov/pdf/12-4-17HarrisTestimony.pdf> (testimony of David A. Harris, Distinguished Faculty Scholar and Associate Dean for Research, University of Pittsburgh School of Law); see also SEARCHES AND SEIZURES: THE FOURTH AMENDMENT, ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 161 (Cynthia Lee ed., 2011) (describing racial profiling as "the practice by law enforcement officials of detaining individuals based at least in part on their race, ethnicity, or national origin").

116. In 1996, the Supreme Court held that such action does not violate the Fourth Amendment as long as the officer had probable cause to believe the driver committed a traffic violation. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (opining that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"). More recently, the Court affirmed *Whren* when it upheld a provision in Arizona's controversial law aimed at combating illegal immigration that requires police officers to investigate the immigration status of a person stopped if there is reasonable suspicion that the person "is unlawfully in the United States." See *Arizona v. United States*, 132 S. Ct. 2492, 2509–10 (2012) (rejecting preemption challenge brought by the United States to section 2(B) of S.B. 1070, the provision requiring Arizona state police officers to investigate the immigration status of persons detained if there is reasonable suspicion that the person is unlawfully in the United States); see also ARIZ. REV. STAT. ANN. § 11-1051(B) (Supp. 2012) ("For any lawful stop, detention, or arrest made by a law enforcement official . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person . . .").

is called “Driving While Black.”<sup>117</sup> Many viewed Zimmerman’s shooting of Trayvon Martin as an example of racial profiling by a private citizen, given Zimmerman’s statement to the 911 operator that he thought Martin looked suspicious, was up to no good, or was on drugs.<sup>118</sup> As Tamara Lawson notes, “[T]he outrage surrounding Trayvon Martin’s death . . . was focused on the perceived injustice and lack of apparent consequences for killing a young Black (male) teen. This narrative projected a suggestion of racial bias as the unspoken motivation for the prosecutor’s initial leniency.”<sup>119</sup>

Indeed, once the racialized nature of the case became evident, it was not just African Americans who condemned the shooting. Many Whites spoke publicly and forcefully against Zimmerman’s actions.<sup>120</sup> For example, Joe Scarborough, anchor of MSNBC’s morning news television broadcast Morning Joe, suggested that if Zimmerman had been Black and Martin had been White, the case would have been handled much differently:

If anybody watching this show . . . doesn’t believe that if an African-American shot a 17-year-old white boy walking through a neighborhood carrying ice tea and Skittles . . . if they do not believe that an arraignment would be scheduled by the next morning for the African-American shooter and that the white boy’s family would be called immediately . . . that an officer would actually drive to the white boy’s home and sit down with the parents on the couch and console them because they have lost a 17-year-old son. If you . . . believe that this case and the handling of this case by the people in Florida had nothing to do with race, you are living in a fantasy world.<sup>121</sup>

117. Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 425 (1997); David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 546, 570 (1997); see also Paul Butler, “Walking While Black:” Encounters with the Police on My Street, LEGAL TIMES, Nov. 10, 1997, at 23 (describing experience of being followed by Washington, D.C., police while walking in his own neighborhood).

118. See Jones, *supra* note 4.

119. Lawson, *supra* note 111 (manuscript at 25).

120. See *id.* (manuscript at 15–16) (describing the reactions taken by African Americans as well as prominent White Americans in response to the Martin killing); CNN Special Report with Soledad O’Brien, *supra* note 60.

121. Lawson, *supra* note 111 (manuscript at 16 n.39) (citing Drew Katchen, Scarborough and Morning Joe Panel on Shooting of Trayvon Martin, MSNBC (Mar. 21, 2012), [http://mojoe.msnbc.com/\\_news/2012/03/21/10790499-scarborough-and-morning-joe-panel-on-shooting-of-trayvon-martin?lite](http://mojoe.msnbc.com/_news/2012/03/21/10790499-scarborough-and-morning-joe-panel-on-shooting-of-trayvon-martin?lite)); see also Mark Caputo, Joe Scarborough: Sanford Police Chief, Prosecutor ‘Acted Shamefully, Should Be Forced from Office’ in Trayvon Martin Case, MIAMI HERALD (Mar. 21, 2012),

Although many individuals spoke out in support of Martin, others expressed the view that Martin was partly to blame for the events leading up to his death. Geraldo Rivera, a Latino talk show host and commentator on Fox News, sparked a debate over whether Martin's decision to wear a hoodie was to blame for Martin's death when he told viewers, "[T]he hoodie is as much responsible for Trayvon Martin's death as George Zimmerman was."<sup>122</sup> Rivera repeated these sentiments when he later warned Black and Brown parents not to allow their sons to wear hooded sweatshirts because really bad criminals wear hoodies.<sup>123</sup>

Rivera's hoodie comment was quickly condemned.<sup>124</sup> During a rally in Sanford, Florida, on March 31, 2012, the Reverend Jesse L. Jackson told the crowd, "This is not about a hoodie, it's about racial profiling."<sup>125</sup> Making a similar point, Representative Bobby Rush, while speaking on the floor of the House of Representatives, removed his suit jacket to reveal a grey hoodie, donned dark sunglasses, and told his colleagues, "Racial profiling has got to stop. . . . Just because someone wears a hoodie does not make them a hoodlum."<sup>126</sup>

Another way race became salient in this case was through the efforts of George Zimmerman's family to prove that Zimmerman was not a racist. Zimmerman's friends and family repeatedly told the

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<http://miamiherald.typepad.com/nakedpolitics/2012/03/joe-scarborough-sanford-police-chief-prosecutor-acted-shamefully-should-be-forced-from-office-in-tra.html> (calling on Florida state government officials to make an arrest in response to Martin's shooting); *Joe Scarborough on Trayvon Martin: Failure to Arrest Killer Is 'Disgusting' and 'Shameful'*, HUFFINGTON POST (Mar. 26, 2012), [http://www.huffingtonpost.com/2012/03/26/joe-scarborough-video\\_n\\_1379706.html](http://www.huffingtonpost.com/2012/03/26/joe-scarborough-video_n_1379706.html) (calling for law enforcement in Florida to arrest Zimmerman).

122. Katherine Boyle, *The Hoodie Label*, WASH. POST, Mar. 26, 2012, at C1.

123. *Id.*

124. See MJ Lee, *Jesse Jackson Knocks Geraldo Rivera 'Hoodie' Comment*, POLITICO (Mar. 23, 2012, 4:49 PM), <http://www.politico.com/news/stories/0312/74410.html>; see also Ediberto Roman, *An Open Letter to Geraldo Rivera*, THE BLOG, HUFFINGTON POST (Mar. 26, 2012, 10:53 AM), [http://www.huffingtonpost.com/ediberto-roman/geraldo-rivera-hoodie\\_b\\_1376453.html](http://www.huffingtonpost.com/ediberto-roman/geraldo-rivera-hoodie_b_1376453.html) (noting that in associating hoodies with urban criminals and thugs, Rivera's comments reinforced negative stereotypes about young African American and Latino urban youth as dangerous, violent criminals).

125. *Protestors March Where Trayvon Martin Was Shot*, WPVI.COM (Apr. 1, 2012), [http://abclocal.go.com/wpvi/6at4/story?section=news/national\\_world&id=8602898](http://abclocal.go.com/wpvi/6at4/story?section=news/national_world&id=8602898).

126. Sari Horwitz & Rosalind Helderman, *Fla. Teen's Father Details Police Account*, WASH. POST, Mar. 29, 2012, at A2. In response to Congressman Rush's demonstration, Representative Greg Harper, who was presiding over the floor, began to pound his gavel and shout that Representative Rush was out of order for wearing a hoodie, ostensibly on the ground that the rules prohibit representatives from wearing hats inside the chamber. *Id.*

press that Zimmerman was not a racist.<sup>127</sup> Zimmerman's attorney pointed out that Zimmerman and his wife mentored two African American boys for free.<sup>128</sup>

Focusing on whether Zimmerman is a racist is misguided. The social science research demonstrates that one does not have to be a Racist with a capital R, or one who intentionally discriminates against Blacks on the basis of race, to harbor implicit racial bias.<sup>129</sup> Even individuals who strongly believe in egalitarian principles can be implicitly biased in favor of Whites and against Blacks.<sup>130</sup> It is unlikely that George Zimmerman set out that night intending to kill a Black person, but implicit bias likely influenced him to see Martin as someone who looked suspicious and dangerous.<sup>131</sup>

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127. See Sari Horwitz, *Charge Filed in Martin Killing*, WASH. POST, Apr. 12, 2012, at A1; *CNN Special Report with Soledad O'Brien*, *supra* note 60 (showing video clips of George Zimmerman's neighbor, his friend, and his father, claiming that Zimmerman is not a racist); Julia Dahl, *Trayvon Martin Case: Zimmerman's Father Tells a Newspaper His Son Is Not Racist*, CBS NEWS (Mar. 16, 2012, 11:10 AM), [http://www.cbsnews.com/8301-504083\\_162-57398745-504083/trayvon-martin-case-george-zimmermans-father-tells-a-newspaper-his-son-is-not-a-racist](http://www.cbsnews.com/8301-504083_162-57398745-504083/trayvon-martin-case-george-zimmermans-father-tells-a-newspaper-his-son-is-not-a-racist).

128. See David Muir & Olivia Katrandjian, *Trayvon Martin Killing: George Zimmerman's Attorney and Friend Speak Out*, ABC NEWS (Mar. 25, 2012), <http://abcnews.go.com/US/george-zimmermans-attorney-friend-speak-trayvon-martin-incident/story?id=15999256> (noting that Craig Sonner, Zimmerman's attorney, insisted that Zimmerman is not a racist, pointing out that he and his wife mentored two black children for free); *Zimmerman Lawyer: No Racial Issue with Client*, CBS NEWS (Mar. 24, 2012, 7:41 AM), [http://www.cbsnews.com/8301-505266\\_162-57403854/zimmerman-lawyer-no-racial-issue-with-client](http://www.cbsnews.com/8301-505266_162-57403854/zimmerman-lawyer-no-racial-issue-with-client) (noting that Zimmerman's attorney told the press that Zimmerman and his wife had served as mentors to an African American single mother with a teenage son and daughter).

129. The social science research suggests that there is often an inverse correlation between the explicit racial attitudes and the implicit racial biases of individuals who view themselves as liberal or progressive. See Levinson et al., *supra* note 102, at 17–18; Nosek et al., *supra* note 85, at 106. For individuals who view themselves as conservative, there is usually a tighter correlation between their explicit racial attitudes and their implicit racial biases. See Nosek et al., *supra* note 85.

130. See Patricia G. Devine et al., *Prejudice With and Without Compunction*, 60 J. PERSONALITY & SOC. PSYCHOL. 817, 829 (1991).

