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BLACK LIVES DISCOUNTED: ALTERING THE STANDARD  
FOR VOIR DIRE AND THE RULES OF EVIDENCE TO  
BETTER ACCOUNT FOR IMPLICIT RACIAL BIASES  
AGAINST BLACK VICTIMS IN SELF-DEFENSE CASES

Because of implicit biases,<sup>1</sup> information about the victims of violence — such as their criminal records, physical appearances, and lifestyles — can be exploited in an attempt to justify the harm that was inflicted upon them. In particular, there is a substantial risk that defendants tried for acts of violence against Black victims<sup>2</sup> will attempt to shift responsibility to those victims by vilifying them, interrogating their pasts, and exploiting negative racial stereotypes about them by, for instance, activating the implicit bias that connects notions of blackness with criminality.<sup>3</sup> Information about the victim can activate the implicit biases of the jurors, and these implicit biases likely affect the way jurors interpret and remember evidence and their ultimate decisions about culpability and punishment.<sup>4</sup> Jurors should not and arguably may not constitutionally discriminate against Black victims by refusing to convict their attackers when those offenders would have likely been convicted for the same acts taken against similarly situated victims of a different race.<sup>5</sup> Yet, the existing procedural rules are ill-suited to address the problem of implicit bias. This Note proposes two additional safeguards to mitigate the effects of implicit racial bias in self-defense cases. The first proposal is a recommendation for judges to permit counsel to participate more actively in juror voir dire and to ask questions intended to uncover implicit racial bias directly. The second recommendation is

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<sup>1</sup> Implicit racial biases are unconscious associations that people make between racial groups and general concepts such as “good,” “bad,” “safe,” and “criminal.” See Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 7, 15 (1995).

<sup>2</sup> Though implicit racial biases exist about many racial groups, the analysis in this Note will focus specifically on cases involving Black victims and implicit racial biases about Black people.

<sup>3</sup> See Calvin John Smiley & David Fakunle, *From “Brute” to “Thug”: The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350, 357–61 (2016). As an example, consider the trial of Michael Slager, the police officer who shot and killed Walter Scott, a Black man, during a routine traffic stop. Slager’s defense team emphasized Scott’s child support debts, criminal history, and possible drug use even though those narratives could bias jurors against the victim. Alan Blinder, *Walter Scott’s Character Scrutinized in Trial of Officer who Killed Him*, N.Y. TIMES (Nov. 3, 2016), <https://nyti.ms/2e6QF9H> [<https://perma.cc/F3QJ-8MUT>].

<sup>4</sup> Virginia Weeks, Note, *Fairness in the Exceptions: Trusting Juries on Matters of Race*, 23 MICH. J. RACE & L. 189, 194–96 (2018); see also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–401 (2007).

<sup>5</sup> See Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 103–11 (2009) (arguing that discriminatory acquittals based on biases against the crime victim violate the Equal Protection Clause).

for an addition to the Federal Rules of Evidence, based on a proposal by Aaron Goldstein,<sup>6</sup> that would prohibit counsel from deploying racial imagery<sup>7</sup> during trial to activate jurors' implicit racial biases.

This Note proceeds in four Parts. Part I provides an overview of traditional self-defense law and highlights a few of the ways that the use of language evoking racial biases could ultimately lead to injustice in cases where Black victims have been subjected to violence. Part II discusses the legal mechanisms currently available to address racial biases at trial and argues that an effective intervention to limit the effects of implicit racial bias should assess the information that jurors bring in to trial and regulate the information that they are exposed to during trial. Part III offers three specific recommendations that judges should implement to alter the way that voir dire is conducted in cases where implicit racial bias could affect jurors' determinations. Part IV offers a proposal for a new rule of evidence that would categorically limit the admissibility of evidence likely to evoke implicit racial biases about the victim in self-defense cases and explores a potential parallel between justifications for rape shield laws and arguments in favor of a race shield law.

## I. THE INTERACTION BETWEEN SELF-DEFENSE LAW AND IMPLICIT RACIAL BIAS

In order to establish the elements of a self-defense claim, defendants often invite jurors to take race into account. This Part will provide a general overview of the basic elements of a traditional claim of self-defense. It will then describe how implicit racial bias could affect the defendant's decision to act in the critical moment and how it could affect the jury's subsequent determination of whether a violent act was justified in self-defense.

### A. General Overview of Laws Governing Claims of Self-Defense

The laws vary between states, but a claim of perfect self-defense<sup>8</sup> generally requires: (1) necessity, meaning that the defendant "honestly and reasonably believed it was *necessary*" to resort to force in order to escape bodily harm at the hands of the victim; (2) imminence, meaning that the threat of bodily harm perceived by the defendant would have come to fruition soon, but for the intervention of the act in self-defense;

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<sup>6</sup> Aaron Goldstein, Note, *Race, Reasonableness, and the Rule of Law*, 76 S. CAL. L. REV. 1189, 1198 (2003).

<sup>7</sup> In this Note, the term "racial imagery" refers to language likely to evoke race-based stereotypes or biases.

<sup>8</sup> This is the type of self-defense claim that allows the defendant to escape all liability for a violent act. See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 391-92 (1996).

and (3) proportionality, meaning that the “amount of force” that the defendant used was “not excessive in relation to the threat[]” posed by the victim.<sup>9</sup> In addition to these elements, claims of self-defense also typically involve both a subjective and an objective assessment of the reasonableness of the defendant’s beliefs.<sup>10</sup> This means that in order to avoid criminal punishment, the defendant must convince the factfinder that he *subjectively* believed that the victim posed an imminent threat, and that belief must have been *objectively* reasonable.<sup>11</sup>

*B. Narratives that Devalue Victims Can Affect Jury Deliberations*

Though the elements of a self-defense claim are race neutral on their face, implicit racial biases based on the victim’s race could enter the relevant determination in at least two ways. The defendant’s implicit or explicit racial biases may affect his or her determination in the moment about whether the victim poses an imminent threat that necessitates violent action. Additionally, if a self-defense case proceeds to trial, race can have secondary effects in the courtroom when racially coded language activates commonly held societal assumptions. Social science research suggests that a majority of Americans harbor implicit racial biases<sup>12</sup> that link blackness with negative characteristics such as aggression, hostility, violence, criminality, and weapons.<sup>13</sup> Jurors’ biases can be activated before trial through pretrial publicity or at trial by racial imagery, and once activated, these biases affect jurors’ internal calculations about the reasonableness of the defendant’s beliefs and make it more likely that the defendant will be acquitted.<sup>14</sup> This phenomenon

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<sup>9</sup> *Id.* at 377; see also Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 786 (1994).

<sup>10</sup> See Lee, *supra* note 8, at 380–81; Armour, *supra* note 9, at 786–87.

<sup>11</sup> See Lee, *supra* note 8, at 379–81.

<sup>12</sup> Seventy-five percent of people who have taken the Implicit Association Test for race have demonstrated a subconscious preference for whites and an implicit racial bias against Black people. Many Black people also demonstrate implicit racial biases against blackness. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-racial Society*, 91 N.C. L. REV. 1555, 1572 (2013). People can develop implicit biases from exposure to pervasive stereotypes in society, and once activated, these biases can operate on a subconscious level to impact the way the bias holder feels or reacts toward members of the target group. See Greenwald & Banaji, *supra* note 1, at 15.

<sup>13</sup> Lee, *supra* note 12, at 1562, 1572.