131. Unfortunately, the law still operates on the assumption that racial bias is something that can be easily controlled and therefore punishes only intentional discriminators. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that proof of intent to discriminate is necessary for an equal protection violation and that proof of racially discriminatory impact alone is not sufficient). Under the perpetrator model of racism, the law presumes that racism is the result of intentional discrimination. Alan David Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054–55 (1978); see also Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1412 (1990) (noting that antidiscrimination law punishes only “perpetrators who have purposely and intentionally caused harm to identifiable victims”).



The fact that Zimmerman may have mentored African American boys and had African American friends does not negate the fact that implicit racial bias could have led him to think Trayvon Martin was a criminal. As Song Richardson and Phillip Goff point out, “[N]ormal psychological processes that operate below the level of conscious awareness . . . could have affected [Zimmerman’s] judgment that Martin posed a threat—regardless of Zimmerman’s conscious racial beliefs.”<sup>132</sup>

Zimmerman’s family also put forth Zimmerman’s ethnic identity as another reason to doubt that race had anything to do with the case. To correct the initial impression that Zimmerman was a racist White man, Zimmerman’s family told the press that Zimmerman was a minority himself.<sup>133</sup> Zimmerman’s father wrote a letter to the Orlando Sentinel explaining that his son is “a Spanish-speaking minority.”<sup>134</sup> It is not clear whether Zimmerman self-identified as White or Hispanic before the shooting. Zimmerman’s father is White<sup>135</sup> and his mother is from Peru,<sup>136</sup> so Zimmerman is of mixed descent and could have chosen to embrace either or both identities.

Zimmerman’s status as an ethnic minority is not a sufficient reason in and of itself to discount the influence of implicit bias in this case.<sup>137</sup> As African American writer Michaela Angela Davis observes, “A young man could be susceptible to the influence of [the image of the black man as a symbol of violence, fear and deviant behavior] whether his ‘mother is from Peru or Norway.’”<sup>138</sup> Thinking that Zimmerman’s status as an ethnic minority insulates him from any claim of racial bias feeds into the myth that Latinos are “a multiracial people incapable of racial discrimination,” but as Tanya Hernandez points out, “Racism, in particular anti-Black racism, is a pervasive and historically entrenched fact of life in Latin America and the

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132. L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 317 (2012).

133. See Manuel Roig-Franzia et al., *Who is George Zimmerman?*, WASH. POST, Mar. 23, 2012, at A1.

134. *Id.*

135. See *id.* (noting that neighbors say Zimmerman’s father is White and his mother is Latina).

136. See Barry et al., *supra* note 1 (noting that Zimmerman’s mother, Gladys, is a Peruvian immigrant who worked as a deputy clerk).

137. See Eugene Robinson, Editorial, *Perils of Walking While Black*, WASH. POST, Mar. 23, 2012, at A19 (noting that it does not matter that Zimmerman himself is a member of a minority group because the problem was not his race or ethnicity, but “the hair-trigger assumption he made that ‘black male’ equals ‘up to no good’”).

138. Roig-Franzia et al., *supra* note 133 (“You being a minority doesn’t make you immune to racist beliefs.”).

Caribbean.”<sup>139</sup> Light skin and European features are prized while darker skin and African features are disparaged.<sup>140</sup> People who migrate from Latin America and the Caribbean come to the United States “with their culture of anti-Black racism well intact,” and “this facet of Latino culture is transmitted . . . to younger generations.”<sup>141</sup> According to social science studies of Latino racial attitudes, both recent immigrants from Latin America and well-established Latinos in the United States prefer to maintain social distance from African Americans.<sup>142</sup> Young Latinos are often the perpetrators of anti-Black hate crimes in the United States.<sup>143</sup>

Viewing young Black males with suspicion occurs even within the Black community. As Gregory Taylor of Upper Marlboro, Maryland, told the Washington Post:

Even in my own black community, we do the same thing. If I’m at the Bowie Town Center, and there’s a whole group of black men hanging out talking, my initial reaction is not one of fear, but suspicion. And that’s one of the things that cuts me if I had to be honest. Those of us who have achieved a level of success and moved out of the ’hood, we even have those suspicions. Some is real, and some is just the same stereotypes perpetrated on us relentlessly by the media.<sup>144</sup>

The point is that any one of us could have seen Trayvon Martin the way George Zimmerman saw him the night of February 26, 2012. As Donna Britt notes, many people saw Zimmerman as a monster who killed an unarmed kid; it’s easy to despise a monster but “what’s hard is seeing the subtle ways we may be like [Zimmerman].”<sup>145</sup>

Once the racialized nature of the shooting was evident, the State Attorney’s Office reversed course and appointed a new prosecutor to handle the case.<sup>146</sup> More than six weeks after he shot and killed Trayvon Martin, George Zimmerman was charged with second

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139. Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense*, 42 HARV. C.R.-C.L. L. REV. 259, 265, 268 (2007).

140. *Id.* at 268–69.

141. *Id.* at 270.

142. *Id.* at 271.

143. *Id.* at 275.

144. Lonnae O’Neal Parker, ‘This Could Have Been Our Kids’, WASH. POST, Mar. 23, 2012, at C1.

145. Donna Britt, *Distance, Then Tears over Trayvon*, WASH. POST, Mar. 23, 2012, at C7.

146. See Lizette Alvarez & Michael Cooper, *Prosecutor Files Charge of 2nd-Degree Murder in Shooting of Martin*, N.Y. TIMES, Apr. 12, 2012, at A1.

degree murder and taken into custody.<sup>147</sup> Continuing to leave Zimmerman at large was no longer a viable option for the State Attorney's Office as it became crystal clear that the public saw the failure to arrest and charge Zimmerman as a racially biased decision.<sup>148</sup> Arguably, race salience encouraged the ultimate decision to file charges against Zimmerman, a decision that should have been made from the beginning.

### III. RACE, SELF-DEFENSE, AND THE PERCEPTION OF FEAR

Implicit racial bias against African Americans has roots in pervasive, negative stereotypes about Blacks, which are "perpetuated within our culture in subtle, yet highly effectual, ways."<sup>149</sup> A stereotype is "a well-learned set of associations that link a set of characteristics with a group label."<sup>150</sup> While most Americans are aware of negative stereotypes about Blacks, "only a subset of these individuals actually endorse the stereotypes."<sup>151</sup> Rejection of negative racial stereotypes, however, does not eliminate these stereotypes from one's knowledge structure.<sup>152</sup> As Jody Armour notes, "Because stereotypes are established in children's memories at an early age and constantly reinforced through the mass media and other socializing agents, stereotype-congruent responses may persist long after a person has sincerely renounced prejudice."<sup>153</sup>

The Trayvon Martin shooting reminds us that Blacks in general, and young Black men in particular, are subjects of the "Black-as-Criminal stereotype."<sup>154</sup> This stereotype links Blacks with violence,

147. *See id.*

148. *See* Lawson, *supra* note 111 (manuscript at 28) (finding that arresting Zimmerman was "in the interest of the majority group to promote the appearance of race-neutral impartiality, fairness, and justice in the exercise of prosecutorial discretion").

149. Patricia G. Devine & Andrew J. Elliott, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139, 1149 (1995). According to one source, 37.5% of 2,223 participants surveyed "believed that 60 percent or more of the people arrested for violent crimes in the preceding year were Black, when in fact Blacks accounted for only 38.4 percent of violent-crime arrests." Touré, *Inside the Racist Mind*, TIME (May 7, 2012), <http://www.time.com/time/magazine/article/0,9171,2113166,00.html>.

150. Devine & Elliott, *supra* note 149, at 1140. Beliefs, in contrast to stereotypes, "are propositions that are endorsed and accepted as true." *Id.*

151. *Id.* Highly prejudiced individuals are those whose beliefs about Blacks are largely congruent with stereotypes about Blacks. *Id.* Low-prejudiced individuals are those who reject negative stereotypes about Blacks. *Id.*

152. *Id.*

153. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 743 (1995).

154. *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN 138-46 (2003)

dangerousness, and criminality.<sup>155</sup> The existence of this stereotype has been documented by social psychologists for over half a century.<sup>156</sup> Not only are individuals more likely to perceive mildly aggressive behavior as more threatening when performed by a Black person than when performed by a White person,<sup>157</sup> they are also more likely to see hostility in African American faces than in White faces.<sup>158</sup> While the Black-as-Criminal stereotype is more likely to be activated from a young Black male wearing baggy pants, a t-shirt, and a skull cap or a hoodie,<sup>159</sup> even well-dressed Black men and women have found themselves the objects of suspicion by taxi drivers who refuse to stop for them;<sup>160</sup> store clerks who follow their every move;<sup>161</sup>

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[hereinafter LEE, MURDER AND THE REASONABLE MAN] (explaining in detail the “Black-as-Criminal” stereotype); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 402–23 (1996) [hereinafter Lee, *Race and Self-Defense*].

155. See Lee, *Race and Self-Defense*, *supra* note 154, at 403.

156. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

157. See Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595 (1976) (finding that seventy-five percent of individuals observing a Black person shoving a White person thought the shove constituted “violent” behavior, while only seventeen percent of individuals observing a White person shoving a Black person characterized the shove as “violent” behavior and forty-two percent characterized the interaction as “playing around”); see also H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1980) (finding that both Black and White children tended to rate relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites).

158. See Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 345 (2004) (finding that faces displaying relatively hostile expressions were categorized as African American by individuals with high prejudice); Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 643 (2003) (concluding that individuals with high implicit racial bias saw hostility as appearing more quickly and lingering longer in African American faces than in Caucasian faces).

159. See Arelis R. Hernandez, *Hoodie Campaign Aims to Change Stereotypes*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Oct. 14, 2012, at 4B (noting that everyone wears hoodies, but when Black people wear hoodies, “it’s interpreted as a symbol of criminal activity”); see also *Racial Stereotypes in GTA SA*, REVIEWS UNIVERSE (Aug. 10, 2012), <http://www.reviewsuniverse.com/racial-stereotypes-in-gta-sa> (discussing various racial stereotypes depicted in the action adventure simulation video game, *Grand Theft Auto*, such as the Black drug dealer who “is always wearing a black skull cap, black vest, baggy jeans, [and] a chain”).

160. See CORNEL WEST, *RACE MATTERS*, at x (1993) (describing the infuriating experience of not being able to hail a taxicab in New York).

161. See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 127–28 (1987).

women who, clutching their purses, cross the street to avoid an imagined possible mugging;<sup>162</sup> and women who avoid getting on the same elevator with them.<sup>163</sup>

Of particular relevance in the self-defense context, several studies have documented the phenomenon of shooter bias in which individuals are quicker to identify weapons and slower to recognize harmless objects, like tools, in the hands of Black persons than in the hands of White persons.<sup>164</sup> For example, B. Keith Payne developed an experiment in which participants were instructed to respond to objects that appeared before them.<sup>165</sup> A human face flashed just before each object appeared.<sup>166</sup> Participants were instructed to ignore the face and simply respond to the objects.<sup>167</sup> In one version of the experiment, participants were allowed to respond at their own pace.<sup>168</sup> In the other version, participants had to respond within a half second of seeing the object.<sup>169</sup>

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162. See Justin Hansford, *On Trayvon Martin and the Cost of Suspicion*, CRITICAL LEGAL THINKING (Apr. 11, 2012), <http://criticallegalthinking.com/2012/04/11/on-trayvon-martin-and-the-cost-of-suspicion>.