<sup>14</sup> See Jonathan Markovitz, “A Spectacle of Slavery Unwilling to Die”: Curbing Reliance on Racial Stereotyping in Self-Defense Cases, 5 U.C. IRVINE L. REV. 873, 894–95 (2015) (describing the public ire in the wake of George Zimmerman’s acquittal and hypothesizing that one of the causes of frustration was the fact that Zimmerman’s defense team relied on “racial tropes” to transform a Black teenager into a “brutal thug,” *id.* at 894); see also Daniel Lathrop & Anna Flag, *Killings of Black Men by Whites Are Far More Likely to Be Ruled “Justifiable,”* MARSHALL PROJECT (Aug. 14, 2017, 5:30 AM), <https://www.themarshallproject.org/2017/08/14/killings-of-black-men-by-whites-are-far-more-likely-to-be-ruled-justifiable> [<https://perma.cc/U56G-5YZP>]

may be a part of the explanation for the disparity between the rates at which civilian homicides are deemed justifiable; overall, less than two percent of civilian homicides are deemed justifiable, but approximately seventeen percent of these cases are categorized as justifiable when the killer is a non-Hispanic white person and the victim is a Black man.<sup>15</sup>

Negative implicit racial biases increase the likelihood that Black people will become victims of violence in self-defense because the mental association linking blackness and criminality is so strong that it can affect what people in the defendant's position see.<sup>16</sup> For example, people with stronger implicit racial biases perceive hostility and anger in ambiguously hostile Black faces more often than they do in ambiguously hostile white faces.<sup>17</sup> Observers also interpret ambiguous acts as more violent when the act was committed by a Black person than they do when the actor was a similarly situated white person.<sup>18</sup>

In addition to affecting the way that observers perceive Black faces and Black actors, implicit racial bias can also impact the way that people process information about their surroundings. For example, observers are more likely to identify items as weapons when they are wielded by Black individuals.<sup>19</sup> While the association between blackness and weapons facilitates quicker identification of dangerous objects in the

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(stating that "irrational fear can come into play" when people make quick decisions based on "imperfect information," which is the norm in self-defense cases).

<sup>15</sup> Lathrop & Flagg, *supra* note 14 ("In comparison, when Hispanics killed black men, about 5.5 percent of cases were called justifiable. When whites killed Hispanics, it was 3.1 percent. When blacks killed whites, the figure was just 0.8 percent. When black males were killed by other blacks, the figure was about 2 percent, the same as the overall rate.").

<sup>16</sup> See, e.g., Lee, *supra* note 8, at 404–06 (describing experiments that indicate this phenomenon); see also Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 617–18, 622–23 (2015) (summarizing a set of experiments that found that implicit racial bias can make it more likely that teachers will perceive a Black student's misbehavior as a part of a problematic pattern of behavior).

<sup>17</sup> See Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH. SCI. 640, 642–43 (2003).

<sup>18</sup> Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCH. 590, 596–97 (1976). Participants in this study rated a shove more violent when a Black person committed the act than when a white person was doing the shoving, regardless of the race of the person shoved. *Id.* at 596; 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. PSYCH. 590, 594–96 (1980) (finding that sixth-grade students interpreted ambiguous behaviors as meaner and more threatening when the actions were performed by Black figures than white figures).

<sup>19</sup> Lee, *supra* note 12, at 1582, 1584–85. This phenomenon is referred to as weapons bias, and it allows people to more readily identify weapons after they have been subliminally primed with images of Black faces than control images or white faces. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 878–81 (2004); 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, 10–12, 14 (2004); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314, 1318 (2002).

hands of Black individuals, it also makes it more difficult for people to identify harmless objects in Black hands, which means that biased observers wrongfully spot weapons more frequently in the hands of Black people when no true threat exists.<sup>20</sup> This tendency to see weapons could potentially explain the shootings of Black victims such as Andre Burgess,<sup>21</sup> William Whitfield,<sup>22</sup> and Odest Mitchell.<sup>23</sup> Each of these men was shot by a person who claimed that he believed that his victim was carrying a weapon when he shot him.<sup>24</sup> Yet, in reality, the metallic, “weapon-like” objects that the men were carrying were a Three Musketeers candy bar in a silver wrapper, a ring of keys, and a pair of sunglasses.<sup>25</sup> Because implicit racial bias affects the way that observers process information and draw conclusions about their environments, it is possible that these implicit biases could increase the likelihood that Black people will become the victims of violence allegedly committed in self-defense by altering the defendants’ subjective assessments of the imminence of harm in critical moments.<sup>26</sup>

Just as implicit racial biases can influence the defendant’s subjective assessment about the imminence of the threat posed by the victim and the necessity of force, these subconscious associations can also affect jurors’ determinations about the objective reasonableness of the defendant’s beliefs because the jurors are socialized in the same society as the defendants.<sup>27</sup> As Professor Cynthia Lee documents, when violence is perpetrated against a Black victim, implicit racial bias may make it more likely that jurors will accept the defendant’s assertion that he reasonably believed that the victim posed an imminent threat.<sup>28</sup> In the absence of formal jury instructions explaining what “reasonable” means in the legal sense, jurors are left to conflate their own opinions about whether the defendant’s act was understandable with the determination

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<sup>20</sup> See Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCH. 399, 403–05 (2003); Correll et al., *supra* note 19, at 1317; see also, e.g., Eberhardt et al., *supra* note 19, at 889.

<sup>21</sup> See Lee, *supra* note 19, at 14.

<sup>22</sup> See *id.* at 18–19.

<sup>23</sup> See *id.* at 19–20.

<sup>24</sup> See *id.* at 14, 18–20.

<sup>25</sup> *Id.* at 14, 19, 20.

<sup>26</sup> See Lee, *supra* note 12, at 1584–85.

<sup>27</sup> See *id.* (“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 . . . 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 . . .”).

<sup>28</sup> Lee, *supra* note 8, at 372.

of whether it was “reasonable.”<sup>29</sup> That means that acts informed by implicit racial bias may be considered “reasonable” because this type of bias is so pervasive in society. But, it is unjust and possibly a violation of the Equal Protection Clause to allow defendants to evade liability for acts of violence committed against Black people when they would have likely been convicted for similar acts against white victims.<sup>30</sup>

In addition to affecting jurors’ assessments of whether the defendant’s beliefs about the victim were subjectively and objectively reasonable, implicit bias can also act independently on jurors to impact trial outcomes.<sup>31</sup> People are inclined to value other people who are similar to themselves more highly than those they regard as “others,” and such in-group preferences could work against the goal of justice for Black victims in interracial cases when juries are primarily or completely composed of white jurors.<sup>32</sup> Furthermore, at least one study found that jury-eligible participants of all races implicitly value Black lives less highly than white ones.<sup>33</sup>

Implicit racial bias, once activated, can cause jurors to misremember case facts in racially biased ways and to evaluate ambiguous evidence differently based on bias.<sup>34</sup> For example, people with stronger implicit racial biases found ambiguous evidence more probative of guilt when the defendant was Black.<sup>35</sup> Bias may also lead jurors to unconsciously associate the racial category “Black” with guilty and “white” with not guilty.<sup>36</sup> This disparity holds true even among people who report positive explicit attitudes toward Black people; in fact, counterintuitively, one study indicated that the participants who reported more positive feelings about Black people were actually more likely to associate Black defendants with guilt.<sup>37</sup> These findings highlight the importance of interventions, like the two proposed in this Note, that are intended to keep information that could activate the implicit biases of jurors out of trial;

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<sup>29</sup> See *id.* at 389–90 (considering whether even an objective reasonableness standard “perpetuates the less than desirable views of the majority,” *id.* at 390).