163. See Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46, 49–50 (1990).

164. See David M. Amodio et al., *Neural Signals for the Detection of Unintentional Race Bias*, 15 PSYCHOL. SCI. 88, 90 (2004) (finding that participants were quicker to identify guns following Black faces than following White faces and slower to identify tools following Black faces compared with White faces); Eberhardt et al., *supra* note 156, at 889–90 (finding that exposure to Black faces lowered the perceptual threshold for recognizing guns and knives, regardless of the individual's explicit racial attitudes); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399, 403 (2003) (finding that the race of the target affected the ability of individuals to distinguish weapons from harmless objects and resulted in a tendency to shoot Blacks); Charles M. Judd et al., *Automatic Stereotype v. Automatic Prejudice: Sorting Out the Possibilities in the Payne (2001) Weapon Paradigm*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 75, 80 (2004) (finding that African-American faces facilitate the categorization of both negatively valenced handguns and positively valenced sports-related objects, and concluding that automatic stereotypic associations are more influential than negative prejudice toward African-Americans); see also B. Keith Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 384, 394–95 (2002) (discussing another study where participants misidentified harmless objects as weapons when exposed to Black faces and misidentified weapons as nonthreatening objects when exposed to White faces).

165. See B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 184 (2001); B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 287, 287 (2006) [hereinafter Payne, *Weapon Bias*].

166. Payne, *Weapon Bias*, *supra* note 165, at 287.

167. *Id.*

168. *Id.*

169. *Id.*

In the first version of the experiment, accuracy was fairly high regardless of race.<sup>170</sup> Participants, however, more quickly detected guns when primed with a Black face than when primed with a White face.<sup>171</sup> In the second version of the experiment, when participants had to respond right away, they falsely saw a gun “more often when the face was black than when it was white.”<sup>172</sup>

Payne theorized that two things contributed to the tendency to “see” a weapon in the hands of an unarmed Black person: (1) the stereotype that links Blacks to violence and weapons, and (2) the lack of intentional control over their responses in the second version of the experiment when participants had to make a snap judgment decision.<sup>173</sup> Negative stereotypes about Blacks were more likely to lead to behavioral errors when the participant was forced to make a quick decision.<sup>174</sup>

In another experiment, Joshua Correll and others developed a video game depicting a series of background and target images.<sup>175</sup> In some of the scenes, the target was holding a gun. In other scenes, the target was holding a harmless object.<sup>176</sup> Participants were instructed to push a button on the right labeled *shoot* if they thought the target was holding a gun and to push a button on the left labeled *don't shoot* if they thought the target was holding something other than a gun, and to do so as quickly as possible.<sup>177</sup> If the participant was correct and shot a target holding a gun, the participant earned ten points.<sup>178</sup> If the participant was correct about not shooting a target holding a harmless object, the participant earned five points.<sup>179</sup> If the participant shot a target holding a harmless object, he was punished by minus twenty points, and if he did not shoot a target with a gun, he was punished by minus forty points.<sup>180</sup> This payoff matrix was designed to replicate the incentives faced “by police officers on the street, where shooting an innocent suspect is a terrible mistake (as in

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170. *Id.*

171. *Id.* (suggesting “that the black face readied people to detect a gun but did not distort their decisions”).

172. *Id.*

173. *Id.* at 288–89.

174. *Id.* at 289.

175. See Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315 (2002).

176. *Id.* at 1315.

177. *Id.* at 1316–17.

178. *Id.* at 1317.

179. *Id.*

180. *Id.*

the case of Amadou Diallo, described below), but where the stronger motivation is presumably to avoid misidentifying an armed and hostile target, which could result in an officer's death."<sup>181</sup> To incentivize participants to respond quickly, researchers told participants that if they failed to respond within a certain time period, they would suffer a loss of ten points.<sup>182</sup>

Correll and his fellow researchers found that both White and Black participants fired at armed Black targets more quickly than armed White targets.<sup>183</sup> They also found that White and Black participants made the decision not to shoot an unarmed target faster if he was White than if he was Black.<sup>184</sup> Their research demonstrated that the Black-as-Criminal stereotype produces shooter bias, a bias in favor of shooting Black persons, and that even African Americans have this bias.<sup>185</sup> If African Americans demonstrate shooter bias, then presumably Latinos, Asian Americans, and other minorities, who are not likely to have an in-group preference for African Americans, are also more likely to "see" a weapon in the hands of an unarmed African American.

This empirical research has disturbing implications for self-defense cases. In self-defense cases, a critical question is whether the defendant's belief in the need to use deadly force in self-defense was reasonable.<sup>186</sup> A defendant claiming self-defense to defend against a homicide charge will only be acquitted if the jury finds that the defendant honestly and reasonably believed it was necessary to use deadly force to protect against an imminent, unlawful threat of death or serious bodily injury.<sup>187</sup> If most individuals would be more likely to "see" a weapon in the hands of an unarmed Black person than in the hands of an unarmed White person and are thus more likely to shoot an unarmed Black person when they would not shoot a similarly

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1327; accord Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 127 (2006) (concluding in part that "racial cues promote biased shooting behavior because . . . Black targets seem more threatening than White targets").

186. See DRESSLER, *supra* note 41, § 18.01[E]; Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 3 (1998); Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 200 (1998).

187. See Lee, *supra* note 186, at 195–96 (discussing the elements of the defense of self-defense).

situated White person, then jurors in self-defense cases may also be more likely to find that an individual who says he shot an unarmed Black person in self-defense because he believed the victim was about to kill or seriously injure him acted reasonably, even if he was mistaken. Jurors are unlikely to realize that negative stereotypes about Blacks may be influencing their evaluation of the reasonableness of the defendant's beliefs and actions unless they are made aware of this possibility.

In the Amadou Diallo case, for example, four New York City police detectives mistakenly thought that a twenty-two-year-old immigrant from West Africa was a rape suspect reaching for his gun, when Diallo was actually an innocent man reaching for his wallet.<sup>188</sup> The officers fired forty-one bullets at Diallo, continuing to fire even after Diallo collapsed to the ground.<sup>189</sup> At their trial for second degree murder, the officers argued that they were justified in shooting Diallo because they honestly and reasonably believed he was reaching for a gun.<sup>190</sup> A jury of eight Whites and four Blacks acquitted the officers of all charges, presumably because they found that the officers acted reasonably under the circumstances.<sup>191</sup>

The shooter bias studies discussed above provide strong evidence that individuals are quicker to associate Black individuals with weapons and to perceive Blacks as armed and dangerous, regardless of whether they are actually armed and dangerous. Given this strong tendency to associate Blacks with weapons, it may have been more likely that Zimmerman jumped to the conclusion that Martin's movements were life-threatening when he might not have perceived those same movements as life-threatening if they had come from a White person. While punching Zimmerman, Martin's hands presumably came close to Zimmerman's stomach area. Zimmerman may have thought Martin was attempting to reach for Zimmerman's gun<sup>192</sup> when perhaps Martin had no such intention.

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188. See Jane Fritsch, *4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1; see also Cynthia Lee, "But I Thought He Had a Gun": Race and Police Use of Deadly Force, 2 HASTINGS RACE & POVERTY L.J. 1, 1-2 (2004) (describing in detail the events surrounding the Diallo case).

189. See Elizabeth Kolbert, *The Perils of Safety*, NEW YORKER, Mar. 22, 1999, at 50, 50 (noting that nineteen of the forty-one bullets fired entered Diallo's body).

190. See John J. Goldman, *4 White Officers Are Acquitted in Death of Diallo*, L.A. TIMES, Feb. 26, 2000, at A1.

191. See *id.*

192. See David K. Li, *Zimmerman Tells Cops Trayvon Martin Reached for His Gun as Police Tapes Released*, N.Y. POST, June 21, 2012, [http://www.nypost.com/f/news/national/zimmerman\\_tells\\_cops\\_trayvon\\_martin\\_McSJd59PkDJfTcZP3CYVzH#axzz2IIV](http://www.nypost.com/f/news/national/zimmerman_tells_cops_trayvon_martin_McSJd59PkDJfTcZP3CYVzH#axzz2IIV)



## IV. MAKING RACE SALIENT

Recent social science research suggests one way to reduce the effects of implicit racial bias—by making race salient. Samuel Sommers and Phoebe Ellsworth have been at the forefront of this research. Their work suggests that making race salient can encourage individuals with egalitarian beliefs and values to consciously suppress stereotype-congruent responses that would otherwise be automatic.<sup>193</sup> Making race salient does not mean simply making jurors aware of the defendant's or victim's race.<sup>194</sup> Race salience means making jurors aware of racial issues that can bias their decision-making, like the operation of racial stereotypes.<sup>195</sup>

Sommers and Ellsworth theorize that when race is made salient at trial, this activates the egalitarian racial attitudes held by White jurors as a normative ideal.<sup>196</sup> In previous eras, racial norms encouraged overtly anti-Black prejudice.<sup>197</sup> In modern America, however, most Whites embrace an egalitarian value system, and therefore will try to behave in a non-prejudiced manner, at least when reminded to do so.<sup>198</sup> When racial issues are highlighted, this reminds

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K6rmY. If Martin did reach for Zimmerman's gun (and there is no way of knowing whether he actually did since Martin is dead), he may have done so to protect his own life by preventing Zimmerman from using it. Martin certainly would have had reason to fear getting shot by Zimmerman since Zimmerman had followed Martin and confronted him for no apparent reason. Because of Zimmerman's preconceived notion that Martin was a criminal, however, Zimmerman may have perceived Martin's movements as more dangerous and violent than they actually were.

193. See generally Sommers & Ellsworth, *supra* note 82 (finding that presenting jurors with race relevant voir dire questions in cases involving interracial violence reduced racial bias in White jurors); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000) [hereinafter Sommers & Ellsworth, *Race in the Courtroom*] (finding that in interracial domestic violence cases, White jurors were more likely to treat White and Black defendants the same if the defendant referred to himself as a White or Black man when speaking to his girlfriend than if he simply referred to himself as a man); Samuel R. Sommers & Phoebe C. Ellsworth, "Race Salience" in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009) [hereinafter Sommers & Ellsworth, "Race Salience" in *Juror Decision-Making*] (summarizing authors' previous research on race salience); Sommers & Ellsworth, *supra* note 81 (finding that White jurors were more likely to treat White and Black defendants equally if a defense witness spoke about the White or Black defendant being the subject of racial slurs).

194. See Sommers & Ellsworth, "Race Salience" in *Juror Decision-Making*, *supra* note 193, at 603–04.

195. See *id.* at 601.

196. See Sommers & Ellsworth, *supra* note 81, at 203.

197. See *id.* at 204 (providing examples of everyday activities which slaves were banned from doing, such as smoking in public and defending themselves in an assault).

198. See *id.* at 209–10 (discussing experiments in which White jurors were less likely to

White jurors of the need to act without prejudice.<sup>199</sup> Contrary to the common intuition that racial prejudice is more likely to be triggered in racially charged cases,<sup>200</sup> and therefore, it is best to deemphasize race, Sommers and Ellsworth argue that White jurors are more likely to demonstrate racial bias against a Black defendant in cases where racial issues are not highlighted.<sup>201</sup> They explain: “When race is an obvious issue at trial, White jurors may be on guard against racial bias. However, in trials without salient racial issues, White jurors may be less likely to monitor their behavior for signs of prejudice, and therefore more likely to render judgments tainted by racial bias.”<sup>202</sup> In several studies, Sommers and Ellsworth found evidence of White juror bias when race was not salient, but no such evidence of bias when race was salient.<sup>203</sup> For example, in one study, participants were given a written summary of a domestic assault case in which the defendant was accused of slapping his girlfriend in a bar and knocking her down.<sup>204</sup> Half the participants received a trial summary where the defendant was a White male who slapped his Black girlfriend; the other half received the same trial summary, except the defendant in their case was a Black man who slapped his White girlfriend.<sup>205</sup> Sommers and Ellsworth manipulated just one condition besides the race of the parties. In the race-salient condition, the defendant yelled, “You know better than to talk that way about a White (or Black) man in front of his friends,” at his girlfriend just before slapping her.<sup>206</sup> In the non-race-salient condition, the defendant yelled, “You know better than to talk that way about a man in front of his friends . . . .”<sup>207</sup>

Sommers and Ellsworth found that in the race-salient condition, where the defendant referred explicitly to his race, mock jurors rated the White and Black defendants equally guilty, as they should have since the fact patterns were identical and the only difference was the

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show prejudice when reminded of the importance of race in the case).

199. *See id.* at 210.

200. *See* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 86 (1993) (“Among the case attributes that might cause jurors of different racial backgrounds to assess evidence in criminal cases differently are ‘racially charged’ accusations or defenses . . .”).

201. *See* Sommers & Ellsworth, *supra* note 81, at 209–10 (summarizing the results of several studies showing the effect that race has on White jurors).

202. *Id.* at 210.

203. *See id.* at 210–12.

204. *See id.* at 212.

205. *See id.*

206. *Id.*

207. *Id.*

race of the defendant.<sup>208</sup> In the non-race-salient condition, where the defendant did not refer to his race, mock jurors were much more likely to convict the Black defendant.<sup>209</sup> In these cases, even though the conditions were identical except for the defendant's race, participants rated the prosecution's case against the Black defendant as stronger than the prosecution's identical case against the White defendant.<sup>210</sup> Participants also rated the defense case presented on behalf of the Black defendant "as significantly weaker than the White defendant's defense," even though the defense arguments were identical in both cases.<sup>211</sup> White jurors also rated the Black defendant as "significantly more . . . aggressive than the White defendant" and perceived the White defendant as "more honest and moral than the Black defendant."<sup>212</sup> No such pattern of bias was found when race was made salient.<sup>213</sup>

What is important to note is that making race salient seems to even the scales. When race is salient, jurors tend to treat similarly situated Black and White defendants the same, as they should when the facts are identical in both cases and the only difference is the race of the defendant. Making race salient does not give the Black defendant an advantage over the similarly situated White defendant. Failing to make race salient, however, seems to lead to unequal treatment of similarly situated defendants, with the Black defendant receiving the short end of the stick.

In another study, Sommers and Ellsworth gave mock jurors a written trial summary about "a high school basketball player charged with one count of battery with serious bodily injury after an altercation with a teammate in the locker room."<sup>214</sup> The prosecution argued that "the defendant was upset over losing his place in the starting line-up and attacked his replacement."<sup>215</sup> The defendant admitted that he "confronted his teammate in the locker room, but claimed that when [another teammate] stepped in and tried to restrain him, [he] panicked and tried to break free," accidentally injuring his replacement in the process.<sup>216</sup>

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208. *See id.*

209. *Id.*

210. *See id.*

211. *Id.*

212. *Id.*

213. *See id.* at 213.

214. *Id.* at 216.

215. *Id.*

216. *Id.*

To make race salient, Sommers and Ellsworth had a defense witness testify that the defendant was one of only two Whites (or Blacks) on the team and had been the “subject of racial remarks and unfair criticism” from many of his teammates.<sup>217</sup> In the non-race-salient version of the case, “the same defense witness testified that the defendant had only one other friend on the team and had been the ‘subject of obscene remarks and unfair criticism’ from many of his teammates.”<sup>218</sup>

Sommers and Ellsworth found that when race was not made salient, White jurors were more willing to convict the Black defendant than the identical White defendant.<sup>219</sup> In the non-race-salient condition, White jurors also recommended a harsher sentence for the Black defendant than for the White defendant.<sup>220</sup> Additionally, jurors viewed the White defendant’s defense as stronger than the Black defendant’s defense even though their arguments were identical.<sup>221</sup> In contrast, when race was made a salient issue at trial, White jurors convicted the Black and White defendants at approximately the same rates.<sup>222</sup>

These studies suggest that making race salient evens the playing field, encouraging jurors to treat similarly situated Black and White defendants the same. Making race salient does not give Black defendants an unfair advantage over White defendants. However, when race is not made salient, jurors do not treat similarly situated Black and White defendants alike. In the non-race-salient condition, White defendants benefit by the lack of attention to race.

The research on race salience suggests that it is important to highlight the relevance of race and make jurors aware of the possibility of racial bias if one is concerned that implicit racial bias might result in unfair treatment of either a Black defendant or a Black victim. Below, this Part turns to some suggestions as to how attorneys concerned about implicit racial bias can make race salient. I then address possible objections to my proposal to make race salient as a model for reform.

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217. *Id.*

218. *Id.*

219. *See id.* at 217.

220. *See id.* at 219.

221. *See id.*

222. *See id.* at 217.

### A. *Voir Dire*

It is often said that a trial is won or lost at the jury selection stage.<sup>223</sup> This is because the composition of the jury greatly influences how the jury perceives the evidence.<sup>224</sup> Voir dire thus presents an important way for an attorney to make race salient.<sup>225</sup> Voir dire is the process of questioning prospective jurors during jury selection in order to enable the attorneys to make intelligent decisions about which prospective jurors they should try to strike.<sup>226</sup> An attorney

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223. See, e.g., Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 575 (1985) ("Experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings."); Herald Price Fahringer, "Mirror, Mirror on the Wall . . .": *Body Language, Intuition, and the Art of Jury Selection*, 17 AM. J. TRIAL ADVOC. 197, 197 (1993) (noting that "[a]cknowledged experts in the field believe that eighty-five percent of the cases litigated are won or lost when the jury is selected").

224. See Covington, *supra* note 223, at 576 (stating that "jurors bring to the courtroom biases and predispositions which largely determine the outcome of the case").

225. While variation exists from court to court, judge-conducted voir dire appears to be the norm in federal courts while attorney-conducted voir dire is more common in state courts. See GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 27 (2007). *But see* GORDON BERMANT & JOHN SHAPARD, THE VOIR DIRE EXAMINATION, JUROR CHALLENGES, AND ADVERSARY ADVOCACY 19 (1978) (noting that there is no requirement that voir dire be judge-directed in federal court and some states require judges to conduct voir dire, so the commonly held belief that judge-directed voir dire is the norm in federal courts and attorney-directed voir dire is the norm in state courts is not completely true).

226. Attorneys have the right to challenge an unlimited number of prospective jurors for cause. 1-14 CRIMINAL LAW DESKBOOK ¶ 14.02[5][c][i] (2008). Cause exists if the prospective juror cannot be fair and impartial. *Id.* Attorneys may also exercise a limited number of peremptory challenges. *Id.* Traditionally, the peremptory challenge allowed an attorney to strike a prospective juror for any reason or no reason at all. The Supreme Court, however, has held that attorneys may not use their peremptory challenges to strike prospective jurors on the basis of race or gender. See *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994) (extending *Batson* to gender); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson* to criminal defense attorneys); *Batson v. Kentucky*, 476 U.S. 79, 88–89 (1986) (holding that race is not a valid reason for asserting a peremptory challenge). For additional information about for-cause challenges, see Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 379–80 (2010) (explaining that "[a] for-cause challenge must be based on specific, demonstrable, and legally cognizable evidence of juror partiality" and that "[t]he number of for-cause challenges is unlimited in both state and federal courts"); Janeen Kerper, *The Art and Ethics of Jury Selection*, 24 AM. J. TRIAL ADVOC. 1, 24–25 (2000) (noting that the usual basis for a challenge for cause is "the juror's inability to be fair and impartial" but that "many other reasons exist for excusing jurors for cause, such as physical disability, impaired hearing, inability to understand English, illiteracy, and the like"). For additional information about peremptory challenges, see Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMP. L. REV. 507, 508 (1997) ("[P]eremptory challenges give parties the right to eliminate a limited number of jurors without stating a specific reason.").

concerned about implicit racial bias can ask the judge for permission to question the prospective jurors about racial bias.<sup>227</sup> If the attorney is in a jurisdiction where the judge conducts the voir dire and will not permit attorney-directed voir dire, the attorney can instead request permission to give prospective jurors a questionnaire that presents race relevant questions.<sup>228</sup>

On several occasions, the Supreme Court has addressed the question of whether there is a constitutional right to voir dire into racial bias. In a few early cases, the Court seemed to suggest that a Black defendant in a racially charged case has a due process right to question prospective jurors on racial bias during voir dire. For example, in 1931, the Court reversed the first-degree murder conviction and death sentence of a Black defendant charged with murdering a White police officer, holding that the trial court erred in denying defense counsel's request to question prospective jurors about the possibility of racial bias.<sup>229</sup> In 1973, the Court in *Ham v. South Carolina*<sup>230</sup> held that a trial judge's refusal to grant a Black defendant's request for voir dire on the subject of racial prejudice violated the defendant's due process rights.<sup>231</sup>

In 1976, the Court retreated from its earlier rulings. In *Ristaino v. Ross*,<sup>232</sup> the Court held that voir dire into racial prejudice was not constitutionally required in a case involving a Black defendant charged with a violent crime against a White victim.<sup>233</sup> Similarly, in *Rosales-Lopez v. United States*,<sup>234</sup> the Court found no error in the trial court's refusal to ask prospective jurors whether they would consider race or Mexican descent of the defendant in their evaluation of the

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227. See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006) (opining that even if its potential to diagnose bias in prospective jurors is limited, race-related voir dire may still be useful by serving as "another way in which racial issues and concerns about prejudice [can be] made salient for jurors").