<sup>30</sup> See Markovitz, *supra* note 14, at 905–06, for further discussion about how *reasonableness* should not be equated with *typicality*. See also Goldstein, *supra* note 6, at 1200 (“Actions based on such stereotypes are wrong on their face because they treat members of minority groups as less worthy of care and consideration than others.”); Tetlow, *supra* note 5, at 79, 103–11 (arguing that discriminatory acquittals based on bias against the crime victim are unconstitutional).

<sup>31</sup> Cf. Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 538–40 (2014).

<sup>32</sup> See Lee, *supra* note 8, at 372.

<sup>33</sup> See Levinson et al., *supra* note 31, at 565, 567 (finding that “jurors implicitly valued White lives over Black lives by more rapidly associating White subjects with the concepts of ‘worth’ or ‘value’ and Black subjects with the concepts of ‘worthless’ or ‘expendable,’” *id.* at 567).

<sup>34</sup> *Id.* at 548.

<sup>35</sup> See Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207–08 (2010).

<sup>36</sup> See *id.* at 206.

<sup>37</sup> See *id.* at 207; Weeks, *supra* note 4, at 194.

jurors may not be consciously aware of whether bias affected their determinations even though race-based heuristics dramatically impacted their conclusions.<sup>38</sup>

## II. THE INADEQUACY OF MECHANISMS IN PLACE TO COUNTER IMPLICIT BIAS IN SELF-DEFENSE CASES

At present, the legal system is ill-equipped to deal with the unique issues posed by implicit racial bias. Courts could theoretically regulate the “inputs” such as the jurors empaneled, the evidence admitted, and the jury instructions given; or they could regulate the “output” from trial, the verdict.

The Federal Rules of Evidence (FRE), the Supreme Court, and the Constitution have imposed a series of barriers that make it difficult to regulate the “output” from trial by overturning a jury verdict, even if that result was based on implicit racial bias.<sup>39</sup> As a preliminary matter, it would be difficult to even assess the impact that implicit racial bias had on any particular case because many courts do not conduct any sort of substantive voir dire on racial attitudes.<sup>40</sup> Furthermore, FRE 606(b) prohibits a juror from testifying about “any statement made . . . during the jury’s deliberations . . . or any juror’s mental processes concerning the verdict or indictment” in an attempt to impeach the verdict.<sup>41</sup> As a result of this rule, once the verdict has been entered, it will not be disturbed unless the case fits into a limited set of exceptions, such as when there is evidence that a juror acted in response to an external influence, like a bribe.<sup>42</sup> In *Peña-Rodriguez v. Colorado*,<sup>43</sup> the Supreme Court created an exception to this rule by holding that the Sixth Amendment requires that the “no-impeachment rule give way” if a juror makes a clear statement that he voted to convict a criminal defendant based on racial stereotypes or animus.<sup>44</sup> But the extent of this limitation on the no-impeachment rule is likely to be limited as the holding seems to only protect defendants in cases where jurors have verbally expressed blatant racial bias.<sup>45</sup> This limitation in the holding means that the *Peña-Rodriguez* exception to Rule 606(b) will likely not be enough to solve the problem of implicit bias against victims in self-defense cases

<sup>38</sup> See Levinson et al., *supra* note 35, at 207.

<sup>39</sup> See generally FED. R. EVID. 606(b); U.S. CONST. amend. V; *Tanner v. United States*, 483 U.S. 107 (1987).

<sup>40</sup> See *infra* p. 1530.

<sup>41</sup> FED. R. EVID. 606(b)(1).

<sup>42</sup> *Id.* 606(b)(2).

<sup>43</sup> 137 S. Ct. 855 (2017).

<sup>44</sup> *Id.* at 869.

<sup>45</sup> See Weeks, *supra* note 4, at 198–99 (suggesting that the impact of *Peña-Rodriguez* will likely be limited because of the high threshold requirement and the Supreme Court’s decision to leave application of the rule largely to the lower courts).

for three reasons. First, it is not clear that the protection would extend beyond defendants to also include victims in criminal trials.<sup>46</sup> Second, even if the *Peña-Rodriguez* holding did apply to victims, the threshold requirement of a clear statement that the juror voted for conviction based on racial stereotypes or animus is not well suited to protect parties from the impact of implicit biases.<sup>47</sup> Third, even if the *Peña-Rodriguez* holding did apply to victims and there were some way to apply the holding to cases where jurors relied on implicit biases, the constitutional double jeopardy protection may shield acquitted defendants from further prosecution because jeopardy attaches before the jury deliberates.<sup>48</sup>

Because there are so many barriers preventing prosecutors from challenging a verdict after trial, the most promising strategy for mitigating the effects of implicit racial bias on jurors' valuations of victims in self-defense cases would be to regulate trial "inputs." In the typical trial, the procedural safeguards for shielding parties from improper racial bias include the opportunities to: (1) question jurors about their biases during voir dire; (2) object to the introduction of evidence with the potential to activate biases under FRE 403; and (3) implore jurors not to allow biases to affect their deliberations through the jury instructions. These methods are inadequate to address the issue of implicit racial bias in self-defense cases, particularly when the subject of that bias is the victim.<sup>49</sup> A solution that addresses only voir dire would be insufficient because counsel would then be able to activate negative implicit racial biases during trial through evidence, oral argument, and other trial tactics.<sup>50</sup> Similarly, a remedy that focuses solely on prohibiting the admission of evidence with the potential to activate implicit racial biases at trial would fail to address the issue because jurors could begin their service with preconceived biases about a party due to exposure to pretrial publicity. While some courts have implemented specific jury selection

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<sup>46</sup> Cf. *Peña-Rodriguez*, 137 S. Ct. at 869 (holding only that the defendant's Sixth Amendment rights trump the no-impeachment rule in this set of cases without mention of victims' rights).

<sup>47</sup> See Weeks, *supra* note 4, at 209.

<sup>48</sup> See Tetlow, *supra* note 5, at 104. *But see, e.g.*, Thomas M. DiBiagio, *Judicial Equity: An Argument for Post-acquittal Retrial When the Judicial Process Is Fundamentally Defective*, 46 CATH. U. L. REV. 77, 77-79 (1996) (asserting that the Double Jeopardy Clause does not prohibit the reversal of an acquittal if the acquittal was the result of a fundamentally defective judicial process).

<sup>49</sup> See Mark W. Bennett, Essay, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010) (suggesting that the current process of voir dire and peremptory challenges may actually worsen implicit bias).

<sup>50</sup> See *infra* Part III, pp. 1529-33. *But see* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 867-69 (2015) (suggesting that race-related voir dire could be an effective way to mitigate implicit racial bias because this type of voir dire would make race salient and motivate jurors to make more egalitarian decisions).



presentations and jury instructions to encourage jurors to make decisions without regard to implicit or explicit racial biases,<sup>51</sup> the results from empirical studies on the effectiveness of implicit bias jury instructions are mixed.<sup>52</sup> Because any remedy focused solely on voir dire, evidence, or jury instructions would likely be inadequate for the reasons discussed above, this Note offers a compound remedy that focuses on both voir dire and the Rules of Evidence. Expanding the scope of voir dire would allow the court to get a better sense of the biases and prior knowledge of the case that each juror would bring to bear as an empaneled member of the jury so that jurors who would likely not be able to decide the case impartially might be excluded for cause. The additional rule of evidence would limit the introduction of evidence likely to activate racial biases during trial. Both of these strategies are necessary to regulate the “inputs” at trial.