228. See Sommers & Ellsworth, *supra* note 82, at 1026–29 (finding that the presence of race-relevant questions on a jury questionnaire reduced White mock jurors' racial bias).

229. See *Aldridge v. United States*, 283 U.S. 308, 309–10, 315 (1931).

230. 409 U.S. 524 (1973).

231. *Id.* at 527.

232. 424 U.S. 589 (1976).

233. *Id.* at 589 ("Absent circumstances comparable in significance to those existing in *Ham v. South Carolina*, examination of veniremen during voir dire about racial prejudice is held not constitutionally required." (citation omitted)).

234. 451 U.S. 182 (1981).

case where defendant of Mexican descent was charged with smuggling Mexican aliens into the United States.<sup>235</sup>

In 1986, the Court again addressed the issue of voir dire into racial bias in *Turner v. Murray*.<sup>236</sup> This time, however, the Court held that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias” when the defendant has specifically requested such voir dire.<sup>237</sup> Since *Turner v. Murray* involved an interracial crime of violence and is the Court’s last statement on the issue of voir dire into racial bias, it appears that the only time when a defendant is entitled to voir dire into racial bias as a matter of due process is when the defendant is charged with a capital offense, the offense is an interracial crime of violence, and the defendant specifically requests such voir dire.<sup>238</sup> The Court has never considered whether the prosecutor has a right to voir dire into racial bias.

Even though the due process right to voir dire into racial bias appears to be limited to death penalty cases involving crimes of interracial violence when the defendant has specifically requested such voir dire, voir dire into racial bias is not prohibited in other cases. It remains within the discretion of the trial court to permit or disallow such voir dire.<sup>239</sup> If permitted to engage in voir dire into racial bias, an attorney would be wise not to start by asking prospective jurors whether any of them are racially biased. A question like this is likely to offend the prospective juror who may interpret such a question as an inquiry into whether the prospective juror is a racist.<sup>240</sup> Instead, an attorney might start by trying to set the venire at ease before questioning them about their racial attitudes. The attorney’s primary goal should be to educate the venire about the workings of implicit bias.<sup>241</sup> The attorney should also aim to highlight the significance of race in the case at hand—to make race salient so that

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235. *Id.* at 184, 192.

236. 476 U.S. 28 (1986).

237. *Id.* at 36–37.

238. *Id.*

239. See *Ristaino v. Ross*, 424 U.S. 589, 594 (1976) (“Voir dire ‘is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.’” (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895))).

240. See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 160–61 (1989) (arguing that voir dire into racial bias is minimally useful, insulting, and patronizing).

241. See Sommers, *supra* note 227, at 601 (arguing that the goal is less to ferret out racially biased jurors and more to make race salient).

those who end up on the jury will be more cognizant of the ways in which race may have shaped the perceptions of the individuals involved in the case and the ways in which race may influence the jurors' own perceptions.

Making race salient in this way was done very effectively in a criminal case out of Alaska. In that case, a criminal defense attorney representing a Black, male teenager charged with assaulting a White, male classmate started her voir dire by sharing a story about herself.<sup>242</sup> The attorney described seeing a young Black male "driving an expensive BMW and thinking 'drug dealer rather than' doctor's son."<sup>243</sup> Hearing an attorney recounting a personal experience like this and admitting to her own racial bias gives prospective jurors "permission to admit their own stereotyp[ical] thinking."<sup>244</sup> It also "diffuses the emotional content of the race discussion."<sup>245</sup> If an attorney does not have a personal story to share, another way she can put prospective jurors at ease about their own implicit biases is to share the fact that even Jesse Jackson, a well-known African American civil rights activist, openly admits, "There is nothing more painful for me at this stage of my life, than to walk down the street and hear footsteps and start to think about robbery, and then look around and see somebody white, and feel relieved."<sup>246</sup>

### B. Opening Statements

If jury selection is the most important stage of the trial proceedings, the next most important phase is probably the opening statement.<sup>247</sup> Good trial attorneys often use the opening statement to tell a compelling story about what happened and why.<sup>248</sup> If the attorney can tell a story that makes sense to the jury, the jury will be

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242. See James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, CHAMPION, August 1999, at 22, 22–23.

243. *Id.* at 23.

244. *Id.*

245. *Id.*

246. *Id.*

247. See Kathryn Holmes Snedaker, *Storytelling in Opening Statements: Framing the Argumentation of the Trial*, 10 AM. J. TRIAL ADVOC. 15, 15 (1986) (noting that "[t]he opening statement can be one of the most important phases of the persuasion process and the most significant aspect of any trial"); Joseph Sorrentino, *Power and Prejudice in Opening Statements*, L.A. DAILY J., Jan. 29, 2013, at 1, 1 (discussing the importance of opening statements).

248. See Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 565 (1991) (noting that "winning the battle of stories in the opening statements may help determine what evidence is attended to, how it is interpreted, and what is recalled both during and after the trial").



more inclined to see the facts in a way that fits that story.<sup>249</sup> Thus, if an attorney is concerned that implicit racial bias may adversely affect the verdict, he may wish to tell a story that makes race salient in his opening statement.

In a case involving a claim of self-defense by a non-Black defendant against a Black victim, the prosecutor may be concerned that stereotypes about Blacks may lead jurors to see the victim as more dangerous, aggressive, or violent than they otherwise would. To counter such stereotypes, the prosecutor may want to emphasize in his opening statement the ways in which racial stereotypes may have influenced the defendant's belief that the victim posed a threat and the actions of the defendant that may have helped provoke the conflict. For example, in the Zimmerman case, the prosecutor may want to emphasize the fact that Zimmerman saw a young Black male walking in his neighborhood, and for no apparent reason began following that person, first in his car, then on foot, even after a 911 dispatcher told him this was not necessary.<sup>250</sup> The prosecutor may wish to mention that the young Black male, Martin, was wearing a hoodie, and that stereotypes about young Black men as gang members who wear hoodies may have triggered Zimmerman's suspicions.<sup>251</sup> Additionally, the prosecutor may wish to highlight the fact that Zimmerman initiated the confrontation by demanding that Martin tell him what he was doing in the neighborhood.<sup>252</sup>

### C. Lay Witness Testimony

Using lay witness testimony to highlight the racialized nature of the case is another way race can be made salient to the jury.<sup>253</sup> If the

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249. See Kenworthy Bilz, *We Don't Want to Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429, 435 (stating that "most people process information by assembling it into plausible 'stories,' and then draw their final conclusions according to which of a set of possible stories makes the most narrative sense"); see also Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 521, 523 (1991) (arguing that "jurors impose a narrative story organization on trial information" and "[t]he story that is accepted is the one that provides the greatest coverage of the evidence and is the most coherent").

250. See Barry et al., *supra* note 1.

251. Boyle, *supra* note 122 (noting that "the word 'hoodie' has echoes of racial overtones").

252. See Barry et al., *supra* note 1.

253. See Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 193, at 1373. (discussing a study where race was made salient through the victim's testimony regarding words that the defendant shouted at her referring to his status as a Black man); Sommers & Ellsworth, *supra* note 81, at 214-15 (discussing a study where race was made salient through the testimony of a defense witness regarding remarks made about the defendant

defendant made reference to the victim's race or called the victim a racial slur in front of witnesses, the prosecution could call these witnesses to the stand to testify about these remarks. In one study, Ellen Cohn and others found that a defense witness's testimony about racial slurs shouted at the defendant by the victims reduced racial bias in jurors.<sup>254</sup> Mock jurors were shown a videotape of an actual trial involving a Black man charged with attempted vehicular manslaughter.<sup>255</sup> According to the facts brought out at trial, the defendant and his wife "were approaching their car after a football game when they noticed an emblem was missing from the exterior of [their] vehicle."<sup>256</sup> Someone standing by their car accosted the defendant and his wife, claiming no one had touched the car.<sup>257</sup> The defendant got into his car and quickly drove off, striking three White individuals in the process.<sup>258</sup> The defendant was charged with attempted vehicular manslaughter.<sup>259</sup> In the race-salient version of the trial, the defendant's wife testified that during the incident, a crowd of White persons surrounded her and her husband, shouting racial slurs ("[t]his nigger thinks he's a cop") and attacking their car.<sup>260</sup> In the non-race salient version of the trial, jurors were not presented with this testimony.<sup>261</sup> Cohn found that making race salient by informing jurors of the racial slurs that were yelled at the defendant reduced racial bias in White jurors.<sup>262</sup> Racial bias was reduced even in jurors who scored highly on tests measuring racism.<sup>263</sup>

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by other team members).

254. See Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953, 1966 (2009).

255. See *id.* at 1958–59.

256. *Id.* at 1959.

257. *Id.*

258. See *id.*

259. See *id.*

260. *Id.*

261. See *id.*

262. See *id.* at 1964 (finding that "making race salient reduced White juror racial bias, making the conviction rate approximately 50%," whereas "when race was not made salient, the conviction rate increased to 66%").

263. The tests measuring racism included the Old-Fashioned Racism Scale, which measures overt forms of prejudice, and the Modern Racism Scale, which measures more subtle forms of prejudice. *Id.* at 1959–60, 1966 ("The fact that there was no association between the scale and juror verdicts when race was made salient suggests that perhaps even highly racist individuals are made cognizant of appearing racist in cases in which race is made salient.").

*D. Expert Witness Testimony*

Another way an attorney can make race salient is by calling an expert witness to testify about the extensive social science research that has been conducted on implicit bias. Calling expert witnesses can be quite expensive, so this may not be a feasible option in every case. If a party has the resources, that party can retain a social psychologist who can discuss the differences between explicit and implicit bias and how implicit bias can be and has been measured. The expert witness may also be able to testify about the shooter bias studies discussed above, demonstrating that individuals have a bias toward shooting Black individuals over White individuals, and the equalizing effects of making race salient.

Whether the trial court will permit such expert witness testimony lies within the court's discretion.<sup>264</sup> When it comes to expert witnesses, the trial court serves as gatekeeper and must be convinced that the proffered testimony is relevant and reliable.<sup>265</sup> If opposing counsel objects to the proffered testimony on relevance or reliability grounds,<sup>266</sup> the attorney wishing to call the expert witness can respond with several arguments. She may explain that just as expert witnesses have provided helpful information to juries on matters such as "eyewitness unreliability, post-traumatic stress disorders, or cross-cultural differences in the meaning of behavior," the expert witness testimony that she is proffering will provide the jury with helpful "information about the social and psychological context in which contested adjudicative facts occurred" and "knowledge about the context will help the [jury] interpret the contested adjudicative

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264. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993) (holding that the trial judge determines whether to allow an expert witness to testify based on a finding of relevance and reliability).

265. *Id.* at 597 (holding that under the Federal Rules of Evidence, the trial judge acts as a gatekeeper who must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand").

266. FED. R. EVID. 702(c). In weighing whether to sustain such objections, Rule 702 provides the trial judge with a framework for assessing the relevance and reliability of expert witness testimony.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

*Id.*

facts.”<sup>267</sup> In other words, the expert witness will provide what has been called “social framework evidence,” which can aid the jury in interpreting disputed facts.<sup>268</sup> The claim that implicit bias research is not reliable can be countered by referencing the work of Anthony Greenwald, Jerry Kang, and Justin Levinson and Robert Smith, synthesizing and explaining the numerous studies that have been conducted on implicit bias.<sup>269</sup>

#### E. Jury Instructions

Another way race can be made salient is through jury instructions.<sup>270</sup> For example, U.S. District Court Judge Mark Bennett expressly tells jurors in his courtroom that they should not rely on implicit biases:

Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings,

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267. Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133, 133 (1989) (discussing Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987)). While acknowledging concerns about the risk of undue prejudice, Vidmar and Schuller tentatively conclude that “juries can utilize social framework evidence in a legally appropriate manner.” *Id.* at 134.

268. *See id.* at 138 (explaining that “social framework evidence can be defined solely by its function: to supply the [jury] with information about some aspect of human behavior to aid in interpreting disputed facts”). Furthermore, as Vidmar and Schuller elaborate, “The purpose of social framework evidence, as with any expert evidence, is to assist the trier of fact by providing information that is either unknown to the trier or potentially at variance with what the trier believes to be true.” *Id.* at 139.

269. *See generally* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009) (assessing the predictive validity of IATs in measuring attitudes, stereotypes, and implicit biases). After an extensive survey of the available research, Greenwald concludes that there is a moderate correlation in predictive validity, especially concerning socially sensitive topics, noting that “IAT measures had greater predictive validity than did self-report measures for criterion measures involving interracial behavior and other intergroup behavior.” *Id.* at 28. For an overview of the research literature on how implicit biases play out in legal contexts, see generally Kang et al., *supra* note 23. Kang’s aim is “to provide useful and realistic strategies” for “legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it.” *Id.* at 1127. The study offers readers an introduction to the scientific literature on implicit bias, then explains how these biases can manifest themselves in judicial proceedings by providing a “step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms.” *Id.* For a broad-ranging critical examination of how implicit racial bias persists across the American legal system, see generally IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 102.

270. *See* Jeffrey E. Pfeifer & James R. P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOL. 1713, 1720 (1991).

assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.<sup>271</sup>

Judge Bennett’s instruction goes further than most model jury instructions, which simply tell jurors to determine the facts without bias or prejudice. For example, Maryland’s Criminal Pattern Jury Instructions state: “[Y]ou must consider and decide this case fairly and impartially. You are to perform this duty without bias or prejudice as to any party. You should not be swayed by sympathy, prejudice or public opinion.”<sup>272</sup> Some model jury instructions go a bit further and explicitly tell jurors not to be influenced by race, ethnicity, or gender. For example, the criminal jury instructions for the District of Columbia suggest that judges instruct juries as follows: “[Y]ou should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone’s race, ethnic origin, or gender. Decide the case solely from a fair consideration of the evidence.”<sup>273</sup> California’s model jury instructions on bias go even further in terms of attempting to educate jurors about stereotypes and implicit bias, providing:

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

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

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271. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 859 (2012).

272. MD. STATE BAR ASS’N, MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS § 2:04 (2012).

273. CRIMINAL JURY INSTRUCTIONS FOR D.C. § 2.102 (2012).

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.<sup>274</sup>

Because jurors are forming impressions of the case throughout the trial, it may be better to inform them of the importance of not allowing racial stereotypes to influence their decision-making earlier in the process, rather than waiting until they are about to deliberate. By the time jurors receive their jury instructions, it may be too late to shake them of earlier formed opinions. Anna Roberts helpfully suggests that courts prepare a video that would impart the same kind of information as Judge Bennett's jury instruction, but would be shown to all individuals who show up for jury duty before they are even assigned to a courtroom.<sup>275</sup> Roberts's proposal has the advantage of informing jurors of the possibility of bias at the beginning of the process, rather than at the end. Since the video would be shown to all prospective jurors, even individuals who are not selected for a jury, it would have the additional advantage of reaching a greater proportion of the citizenry. Moreover, since the video would be shown to all prospective jurors, not just jurors on racially sensitive cases, prospective jurors who ended up serving on a case involving interracial violence would not feel as if one party in the case, the racial minority, was being favored.

In previous work, the author has suggested a race-switching jury instruction as another way race can be made salient.<sup>276</sup> In an interracial case involving a claim of self-defense, a party concerned with the influence of racial stereotypes could request, or the judge could *sua sponte* give, a race-switching jury instruction, one that suggests to jurors that they imagine the same facts and circumstances but simply switch the race of the defendant with the race of the victim. For example, if the defendant is a White man and the victim is a Black man, jurors would imagine the same facts with a Black male

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274. CAL. FORMS OF JURY INSTRUCTION § 113 (2012).

275. See Roberts, *supra* note 271, at 861–66.

276. See LEE, MURDER AND THE REASONABLE MAN, *supra* note 154, at 224–25 (discussing race-switching as a means of helping the jury to figure out what is normatively reasonable); Lee, *Race and Self-Defense*, *supra* note 154, at 421–22 (discussing the idea of race-switching).

defendant and a White male victim. If jurors come to a different conclusion about the reasonableness of the defendant's belief that he needed to use deadly force in self-defense, this should alert jurors to the possibility that racial stereotypes and implicit racial bias may have influenced their decision-making and that they should deliberate anew about whether the defendant's use of deadly force was reasonable. A race-switching jury instruction could take the following form:

It is natural to make assumptions about the parties and witnesses based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group. If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you would imagine a Latino defendant and a White victim. If your evaluation of the case before you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.<sup>277</sup>

A race-switching jury instruction was used in an actual criminal case in Alaska and may have helped defense attorneys secure a not guilty verdict for their client, a Black teenager charged with aggravated assault upon a White classmate.<sup>278</sup>

#### F. Closing Arguments

The judge may choose not to give a race-switching jury instruction, so an attorney concerned about implicit racial bias may wish to suggest race-switching to the jury in her closing statement. This was done in the movie adaptation<sup>279</sup> of John Grisham's book, *A Time to Kill*.<sup>280</sup> Grisham's book revolves around the trial of a Black father charged with murdering two White men who brutally beat and

277. Lee, *Race and Self-Defense*, *supra* note 154, at 482.

278. See McComas & Strout, *supra* note 242, at 24.

279. A TIME TO KILL (Warner Bros. 1996).

280. JOHN GRISHAM, A TIME TO KILL (Island Books 1992).

raped the Black man's ten-year-old daughter.<sup>281</sup> In the book, one of the jurors asks the other jurors to close their eyes and imagine a blond-haired, blue-eyed little girl getting raped and beaten by two Black men.<sup>282</sup> In the movie, the defendant's attorney asks jurors to do the same during his closing statement.<sup>283</sup> After imagining that a blond-haired, blue-eyed, little girl was raped and beaten by two Black men and that her White father is on trial for murdering the two Black men, the jury finds the Black father not guilty on all counts.<sup>284</sup>

*G. Possible Objections to Making Race Salient*

Despite the recent social science research suggesting that making race salient encourages equal treatment of all defendants regardless of race, fair-minded individuals might nonetheless object to making race salient as a way to combat implicit racial bias. These objections might take several forms. First, one might object to highlighting the inappropriateness of making assumptions based on racial stereotypes on the ground that it is unfair to the individual defendant who had to act on the spur of the moment and, unlike the jury, did not have the luxury of time to deliberate. Second, one might object on the ground that a person who honestly believes she is about to be killed is not morally blameworthy if she responds to the perceived threat with deadly force, even if her belief in the need to act in self-defense stemmed from racial bias. Since the State cannot punish a person for the status of being a racist or for holding racist views and beliefs, it should not be able to preclude a defendant from asserting a defense based on racially biased beliefs. Third, one might believe that making race salient is an ineffective way to debias extremely prejudiced individuals on the jury and that race salience might reinforce their racial biases rather than defuse them. Fourth, one might worry that if attorneys make race too salient, this may encourage overcorrection and lead to unjust verdicts. The fear here is that jurors may bend over backwards to prove they are not engaging in racially biased decision making and convict innocent White defendants while acquitting guilty Black defendants. Finally, one might object to making race salient as a model for reform on the ground that race conscious decision-making violates the principle of colorblindness. Each of these objections are addressed in turn.

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281. See generally *id.* (exploring fictional racial tension in the American court system).

282. See *id.* at 503–04, 513.

283. See *A TIME TO KILL*, *supra* note 279, at 02:13:01 to 02:20:20.

284. *Id.*



### 1. Objection 1: Unfair to Hold Zimmerman Liable for Acting on Implicit Biases

One might object to efforts to make race salient on the ground that it is unfair to hold Zimmerman liable for acting upon biases that are implicit and automatic, not consciously chosen. While the jury enjoys the luxury of time to deliberate, Zimmerman had to act on the spur of the moment. He did not know whether Martin actually posed a threat of death or grievous bodily injury, but believed Martin was going to kill him or at least seriously injure him unless he acted to stop Martin from doing so.

It does not seem fair to expect Zimmerman to have engaged in the same kind of conscious rejection of racial stereotypes that race salience may encourage in jurors. “Detached reflection cannot be demanded in the presence of an uplifted knife.”<sup>285</sup> On the other hand, well before Zimmerman found himself on the ground in a tussle with Martin, he had plenty of time to think about whether he was making unfair assumptions about Martin based on Martin’s race. He also had time to think about whether to act on these assumptions. When Zimmerman first spotted Martin and thought Martin looked suspicious, Zimmerman could have simply called 911 and let the police handle things. Instead, Zimmerman followed Martin in his car and then on foot, even after the 911 dispatcher specifically told him that was not necessary.<sup>286</sup> Zimmerman did not have to confront Martin or ask him what he was doing in the neighborhood.<sup>287</sup> Individuals have a right to walk the public streets. In short, there were many opportunities for Zimmerman to have avoided the confrontation that ultimately resulted in the death of Trayvon Martin.

Additionally, precautionary measures exist to avoid harm, such as crossing the street or not getting onto an elevator. When an individual chooses to go beyond these measures and instead uses deadly force to kill another human being, and then claims self-defense, it is fair to scrutinize that self-defense claim. The jury should determine that it was indeed reasonable for the individual to believe

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285. *Brown v. United States*, 256 U.S. 335, 343 (1921).

286. *See supra* notes 7–8 and accompanying text.

287. *See CNN Special Report with Soledad O’Brien*, *supra* note 60. Benjamin Crump, attorney for Trayvon Martin’s family, told CNN reporter Soledad O’Brien that Trayvon’s girlfriend, Dee Dee, overheard part of his conversation with Zimmerman via cellphone. As Crump recounted, “[W]hat she heard was not [Zimmerman] coming to identify himself as any neighborhood association or anything like that. He said, ‘what are you doing around here?’ As to suggest [Trayvon] didn’t have a right to be here.” *Id.*

the use of deadly force was necessary to counter an imminent threat of death or grievous bodily injury.