### III. JURORS WHO HAVE BEEN EXPOSED TO PRETRIAL PUBLICITY THAT ACTIVATES IMPLICIT RACIAL BIASES SHOULD BE EXCUSED DURING VOIR DIRE

One of the reasons why the activation of jurors’ implicit biases is a difficult problem to address is because this activation can happen *at trial* due to the trial tactics and language used by counsel or witnesses or *before trial* when members of the potential jury pool are exposed to pretrial publicity. In an attempt to limit the effectiveness of pretrial publicity as a method for activating the implicit racial biases of potential jurors, this Part proposes that courts institute a lower standard for excusing jurors for cause in cases of self-defense that have been widely publicized. Specifically, in self-defense cases, the prosecution should be able to request lawyer-led voir dire that specifically addresses race and exposure to pretrial publicity, and courts should grant such requests when made.

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<sup>51</sup> See Bennett, *supra* note 49, at 169 (discussing Judge Bennett’s jury selection presentations in the U.S. District Court for the Northern District of Iowa); Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1290–94 (discussing several cases that demonstrate the reluctance of courts to issue jury instructions about avoiding racial bias but also noting that states such as Pennsylvania and Washington have developed model jury instructions that implore potential jurors to avoid identity-based bias).

<sup>52</sup> See Elizabeth Ingriselli, Note, *Mitigating Jurors’ Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1729–30 (2015) (finding Black defendants were less likely to be found guilty if race-related jury instructions were provided before evidence was introduced but also concluding that the combination of low racial salience and egalitarian jury instructions caused participants to give longer sentences to Black defendants). *But see* Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 CT. REV. 116, 121 (2015) (finding no evidence of backlash effects after participants were given race-based jury instructions).

A. *Proposal for Voir Dire in Cases of Self-Defense*

Voir dire is the process of questioning potential jurors about their qualifications to serve on a jury panel and their ability to perform the task fairly and impartially.<sup>53</sup> In criminal cases, many of the specific details of the voir dire process are left to the discretion of the court. Federal Rule of Criminal Procedure 24 states that either the judge or counsel for the parties may examine prospective jurors, and the range of questions appropriate for voir dire may extend to any issue that the court considers “proper.”<sup>54</sup> After voir dire, the court must strike any potential juror who, based on his responses, does not appear capable of rendering a fair and impartial verdict. Counsel for the parties may also request that the court remove any juror whose views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”<sup>55</sup> If the judge rejects counsel’s request to strike a potential juror for cause, then the attorney may use one of a limited number of peremptory strikes to remove the juror.<sup>56</sup>

The rule governing voir dire is broad, so it is also useful to consider how voir dire is typically conducted. In practice, voir dire is often “judge-dominated,”<sup>57</sup> with little to no attorney involvement, even though state and federal rules permit attorneys to participate. Additionally, the scope of voir dire is often limited and superficial with regard to questions about race and pretrial publicity, even in cases where racial attitudes are likely to be important in the trial.<sup>58</sup> Judge Mark Bennett acknowledges that, “judges commonly ask questions such as, ‘Can all of you be fair and impartial in this case?’”<sup>59</sup> Then, if a potential juror gives the correct response to this yes-or-no question, the court may refrain from striking the juror for cause. This type of surface-level inquiry would do little to uncover implicit biases because jurors may feel pressure to give the judge the “appropriate” answer, or they may actually be unaware of their biases and therefore unable to accurately reflect on their ability to render an impartial decision.

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<sup>53</sup> Bennett, *supra* note 49, at 158.

<sup>54</sup> FED. R. CRIM. P. 24(a).

<sup>55</sup> *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

<sup>56</sup> See FED. R. CRIM. P. 24(b).

<sup>57</sup> Bennett, *supra* note 49, at 159.

<sup>58</sup> See, e.g., Lois Heaney, *The Case for Meaningful Voir Dire on Race and Sexual Orientation Bias*, NJP LITIG. CONSULTING 1, <http://www.njp.com/wp-content/uploads/article/article12.pdf> [<https://perma.cc/G3HD-WHB2>] [hereinafter Heaney, *The Case*]; Lois Heaney, *Rodney King and the Case for Meaningful Voir Dire on Race*, 49 NAT’L LAWS. GUILD PRAC. 73, 73–74, 81, 83 (1992) [hereinafter Heaney, *Rodney King*].

<sup>59</sup> Bennett, *supra* note 49, at 160; see also Heaney, *The Case*, *supra* note 58, at 2 (describing a case where the court decided “to ask a series of leading, close-ended questions, which telegraphed the ‘correct’ answers” instead of using more specific questions submitted by counsel).

This Note does not offer a proposal for changing the federal rule of criminal procedure that governs voir dire. Instead, it presents three specific recommendations for altering the typical voir dire practices so that the court may better assess the implicit biases of jurors. These recommendations are generally applicable, but they will be particularly important for cases where racial biases are likely to be implicated, such as cases where a defendant claims to have committed an act of violence against a Black victim in self-defense.<sup>60</sup> First, voir dire should be conducted by counsel rather than led by a judge. Second, there should be more specific questions posed to jurors regarding their beliefs concerning race and their prior exposure to publicity related to the trial at issue during voir dire.<sup>61</sup> Third, the court should strike for cause when it suspects that a juror is already biased against a party (or a victim) or it suspects that the potential juror has already been exposed to information that is likely to activate biases before trial. Because this proposal would not alter Rule 24, the voir dire process would still be largely left to the discretion of the court, but the court should grant requests for these modifications to the traditional procedure liberally.<sup>62</sup>

*B. Justifications for Excusing Jurors with Pretrial  
Exposure to Self-Defense Cases for Cause*

Under the current system of voir dire, a juror who had some pretrial exposure to information about a case may still be empaneled as a juror if he claims that he can set this information aside.<sup>63</sup> The problem with this approach to voir dire is that research on implicit bias suggests that people are not particularly adept at identifying when their biases have been activated or at knowing how deeply biased they are for or against a particular person.<sup>64</sup> As a result, there is a great risk that jurors in self-defense cases where prejudicial information about the victim (such as

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<sup>60</sup> Currently, prosecutors do not have a right to voir dire potential jurors about their potential biases in these cases, but the Supreme Court guaranteed that right to defendants in *Ristaino v. Ross*, 424 U.S. 589 (1976). Tetlow, *supra* note 5, at 126–27 (arguing that when race is an important issue in the case, “[p]rosecutors should be permitted to ask jurors . . . questions designed to reveal their racial prejudices,” *id.* at 127).

<sup>61</sup> For examples of ineffective questions for voir dire on pretrial publicity, see Heaney, *Rodney King*, *supra* note 58, at 79–80. For similar examples of “meaningful” voir dire questions on race, see *id.* at 88–89 (providing a list of seventeen suggested questions for in-depth voir dire on race).

<sup>62</sup> *But see* Ryan Brett Bell & Paula Odysseos, *Sex, Drugs, and Court TV?*, 15 GEO. J. LEGAL ETHICS 653, 665 (2002) (stating that lawyer-dominated voir dire is expensive and time-consuming).

<sup>63</sup> See Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 695 (1991).