Moreover, making race salient does not direct the jury to hold the defendant liable. It does not direct a verdict against the defendant. What making race salient does (or should do) is call attention to the ways in which race, or more specifically racial bias, may have affected the defendant's perceptions and actions. With this knowledge, the jury is free to decide whether to accept or reject the defendant's claim of self-defense.

Jurors made aware of the racial stereotypes that may have influenced George Zimmerman's beliefs and actions may nonetheless think it unfair to convict Zimmerman of murder, when they themselves might have been afraid of Trayvon Martin because of Martin's race. While jurors may believe Zimmerman should be held criminally responsible for having killed Martin, they may also think that convicting Zimmerman of murder would be unjust.

One problem arising in the Zimmerman case is that the jury will be faced with an "all or nothing" choice. Zimmerman's jury will either have to convict Zimmerman of second degree murder, which means a possible sentence of between thirty years and life,<sup>288</sup> or acquit Zimmerman altogether. Zimmerman does not appear to be as culpable as an intentional murderer, but allowing him to go free also does not seem fair.

Many jurisdictions, although not Florida, recognize the partial defense of imperfect self-defense, which allows the jury to find the defendant not guilty of murder, and instead guilty of voluntary manslaughter if it feels the defendant honestly but unreasonably believed that he needed to use deadly force in self-defense<sup>289</sup> or used

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288. See FLA. STAT. ANN. § 782.04(2) (West 2012) ("The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree . . ."); *id.* § 775.082(3)(b) (West 2013) (setting mandatory thirty year term of imprisonment for first degree felonies unless otherwise provided by statute); *id.* § 775.087(2)(a)(3) (West 2013) (establishing minimum mandatory sentence of twenty-five years for "[a]ny person who is convicted of a felony . . . and during the course of the commission of the felony such person discharged a 'firearm' . . . and, as the result of the discharge, death or great bodily harm was inflicted upon any person"); see also *id.* § 27.366 (codifying the requirement that the state attorney must explain, in writing, why a defendant did not receive the statutory minimum sentence); WILLIAM H. BURGESS, FLORIDA SENTENCING § 6:69 (16th ed. 2012) (noting that "[o]nly the State Attorney has the discretion to waive the [twenty-five year] minimum mandatory sentence" for murder with a firearm).

289. Twenty-two states recognize this version of imperfect self-defense. COLO. REV.

disproportionate force in self-defense.<sup>290</sup> A jury could easily find that Zimmerman honestly but unreasonably believed he was being threatened with imminent death or serious bodily injury or that Zimmerman's use of a gun to shoot Martin was wildly disproportionate to the threatened force of Martin's fists. If Florida recognized imperfect self-defense, the jury could find Zimmerman guilty of voluntary manslaughter.<sup>291</sup> Instead, jurors will have to choose between finding Zimmerman guilty of murder or acquitting him when a murder conviction seems overly severe and an acquittal seems overly lenient. Lack of an intermediate verdict option poses a far greater threat to injustice than making race salient.

## 2. Objection 2: Unfair to Hold Zimmerman Liable for Acting on an Honest but Unreasonable Belief in the Need to Use Deadly Force in Self-Defense

A second, related objection to making race salient might be that it is unfair to hold Zimmerman liable for acting on a sincere belief that he was about to be killed and thus deadly force was the only way he could protect himself, even if his beliefs stemmed from racially biased assumptions. As Stephen Garvey explains, "[T]he belief that . . . I am about to be killed, and deadly force is necessary to avoid

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STAT. ANN. § 18-1-704 (West 2003); DEL. CODE ANN. tit. 11, § 470 (West 1995); *Harshaw v. State*, 39 S.W.3d 753, 756 n.1 (Ark. 2001); *In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994); *Mathis v. State*, 968 A.2d 492 (Del. 2009), 2009 WL 405872, at \*2; *Williams v. United States*, 858 A.2d 984, 993 n.13 (D.C. 2004); *Paz v. State*, 852 P.2d 1355, 1363 (Idaho 1993); *People v. Taylor*, 600 N.E.2d 9, 13 (Ill. App. Ct. 1992); *State v. Sterrett*, 45 N.W. 401, 402 (Iowa 1890); *State v. Harris*, 269 P.3d 820, 825 (Kan. 2012); *Davis v. Commonwealth*, No. 2008-SC-000406-MR, 2009 WL 4251646, at \*3 (Ky. Nov 25, 2009); *State v. Hanaman*, 2012 ME 40, 38 A.3d 1278, 1282 n.4; *State v. Greco*, 24 A.3d 135, 143 (Md. Ct. Spec. App. 2011); *Beale v. State*, 2 So. 3d 693, 700 (Miss. Ct. App. 2008); *State v. Phroper*, 619 S.W.2d 83, 87-88 (Mo. Ct. App. 1981); *Lucas v. State*, 111 N.W. 145, 147 (Neb. 1907); *State v. Abeyta*, 901 P.2d 164, 171 (N.M. 1995), *abrogated by State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266; *State v. Clark*, 1997 ND 199, ¶ 11, 570 N.W.2d 195, 199; *McHam v. State*, 2005 OK CR 28, 126 P.3d 662, 668; *Commonwealth v. Truong*, 36 A.3d 592, 599 (Pa. Super. Ct. 2012); *State v. Low*, 2008 UT 58, 192 P.3d 867, 877; *Couture v. Commonwealth*, 656 S.E.2d 425, 430 (Va. Ct. App. 2008); *State v. Camacho*, 501 N.W.2d 380, 383 (Wis. 1993).

290. See *Sanchez v. People*, 470 P.2d 857, 860 (Colo. 1970) (en banc); *Commonwealth v. Young*, 959 N.E.2d 943, 954 (Mass. 2012); *State v. Henley*, 2010-NMSC-039, ¶ 20, 148 N.M. 359, 237 P.3d 103, 108; *State v. Revels*, 195 N.C. App. 546, 551, 673 S.E.2d 677, 681 (2009); *Couture*, 656 S.E.2d at 430; *Camacho*, 501 N.W.2d at 388-89.

291. See Darren Lenard Hutchinson, *Trayvon Martin: "Stand Your Ground" Rule Has NOTHING to Do with This Case*, DISSENTING JUST. (Mar. 21, 2012, 9:01 PM), <http://dissentingjustice.blogspot.com/2012/03/trayvon-martin-stand-your-ground-rule.html> (opining that the force Zimmerman used was not proportionate to the force threatened).

being killed—is one that only a saint or a fool would ignore.”<sup>292</sup> Garvey suggests that “self-defense should, all else being equal, be available to any actor who killed because and only because he believed that doing so was necessary to avoid being killed or seriously injured.”<sup>293</sup>

Allowing an actor to claim self-defense based on the actor’s honest belief that he was threatened with imminent death or serious bodily injury, regardless of the reasonableness of that belief, is deeply problematic. Under this view, an individual suffering from serious delusions caused by mental illness could shoot a totally innocent person based on a sincere belief that the victim was threatening him with death or serious bodily injury and completely escape punishment, even if no one else in the defendant’s situation would have felt the same way. This occurred in *State v. Simon*,<sup>294</sup> a case involving an elderly man from Kansas who shot at his Asian American next-door duplex neighbor as the neighbor was entering his own home and claimed he acted in self-defense.<sup>295</sup> The defendant, who was described as a “psychological invalid” by his own expert witness, assumed his neighbor was an expert in martial arts because he was Chinese.<sup>296</sup> After being instructed that “[a] person is justified in the use of force to defend himself against an aggressor’s imminent use of unlawful force *to the extent it appears reasonable to him* under the circumstances then existing,” the jury found the defendant not guilty of aggravated assault.<sup>297</sup>

The reasonableness requirement in self-defense doctrine, while not a model of clarity, serves an important limiting function. It ensures that not all claims of self-defense result in an acquittal. The problem lies in determining which claims of self-defense are reasonable and which are not. If the reasonable person is simply understood to mean the average person, the defendant’s belief in the need to act in self-defense will be considered reasonable if the

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292. Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119, 126 (2008).

293. *Id.*

294. 646 P.2d 1119 (Kan. 1982).

295. *Id.* at 1121.

296. *Id.*

297. *Id.* (emphasis added). On appeal, the Kansas Supreme Court ruled that the trial judge incorrectly told the jury to apply a subjective standard of reasonableness, *see id.* at 1121–22, which was similar to telling the jury they could acquit if they found that the defendant honestly believed that he needed to use deadly force in self-defense. Because of double jeopardy, Simon could not be retried and remained free based on the jury’s not guilty verdict. *See id.* at 1122.

ordinary person in the defendant's situation would have thought the victim was threatening and dangerous. In cases where the defendant was influenced by negative racial stereotypes about Blacks as violent, dangerous criminals, simply equating reasonableness with typicality is problematic because this permits majoritarian attitudes and beliefs, which may be highly prejudicial, to control the verdict.<sup>298</sup>

Garvey goes further than simply defending an actor who uses deadly force because of an honest but unreasonable belief in the need to act in self-defense. Garvey also argues that a liberal state has no business denying a racist citizen the ability to assert a claim of self-defense.<sup>299</sup> Garvey draws support for this position from the rule in criminal law that the State may not punish a person for a status, such as being a narcotics addict.<sup>300</sup> According to Garvey, if the state cannot punish a person for having a particular status, then it cannot punish a person for being a racist.<sup>301</sup> Garvey also points out that a liberal state lacks authority to punish a person for having state-disapproved beliefs or desires.<sup>302</sup> Garvey concludes that if a state cannot punish a citizen for being a racist or for having racist views, neither can it deny him a defense on these grounds.<sup>303</sup>

Garvey's argument makes a lot of sense, but does not square with existing Supreme Court precedent. The Court has made clear on several occasions that the constitutional right to present evidence in one's defense is not absolute. For example, in *Montana v. Egelhoff*,<sup>304</sup> the Court held that a state may deny a defendant the right to assert evidence of voluntary intoxication to negate the mens rea element of the charged offense.<sup>305</sup> The Court based its decision, at least in part, on the public policy rationale that precluding defendants from asserting evidence of voluntary intoxication would serve to discourage drunkenness and reckless behavior by drunken individuals.<sup>306</sup> Similarly, in *Clark v. Arizona*,<sup>307</sup> the Court held that a state may preclude a defendant from offering evidence of mental

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298. LEE, MURDER AND THE REASONABLE MAN, *supra* note 154, at 235–45.

299. Garvey, *supra* note 292, at 168–70.

300. *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

301. Garvey, *supra* note 292, at 154–57.

302. *See id.* at 168–69.

303. *Id.* at 154–57.

304. 518 U.S. 37 (1996).

305. *Id.* at 56.

306. *Id.* at 49–51.

307. 548 U.S. 735 (2006).

incapacity stemming from mental illness to negate the mens rea element of the charged offense.<sup>308</sup>

While one can disagree with these Supreme Court decisions on the ground that a defendant's constitutional right to present a defense ought to be absolute or near absolute, these decisions suggest that a state has great leeway to decide whether to allow a defendant to assert a particular defense. If a state can completely preclude a defendant from asserting a particular defense, even one that merely requires the state to uphold its burden of proving every element of the charged offense, it can certainly impose restrictions that might make a defense less persuasive to the jury.

One could argue, as Claire Finkelstein does, that the defense of self-defense is different from other defenses and the state should not be able to take away one's right to act in self-defense.<sup>309</sup> Making race salient, however, does not preclude a defendant from asserting a claim of self-defense. Making race salient simply encourages jurors to consider whether racial bias influenced the defendant's beliefs and acts when assessing whether the defendant acted reasonably in self-defense.

### 3. Objection 3: Making Race Salient Might Reinforce Racial Prejudice in Certain Jurors

A third objection to this Article's proposal is that making race salient may be ineffective as to highly prejudiced individuals or those whose beliefs are congruent with the Black-as-Criminal stereotype. Making race salient to highly prejudiced individuals might reinforce their existing racial biases and provide them with even more reason to perceive the defendant's actions as justified.

It is true that early social science research suggested that egalitarian-minded individuals reminded of the racialized nature of a particular situation were most likely to try to correct their own implicit biases, suggesting that highly prejudiced individuals would not act in a more egalitarian way even if the racialized nature of the situation was made salient.<sup>310</sup> More recent social science research on

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308. *Id.* at 769–71.

309. Claire Finkelstein, *A Puzzle About Hobbes on Self-Defense*, 82 PAC. PHILA. Q. 332, 334 (2001). For Finkelstein, a natural right to self-defense is the central protection all citizens have against their government. *Id.* at 356–57. Consequently, any government that “failed to respect the right of self-defense of [its] citizens would be a [government] to whom citizens no longer owed their allegiance.” *Id.* at 359.

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

race salience, however, suggests that making race salient helps to reduce racial bias in both egalitarian-minded and highly prejudiced individuals.<sup>311</sup> This is probably due to the fact that race norms in today's society are more egalitarian than in days past. Given the decidedly egalitarian race norms that are prevalent today, even highly prejudiced individuals may attempt to appear egalitarian in front of others. In the context of jury decision making, having to decide the guilt or innocence of a defendant with eleven other individuals<sup>312</sup> means that both egalitarian-minded and highly prejudiced individuals are more likely to try to act in racially unbiased ways when the racialized nature of the case is salient.

#### 4. Objection 4: Making Race Salient May Lead to Overcorrection

A fourth possible objection to my proposal is that making race salient may encourage jurors to overcorrect. According to this objection, jurors, in an effort to correct their implicit racial biases, may overcorrect by convicting innocent White defendants and acquitting guilty Black defendants.

It would be problematic if making race salient did lead to such overcorrection. Theoretically, one could see how race salience could lead jurors to acquit a guilty defendant. The fictional account in John Grisham's book *A Time to Kill* illustrates how this might happen. The African American father who shot and killed his daughter's rapists in *A Time to Kill* clearly laid in wait, premeditated, and deliberated upon killing his victims, and yet his jury acquitted him of first degree murder, presumably because they thought they would acquit a similarly situated White father.

The social science research on race salience, however, suggests only that jurors are more likely to treat Black and White defendants equally when race is made salient, not that jurors are more likely to treat Black defendants better than White defendants. Further research needs to be done on this front, but until there is some tangible evidence that making race salient would lead jurors to overcorrect in racially unjust ways, it seems imprudent not to even attempt to deal with the racial bias we know exists through my proposed reform. Moreover, if making race salient encourages jurors

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311. Cohn et al., *supra* note 254, at 1964–66.

312. While most jurisdictions utilize twelve-person juries in criminal cases, the United States Supreme Court has held that twelve-person juries are not constitutionally required. See *Williams v. Florida*, 399 U.S. 78, 102–03 (1970).

to exercise the same leniency toward Black defendants that they would toward White defendants, this may not be such a bad thing.

#### 5. Objection 5: Making Race Salient Violates Our Constitutional Commitment to Color-Blindness

A fifth possible objection to making race salient is the argument that calling attention to race violates our constitutional commitment to colorblindness. Proponents of this objection might argue that if we want to get beyond race, we should stop noticing race.<sup>313</sup> Under this view, making race salient encourages jurors to take race into account when judging the merits of the defendant's self-defense claim, which is precisely the opposite of being colorblind.

The principle of colorblindness embraces the notion that inattention to race is "a moral requirement of all 'right' thinking people."<sup>314</sup> Proponents of colorblindness believe that "ignoring race in making social policy will bring about justice."<sup>315</sup> As Neil Gotanda notes, "Advocates of the colorblind model argue that nonrecognition by government is a decision-making technique that is clearly superior to any race-conscious process."<sup>316</sup> The principle of colorblindness "runs deep in the American civil rights narratives, from the first Justice Harlan's dissent in *Plessy v. Ferguson* to Martin Luther King, Jr.'s hope that his children would be judged by the 'content of their character' rather than by the 'color of their skin.'"<sup>317</sup> The principle of colorblindness is so pervasive in American society that both liberals and conservatives routinely invoke it.<sup>318</sup>

313. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

314. Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 162 (1994).

315. *Id.* at 162.

316. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 16 (1991).

317. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1060-61 (1991) (footnote omitted).

318. Compare Bobby Jindal, *How Republicans Can Win Future Elections*, CNN (Nov. 15, 2012, 5:22 PM), <http://www.cnn.com/2012/11/15/opinion/jindal-gop-election> ("The old notion that ours should be a colorblind society is the right one, and we should pursue that with vigor."), Rush Limbaugh, *The Rush Limbaugh Show*, PREMIERE RADIO NETWORKS (Oct. 12, 2008), available at <http://mediamatters.org/video/2009/10/12/limbaugh-im-colorblind-i-treat-everybody-equall/155605> ("Frankly, the biggest problem I face in the current climate of political correctness is that I'm colorblind about it."), and Chris Matthews, *The State of the Union* (MSNBC television broadcast Jan. 27, 2010) ("I was trying to think about who [Barack Obama] was tonight. It's interesting; he is post-racial,



The problem with colorblindness is that it ignores reality. Even if we believe that race should not matter, the fact is that it does matter. As the research on social cognition and implicit bias has shown over and over, most people are implicitly biased in favor of Whites and implicitly biased against Blacks.<sup>319</sup> Pretending that race does not matter, which the principle of colorblindness encourages, only exacerbates the problem of implicit bias. When individuals are not cognizant of their implicit biases, those biases can automatically trigger stereotypes and prejudice.<sup>320</sup> It is conscious awareness of racial bias, not blindness to race, that encourages one to correct assumptions that one might otherwise make about others because of their race.<sup>321</sup> If we really want to counter racial bias, we should be race-conscious, not colorblind.

#### CONCLUSION

Trayvon Martin died prematurely when he was shot by George Zimmerman last year. The untimely death of an innocent Black teenager and the Sanford Police Department's failure to arrest the man who shot him sparked a nationwide debate about race and justice in America. Race was made salient in the Trayvon Martin case by the huge public outcry following the shooting and the extensive media coverage of the shooting. One unexpected benefit that came from all this public attention was that it focused people's attention on the pervasiveness of racial stereotypes. Most criminal cases, however, do not garner the same level of media attention or public scrutiny. In the run-of-the-mill criminal case, race is not an issue that is highlighted by either party even when the defendant or victim is a racial minority and racial stereotypes and implicit racial bias are likely to influence the verdict.

Recent social science research on race salience demonstrates that making race salient can encourage jurors to treat Black and White defendants equally. The same research indicates that not making race salient can lead to unequal treatment of Black and White defendants.

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by all appearances. I forgot he was black tonight for an hour.”), with Daniel Schorr, *A New, 'Post-Racial' Political Era in America*, NPR (Jan. 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=18489466> (“The post-racial era, as embodied by Obama, is the era where civil rights veterans of the past century are consigned to history and Americans begin to make race-free judgments on who should lead them.”).

319. See *supra* Part II.

320. See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 541–42 (2008).

321. See *supra* text accompanying notes 194–223.

In light of this research, this Article urges attorneys who are concerned about the effects of implicit racial bias to make race salient. Making race salient, not being blind to racial difference, may be the best way to even the scales of justice.

In February 2013, United States Supreme Court Justice Sonia Sotomayor, the Court's first Hispanic Justice, made race painfully salient for one federal prosecutor by publicly criticizing his racially stigmatizing questioning of an African American defendant charged with participating in a drug conspiracy.<sup>322</sup> A critical issue in the case was whether the defendant knew that the people with whom he was traveling were about to engage in a drug deal.<sup>323</sup> During cross-examination, the prosecutor stated, "You've got African Americans, you've got Hispanics, you've got a bag full of money. Does that tell you—a light bulb doesn't go off in your head and say, 'This is a drug deal?'"<sup>324</sup>

Justice Sotomayor chastised the prosecutor for his remarks, stating, "By suggesting that race should play a role in establishing a defendant's criminal intent, the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation."<sup>325</sup> Justice Sotomayor continued, "The prosecutor's comment . . . was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason."<sup>326</sup> And to make sure her disapproval was crystal clear, she concluded, "It is deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st Century. . . . We expect the Government to seek justice, not to fan the flames of fear and prejudice. . . . I hope never to see a case like this again."<sup>327</sup>

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322. Calhoun v. United States, 133 S. Ct. 1136, 1136 (2013) (Statement of Sotomayor, J.).

323. *Id.*

324. *Id.* During his rebuttal closing argument, the prosecutor reiterated, "I got accused by [defense counsel] of, I guess, racially, ethnically profiling people when I asked the question of Mr. Calhoun, Okay, you got African-American[s] and Hispanics, do you think it's a drug deal? But there's one element that's missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash? None of these people are Bill Gates or computer [magnates]? None of them are real estate investors." *Id.* at 1137 n.\*.

325. *Id.* at 1137.

326. *Id.*

327. *Id.* at 1138. In an interview, the prosecutor at issue said, "I can't disagree with the idea [Justice Sotomayor] was expressing," and explained that it was not his intent to interject race into the case. Robert Barnes, *Sotomayor Says Prosecutor Was Wrong to*

Even though she joined the majority of the Court in ruling in favor of the government, Justice Sotomayor made race salient by highlighting the ways in which the prosecutor's remarks relied on racial stereotypes and prejudice. Her remarks will likely encourage the prosecutor in this case and attorneys in future cases to think twice before making similar comments that draw generalizations about individuals based on their race.