<sup>64</sup> A study on the effectiveness of voir dire in criminal cases with prejudicial pretrial publicity found that “jurors’ assertions of impartiality or partiality should not be taken simply at face value,” *id.* at 700, because the effects of exposure to prejudicial pretrial publicity “survive the simple exclusion of jurors who admit that it might be hard for them to disregard completely such publicity,” *id.* at 695.

text messages suggesting that the victim had used marijuana in the past or records indicating that the victim had been suspended from school<sup>65</sup>) becomes public will unwittingly allow their biases to affect their determinations about the defendant at trial, even if the information that activated their biases is not technically admitted as evidence. Because of this risk, there should be a lower standard for excluding a juror for cause based on prior knowledge in such cases. The three modifications proposed in the previous section would give parties more useful information about the extent of a juror's exposure to pretrial information so that the court and attorneys could make more informed decisions about which members of the venire to excuse.<sup>66</sup>

The suggestion that voir dire regarding pretrial publicity and race be lawyer-led rather than judge-led is vital to the overall recommendation because experience suggests that potential jurors respond to questions more candidly and are less likely to give socially desirable answers when voir dire is conducted by counsel.<sup>67</sup> Additionally, between judges and attorneys for the parties, counsel is likely in the best position to craft questions that would be specific and germane to the case at hand.<sup>68</sup>

The proposed modification about more specific questions related to race and exposure to pretrial publicity is important because while people are often unaware of whether their implicit biases have been activated or whether they can truly set their biases aside when making decisions, they can accurately report what they have heard about a defendant or victim in the news. There are two sets of specific questions that could reveal information relevant to implicit biases during voir dire: questions about racial attitudes<sup>69</sup> and questions about potential exposure to pretrial publicity. Prosecutors should pursue both of these lines of inquiry

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<sup>65</sup> These examples come from the trial of George Zimmerman after the death of Trayvon Martin. See Steve Almasy, *Zimmerman Attorneys: Texts Show Trayvon Martin "Hostile" Day of Shooting*, CNN (May 28, 2013, 7:04 AM), <https://www.cnn.com/2013/05/26/justice/florida-zimmerman-defense/index.html> [<https://perma.cc/4AJQ-C5P3>]; *Trayvon Martin Texts and Tweets Limited in Zimmerman Trial*, BBC (May 28, 2013), <https://www.bbc.com/news/world-us-canada-22692772> [<https://perma.cc/LN38-MRVA>].

<sup>66</sup> But see Lee, *supra* note 50, at 866–68 (arguing that jury orientation materials and voir dire that makes race salient could effectively mitigate the effects of implicit racial bias); Bennett, *supra* note 49, at 168 (arguing that expanded lawyer participation in jury selection and the elimination of peremptory challenges could be an effective way to prevent jurors and lawyers from acting on their own implicit biases).

<sup>67</sup> See Bennett, *supra* note 49, at 160 (noting that the former judge found it “remarkable when a juror ha[d] the self-knowledge and courage to answer that he or she [ould not] be fair in a particular case”); see also Heaney, *Rodney King*, *supra* note 58, at 86 (“Social desirability leads a prospective juror to tell the court that he or she is a good, fair-minded citizen who is devoid of opinion, attitude, prejudice and for that matter, life experience.”).

<sup>68</sup> See Bennett, *supra* note 49, at 160.

<sup>69</sup> Cf. Lee, *supra* note 50, at 866–68. Lee recommends specific voir dire about race and racial attitudes as a method of making race salient during trial so that egalitarian jurors will rely less on their biases. While specific voir dire on race may have the benefit of encouraging empaneled jurors

in appropriate situations. Questions about race and racial attitudes should be included in voir dire when a defendant has been accused of a violent crime against a victim from a different racial or ethnic group.<sup>70</sup> Effective voir dire on racial attitudes could include questions such as: “You have just learned about the concept of [implicit racial bias]. Not everyone agrees on the power of its influence . . . . Let me start by asking for your reaction to learning about the idea,”<sup>71</sup> or “In general, do you think our society treats people of all races equally?”<sup>72</sup> Specific questions about exposure to pretrial publicity should be incorporated into voir dire when information about a victim’s criminal record or illicit activities has garnered media attention.<sup>73</sup> These questions should focus on uncovering what knowledge the potential juror would bring into the jury room by asking specifically what, if anything, the juror has heard about the altercation at issue and the victim’s lifestyle. Responses to questions from these two lines of inquiry would give the court and counsel a better sense of the information and opinions that potential jurors would bring to the trial than would a general question about whether the juror could “put all of the information that you have heard before aside and be fair and impartial in reaching a decision.”

Once the court has elicited more detailed information about potential jurors’ exposure to pretrial publicity and racial opinions through more meaningful voir dire, judges should be comfortable with striking for cause jurors who have had pretrial exposure to information with the potential to activate biases. For example, a potential juror who states that she has learned that the victim in a case was convicted of several misdemeanors such as selling loose cigarettes could rightfully be struck for cause because the knowledge of the victim’s criminal history could prompt that juror to devalue the victim.

#### IV. PROPOSED RULE OF EVIDENCE TO LIMIT THE USE

to act more fairly, as Lee hypothesizes, the recommendation in this Note highlights the possibility that more in-depth voir dire would allow courts to exclude potential jurors whose biases have already been activated from service.

<sup>70</sup> The Supreme Court has already held that federal courts must inquire about racial prejudice when requested by a defendant accused of a violent crime where the victim and defendant are of different races. See *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) (plurality opinion). The prosecution should also be permitted to pursue this line of inquiry during voir dire.

<sup>71</sup> Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999, 1032 (2013).

<sup>72</sup> Heaney, *The Case*, *supra* note 58, at 6.

<sup>73</sup> For a discussion about how media representations often criminalize Black male victims, see Smiley & Fakunle, *supra* note 3, at 357–61, which describes examples such as Freddie Gray, Tamir Rice, Tony Robinson, Akai Gurley, Michael Brown, and Eric Garner.

## OF RACIAL IMAGERY IN SELF-DEFENSE CASES

While the proposed changes to voir dire would help address the devaluation of Black victims that often occurs in the media, this change should be accompanied by an adjustment in the rules of evidence to prohibit the introduction of racial imagery at trial. Because the language used during trial can activate jurors' racial biases and racial biases can affect jury decisionmaking,<sup>74</sup> evidence that is likely to activate jurors' biases should be inadmissible.

*A. Proposed Text of a Race Shield Law in Self-Defense Cases*

This Note proposes the following language<sup>75</sup> for a rule to ban the use of prejudicial racialized imagery in self-defense cases:

Proposed Rule 416. Self-Defense Cases: The Victim

(a) Prohibited Uses.<sup>76</sup> The following evidence is not admissible in a civil or criminal proceeding involving violence allegedly committed in self-defense:

- (1) evidence suggesting that the alleged victim's race is relevant to determining whether the defendant's apprehension of imminent or severe bodily harm was reasonable;
- (2) evidence suggesting that any racial group poses an increased danger to other citizens; and
- (3) evidence of an alleged victim's character, character trait, or propensity for criminal behavior that serves to prove anything other than the defendant's present state of mind at the time of the incident.

(b) Trial Tactics. Insinuations by counsel, at any point in front of the jury, which are intended to suggest the types of conclusions barred under (a)(1)–(3) shall also be barred under this rule.

In particular, when an alleged victim testifies as a witness, the defense on cross-examination may not:

- (1) attack the victim-witness's character for truthfulness with evidence of a criminal conviction unless the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement or if the probative value of the evidence outweighs its prejudicial effect.<sup>77</sup>
- (2) inquire into specific instances of the victim-witness's conduct unless

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<sup>74</sup> See Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 339–45 (2010) (explaining the various ways in which implicit biases influence jury decisionmaking).

<sup>75</sup> The recommended rule is structured similarly to the Rule 412 rape shield law that precludes counsel from introducing evidence related to the victim's sexual history in sexual assault cases. FED. R. EVID. 412. Subsections (a)(1), (a)(2), (b), (c)(1)(i), and (c)(1)(ii) in the proposed rule are substantially similar to the Goldstein rule. See Goldstein, *supra* note 6, at 1214–15.

<sup>76</sup> For another possible definition of the scope of "racial imagery" that should be inadmissible, see Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1799–800 (1993).

<sup>77</sup> This portion of the proposed rule is modeled after Federal Rule of Evidence 609(a) and the standards for impeaching the testimony of a testifying defendant in a criminal case.

they are probative of the character for truthfulness or untruthfulness of the witness<sup>78</sup> or relevant to a determination of the defendant's present state of mind at the time of the incident.

(c) Remedies if Inadmissible Evidence Is Introduced.

(1) Should evidence or trial tactics barred under this section be presented to the jury, the presiding judge may:

(i) declare a mistrial, or

(ii) allow the prosecution to submit character evidence regarding the defendant's possible racial motivations, and

(iii) allow the prosecution to present evidence about implicit racial bias and offer a corrective jury instruction.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

The idea of developing a rule of evidence to limit the admissibility of potentially irrelevant and prejudicial racial insinuations during trial is not novel.<sup>79</sup> This Note builds upon that previously established foundation by proposing three modifications to the rule that Goldstein proposed in order to better account for implicit racial bias. First, the scope of evidence excluded by the rule should be expanded in order to prohibit the introduction of evidence likely to activate jurors' *implicit* racial biases. Proposed subsection (a)(3) of the rule aims to address this concern by limiting the evidence that a defendant may offer about an alleged victim's pertinent traits under the exception to Rule 404.<sup>80</sup> This change will bring the rule into closer alignment with the abundance of social science research that suggests language that does not directly implicate race can still evoke stereotypic associations.<sup>81</sup> Second, the rule proposed here provides additional protection to victims who testify at trial by limiting the evidence that would be admissible to attack their character for truthfulness. Subsection (b)(1) extends a protection to victims who testify that is similar to the protection enjoyed by testifying defendants under Rule 609.<sup>82</sup> Subsection (b)(2) limits the use of specific instances of conduct to attack a victim's credibility as a witness. Third, this rule includes an additional possible remedy in the case that inappropriate evidence is admitted at trial. Subsection (c)(1)(iii) would permit the prosecution to submit evidence beyond evidence of the defendant's explicit racial biases and possible racial motivations to counteract the effect of

<sup>78</sup> This portion of the proposed rule is modeled after Federal Rule of Evidence 608. It tightens the standard for impeaching a witness with specific instances of the witness's conduct when the witness is the alleged victim of criminal activity.

<sup>79</sup> Aaron Goldstein proposed a similar addition to the Federal Rules of Evidence in 2003. See Goldstein, *supra* note 6, at 1198, 1215. Professor Kelly Strader similarly recommends a "gay shield" rule of evidence to protect victims of violence from biases based on their sexual or gender identities. See generally J. Kelly Strader et al., *Gay Panic, Gay Victims, and the Case for Gay Shield Laws*, 36 CARDOZO L. REV. 1473 (2015).

<sup>80</sup> FED. R. EVID. 404.

<sup>81</sup> See *supra* section I.B, pp. 1523–27.

<sup>82</sup> FED. R. EVID. 609.

improper evidence. This adjustment is necessary in light of the fact that the defendant's subjective decision to act could have been influenced by the victim's race even if the defendant lacked an articulable racial motivation; therefore, character evidence about the defendant's racial motivations may not be available even if racial biases were in play.

*B. Justifications for a Race Shield Law in Self-Defense Cases*

I think the hoodie is as much responsible for Trayvon Martin's death as George Zimmerman was. . . . Trayvon Martin, god bless him, an innocent kid, a wonderful kid, a box of Skittles in his hands. He didn't deserve to die. But I bet you money, if he didn't have that hoodie on that, nutty neighborhood watch guy wouldn't have responded in that violent and aggressive way.<sup>83</sup>

Statements assigning culpability to victims like Trayvon Martin for the violence that was perpetrated against them bear a striking resemblance to claims that the victims in sexual assault cases somehow invited the attack.<sup>84</sup> This type of victim-blaming motivated the rape reform movement in the 1970s during which Congress and state legislatures passed statutes intended "to end the practice of putting victims on trial" by making certain information about the victim's sexual history and prior behavior categorically inadmissible.<sup>85</sup> Since then, nearly every state has passed some form of rape shield law.<sup>86</sup> But neither Congress nor any state legislature has enacted a law to stymie the practice of "putting victims on trial" in cases where the defendant claims to have committed an act of violence in self-defense, despite the prevalence of similar victim-blaming rhetoric in this sphere. There should be a rule that limits the introduction of evidence that would activate racial biases in cases of self-defense. The federal rape shield law, Rule 412, is an example of a rule that prohibits the admission of a certain type of evidence in a particular class of cases.<sup>87</sup> The proposed law is modeled after Rule 412, and this section explores a parallel between the most common

<sup>83</sup> Ryan J. Reilly, *Geraldo Rivera: Hoodie to Blame for Trayvon Martin's Death (VIDEO)*, TPM (Mar. 23, 2012, 5:50 AM), <https://talkingpointsmemo.com/muckraker/geraldo-rivera-hoodie-to-blame-for-trayvon-martin-s-death-video> [<https://perma.cc/979C-LL56>]. Journalist Geraldo Rivera made this comment on a talk show, *Fox & Friends*, less than one week after Trayvon Martin, a seventeen-year-old Black boy, was shot and killed by George Zimmerman, a neighborhood watchman who saw Martin walking down the street and approached him. *See id.*

<sup>84</sup> Cf. Maya Oppenheim, *Majority of Men Believe Women More Likely to Be Sexually Assaulted If Wearing Revealing Clothes, Study Suggests*, INDEPENDENT (Feb. 23, 2019, 11:37 PM), <https://www.independent.co.uk/news/uk/home-news/men-sexual-assault-clothes-women-victim-blaming-rape-a8792591.html> [<https://perma.cc/G6MK-RAAP>].

<sup>85</sup> David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 *FORDHAM URB. L.J.* 305, 329 (1995).

<sup>86</sup> *See Rape Shield Law*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/rape-shield-law> [<https://perma.cc/MD9L-6XRK>].

<sup>87</sup> FED. R. EVID. 412.



justifications for rape shield laws and the arguments that could be asserted in support of a race shield law in cases of self-defense.

Common justifications for rape shield laws include:

(1) [preventing] the harassment and humiliation of the victim, (2) the exclusion of irrelevant evidence,<sup>88</sup> (3) the need to keep the jury focused on relevant issues, and (4) the furtherance of effective law enforcement by insuring that victims are not discouraged from cooperating with the police for fear of the trial.<sup>89</sup>

Other legal theorists understand the federal rape shield law as a categorical application of the balancing test mandated by Federal Rule of Evidence 403.<sup>90</sup> Under this theory, evidence of a victim's prior sexual history should be inadmissible in trials for sexual misconduct because stereotypes about women<sup>91</sup> historically linked the victim's chastity with her capacity for truthfulness.<sup>92</sup> Due to this stereotype, it was likely that evidence of the victim's prior sexual history ostensibly introduced to challenge the victim's propensity for truthfulness as a witness would be used to form conclusions about the victim's general character that would unfairly prejudice the jury in favor of the defendant.<sup>93</sup>

Many of the justifications for excluding evidence of the victim's prior

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<sup>88</sup> Federal Rule of Evidence 402 states that "[i]rrelevant evidence is not admissible," FED. R. EVID. 402, and Rule 401 defines relevant evidence as evidence that "has any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence," FED. R. EVID. 401. The assumption underlying the claim that a rape shield law can be justified as an extension of the relevance bar established by Rules 401 and 402 is therefore that a victim's prior sexual history has no bearing on whether the victim consented to the act at issue in the trial. See Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1251 (1989).

<sup>89</sup> Tuerkheimer, *supra* note 88, at 1250–51 (footnotes omitted).

<sup>90</sup> See Jason M. Price, Note, *Constitutional Law — Sex, Lies and Rape Shield Statutes: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim's Motive to Fabricate*, 18 W. NEW ENG. L. REV. 541, 573–74 (1996) (arguing that sexual history could be properly excluded under ordinary relevance rules in many cases); see also Tuerkheimer, *supra* note 88, at 1252 ("[O]ne justification for rape shield laws is that whatever relevance the prior sexual conduct of the complaining witness has, it is outweighed by the damage to her privacy interests and, as well, the confusion such evidence of prior conduct brings to the jury's deliberations.").

<sup>91</sup> This Note focuses on cases of sexual assault where the victims are female because research indicates that this is the case in over ninety percent of rape and sexual assault cases. *Statistics*, NAT'L SEXUAL VIOLENCE RES. CTR., <https://www.nsvrc.org/node/4737> [<https://perma.cc/74QZ-CGSP>].

<sup>92</sup> See Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 715 (1995) ("It was considered 'a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth . . . while it does that of a woman.'" (omission in original) (quoting *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895))).

<sup>93</sup> See *id.*; Tetlow, *supra* note 5, at 94 ("Rape shield statutes became necessary precisely because defense lawyers were effectively attacking female victims for their sexual history — sending a clear message to women that only the virtuous and conformist will be protected by juries against sexual violence."); Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 990 (2008).

sexual history in sexual misconduct cases also apply to the claim that evidence that evokes racial stereotypes in self-defense cases should be excluded through a race shield law. Specifically, evidence that evokes racial imagery could be excluded as irrelevant, overly prejudicial, or against public policy considerations.

At least one writer has suggested that a race shield law in self-defense cases could be justified because the evidence is irrelevant.<sup>94</sup> Goldstein claims that the race of the victim cannot make it any more or less likely that the defendant “reasonably” believed that he was in imminent danger unless the defense can cite “evidence that the victim’s race indeed had some bearing on the level of risk faced by the defendant,” such as statistics showing that “African Americans commit a disproportionate number of crimes.”<sup>95</sup> But even if that showing could be made, Goldstein notes that Professor Jody Armour provides a compelling argument against the relevance of any statistical relationship between Black people and crime.<sup>96</sup> Though the victim’s race may have been relevant to the question of whether the defendant subjectively believed that the victim posed an imminent threat,<sup>97</sup> that *does not* mean that the defense should be free to invoke racial stereotypes during trial in an attempt to convince jurors that the defendant’s fear was *reasonable*. Racial bias should not be a cognizable defense in the American legal system. Therefore, evidence that benefits a defendant by activating negative racial biases about the victim should not be considered relevant.

However, in the case that evidence intended to evoke racial imagery could clear the low bar set by the relevance rule, this evidence should still categorically fail the Rule 403 balancing test for admission because it has the potential to be far more prejudicial than probative.<sup>98</sup> The court may exclude evidence if its probative value is substantially outweighed by a danger of “unfair prejudice,”<sup>99</sup> with “unfair prejudice” defined in relevant part as “an undue tendency to suggest decision on an improper basis.”<sup>100</sup> Race should qualify as “an improper basis” for decision in a court,<sup>101</sup> particularly given the equal protection guarantee

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<sup>94</sup> See Goldstein, *supra* note 6, at 1216–18.

<sup>95</sup> *Id.* at 1217. And even if that showing could be made, any such statistics would also reflect racial biases at other levels of the criminal justice system such as the determination of which areas to police and which people to stop, arrest, prosecute, and ultimately convict.

<sup>96</sup> See *id.* (citing JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM* 38–42 (1997)).

<sup>97</sup> See *supra* section I.B, pp. 1523–27.

<sup>98</sup> See Goldstein, *supra* note 6, at 1218–21 (“Evidence of the victim’s race, in cases where the defendant claims self-defense, is often presented in order to pander to the fears and prejudices of the jury.” *Id.* at 1219.).

<sup>99</sup> FED. R. EVID. 403.

<sup>100</sup> FED. R. EVID. 403 advisory committee’s note.

<sup>101</sup> See Goldstein, *supra* note 6, at 1219.

embodied in the Fourteenth Amendment.<sup>102</sup>

In addition to the fact that the high potential for “unfair prejudice” warrants a categorical ban on the use of evidence and trial tactics that evoke racial imagery as an extension of Rule 403, there are also compelling public policy concerns that support the creation of a race shield law. The most obvious of these policy considerations is that invocation of racial biases during trial should be odious to the American judicial system. Jurors should not be allowed to give legal effect to race-based distinctions in self-defense cases.<sup>103</sup>

The evidence that would be prohibited by the proposed race shield law in self-defense cases likely should not make it past the Rule 402 prohibition on irrelevant evidence or the Rule 403 bar to admissibility. Yet, as demonstrated through the example of the *People v. Goetz*<sup>104</sup> case, evidence with this grand propensity to activate implicit racial biases routinely evades these procedural bars. That is why the Federal Rules of Evidence should be amended to include a more specific rule to prohibit this type of evidence.

### C. Application of the Proposed Rule of Evidence to an Example Self-Defense Case

As an example of how this rule could be applied in practice, consider how this rule would have affected the trial of Bernhard Goetz.

On the afternoon of December 22, 1984, Goetz fired five shots at Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen after one or two of the teenagers approached him and said “give me five dollars.”<sup>105</sup> While Goetz later admitted that “he was certain that none of the youths had a gun” at the time of the incident, he shot and injured each of the teens instead of simply refusing the request, paralyzing Cabey.<sup>106</sup> Goetz claimed that he shot his four victims in self-defense based on his reasonable belief that they intended to rob him.<sup>107</sup> Goetz had been mugged by Black men three years earlier, and he claimed that he could tell from the smile on Canty’s face as he approached that the

<sup>102</sup> U.S. CONST. amend. XIV, § 1; see also Tetlow, *supra* note 5, at 103–11.

<sup>103</sup> See Goldstein, *supra* note 6, at 1222 (“By not only taking the victim’s race into account but demanding that the jury do so as well, the defendant asks the court to sign into law the reasonableness of shooting an African American in the same exact situation in which one would not shoot a Caucasian.”); see also Markovitz, *supra* note 14, at 875 (“Because fears of violent crime are so deeply entwined with ‘common sense’ understandings of race and gender in American society, there is a danger that determinations of what counts as ‘reasonable’ fear may be driven, at least partly, by reliance upon racist stereotypes.”).

<sup>104</sup> *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986); see also *infra* section IV.C, pp. 1539–42.

<sup>105</sup> *Goetz*, 497 N.E.2d at 43; see also Douglas O. Linder, *The Trial of Bernhard Goetz: An Account*, FAMOUS TRIALS, <https://www.famous-trials.com/goetz/133-home> [https://perma.cc/EGJ2-VYZD].

<sup>106</sup> *Goetz*, 497 N.E.2d at 44; accord *id.* at 43–44.

<sup>107</sup> See *id.* at 47; Linder, *supra* note 105.

young men intended to “play with [him] like a cat plays with a mouse.”<sup>108</sup>

After the incident, Goetz was tried for four counts of attempted murder, four counts of assault, one count of reckless endangerment, and three counts of illegal possession of a weapon.<sup>109</sup> During the trial, defense attorney Barry Slotnick attempted to activate biases linking young Black men with criminality by referring to the victims as “‘hoodlums,’ ‘criminals,’ ‘savages,’ ‘punks,’ ‘low-lives,’ and ‘thugs.’”<sup>110</sup> He also questioned each of the testifying victims extensively about his criminal history in order to bolster the narrative that the youths were the initial aggressors.<sup>111</sup> Slotnick cross-examined victim Troy Canty about whether he had been suspended from school for beating up a teacher seven years before the altercation with Goetz.<sup>112</sup> Then, he cross-examined victim James Ramseur about whether he had warrants pending against him on the date of the incident and whether he had been convicted of rape, robbery, sodomy of a pregnant woman, assault, and possession of a weapon after the incident.<sup>113</sup>

Slotnick’s legal approach to the case was not wrong under the existing law. On cross-examination of a testifying witness, an attorney may inquire into specific instances of the witness’s conduct (such as prior criminal behavior) in order to attack the witness’s character for truthfulness.<sup>114</sup> This evidence may be admissible for one purpose, such as for witness impeachment, but inadmissible for another purpose, such as to show a victim’s propensity for criminality.<sup>115</sup> In cases where evidence has only limited admissibility, the jury is typically instructed to use the evidence only for this restricted purpose.<sup>116</sup> However, that corrective measure is unlikely to have undone the damage that admission of evidence about the victims’ criminal histories did in this case, because research indicates that limiting jury instructions that explicitly tell jurors not to allow their biases to affect their decisions are often ineffective.<sup>117</sup> In this case, it would have likely been particularly tempting for the jury

<sup>108</sup> Linder, *supra* note 105.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See id.* (noting that Slotnick “seemed much more interested in Ramseur’s criminal past than anything that happened on the subway”).

<sup>112</sup> *See* Douglas O. Linder, *The Trial of Bernhard Goetz: Testimony of Troy Canty*, FAMOUS TRIALS, <https://www.famous-trials.com/goetz/140-cantytestimony> [<https://perma.cc/LG9N-Y3FV>].

<sup>113</sup> Douglas O. Linder, *The Trial of Bernhard Goetz: Testimony of James Ramseur*, FAMOUS TRIALS, <https://www.famous-trials.com/goetz/145-ramseurtestimony> [<https://perma.cc/DZR7-A9N6>].

<sup>114</sup> *See* FED. R. EVID. 608.

<sup>115</sup> *Cf.* FED. R. EVID. 105 (relying on jury instructions to limit jurors’ use of evidence).

<sup>116</sup> *See id.*

<sup>117</sup> *See* Ingriselli, *supra* note 52, at 1729–30. *But see* Elek & Hannaford-Agor, *supra* note 52, at 121.

to use the information about the victims' criminal histories in an improper way by also factoring it into the determination of whether Goetz's fear of the victims was reasonable because the information was so damaging; in fact, it seems likely that Slotnick intended to invite the jury to make such assumptions.<sup>118</sup> Use of prior criminal history evidence in this manner would have been improper because Goetz would not have known about the victim's prior or subsequent criminal history at the time of the incident, so there is no way that information could have factored into his calculation of whether the teenagers posed an imminent danger.

The jury ultimately acquitted Goetz of all of the assault and attempted murder charges, finding him guilty on only the charge of illegally possessing a loaded firearm outside of his home or business.<sup>119</sup> Under the law, the jury's acquittal on the attempted murder charges means that the jurors accepted that Goetz reasonably believed that the youths were about to use deadly physical force against him or that the youths were attempting to rob him.<sup>120</sup> However, it seems possible that the victims' race played a role in Goetz's assessment of the situation and that the racialized imagery used by the defense team affected the jury's assessment of his self-defense claim.<sup>121</sup>

Subsection (b)(2) of the rule proposed in this Note would have prohibited Slotnick from inquiring about the alleged altercation between Canty and his teacher in 1977. A violent incident is not probative of the witness's character for truthfulness or untruthfulness, and Goetz was not aware of Canty's history when he fired his weapon at him, so this information could not have been relevant to his present state of mind. Similarly, the questions that Slotnick posed to Ramseur about his subsequent criminal convictions, particularly the rape and sodomy of a

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<sup>118</sup> Canty's possible altercation with a teacher seven years before the shooting and Ramseur's subsequent conviction for rape and sodomy seem only loosely relevant to their character for truthfulness as witnesses, but this information would likely prompt the jury to form general assumptions about the victims' propensities for criminal activity. There are contemporary examples of claims that defense attorneys introduce evidence about victims to pollute the potential jury pool. *See* Almasy, *supra* note 65 (quoting a statement from Benjamin Crump, the attorney for the Martin family, in which Crump referred to the pretrial release of irrelevant evidence about Trayvon as "a desperate and pathetic attempt . . . to pollute and sway the jury"); Meagan Flynn, *Dallas Police Shooting: Search for Marijuana in Victim's Home Was Attempt to "Smear" Him, Attorneys Say*, WASH. POST (Sept. 14, 2018, 7:11 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/09/14/dallas-police-shooting-search-for-marijuana-in-victims-home-was-attempt-to-smear-him-attorneys-say> [https://perma.cc/HM5P-CVDK].

<sup>119</sup> Margot Hornblower, *Jury Exonerates Goetz in 4 Subway Shootings*, WASH. POST (June 17, 1987), <https://www.washingtonpost.com/archive/politics/1987/06/17/jury-exonerates-goetz-in-4-subway-shootings/53973777-a617-4ed5-88ed-e841e0643746> [https://perma.cc/g6JM-P6JR].

<sup>120</sup> *Cf.* N.Y. PENAL LAW § 35.15(2).

<sup>121</sup> *See supra* section I.B, pp. 1523–27.

pregnant woman, would have been excluded as improper under subsection (b)(1). This evidence would fail both prongs of the test articulated for admissibility in subsection (b)(1) because the crimes would not qualify as crimes of dishonesty and the probative value of the evidence in illustrating the witness's character for truthfulness would certainly be outweighed by the great possibility that information about these heinous crimes would prejudice the jury against the alleged victim.

### CONCLUSION

All victims of violent crimes should enjoy the same protection, regardless of their race. But national discourse after the killings of Black people like Botham Jean, Walter Scott, Trayvon Martin, and Breonna Taylor has brought questions about racial bias, stereotypes, and assessments of dangerousness to the forefront of the national consciousness.<sup>122</sup> Is it "reasonable" to allow stereotypes about racial groups to factor into the determination of whether to fear a person in the moment? Bias-based fear should not be a legally cognizable defense even if it masquerades under the veil of "reasonableness." And if the existing legal framework will allow such fear to affect the determination about whether violence is justified in self-defense, then it must be changed in order to guarantee members of racial minority groups the full protection of the law. This Note proposes a two-pronged approach to limiting the effects of implicit racial bias on jurors' determinations in cases of self-defense so that the lives of Black victims are not discounted. First, judges should permit lawyer-led voir dire about racial assumptions and pretrial publicity about the victim so that jurors who have already had their implicit racial biases activated can be struck for cause. Second, a new rule of evidence should be adopted so that the information jurors learn about the victims during trial will not activate implicit racial biases against them.

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<sup>122</sup> Cf. Elijah C. Watson, *A Manipulation of Black Innocence: Botham Jean & How Black People Are Wrong Even When They're Not*, OKAYPLAYER (2018), <https://www.okayplayer.com/originals/botham-jean-fox-station-marijuana-tweet-reaction.html> [<https://perma.cc/5FU4-SB72>].