

**DO I LOOK LIKE I HAVE AN ATTITUDE? HOW
STEREOTYPES OF BLACK WOMEN ON TELEVISION
ADVERSELY IMPACT BLACK FEMALE DEFENDANTS
THROUGH THE IMPLICIT BIAS OF JURORS**

*Fanta Freeman**

ABSTRACT

“Do you watch television? What kind of shows do you watch on a weekly basis? Do any of the shows you watch have black female characters? If so, how are the women portrayed?” It is not typical for these questions to be asked during voir dire. Yet these questions may be imperative to identify jurors who may be biased toward black female defendants as a result of their television-watching habits. Although voir dire currently focuses on excluding jurors with blatant, egregious, and explicit biases, it has yet to normalize targeting the implicit biases of jurors, especially biases acquired through television shows.

Every criminal defendant has a constitutional right to a fair and impartial jury. However, juror bias can impinge on a juror’s ability to evaluate a defendant fairly. Research shows there is a connection between stereotypes seen on television and perceptions of people in real life. There is a severe imbalance in how black women are portrayed on television, with the negative portrayals outweighing the positive. Negative stereotypes are continuously perpetuated through the media with little positive representation to counter, leaving viewers susceptible to misinformed beliefs about black women. Considering

* Candidate for *Juris Doctor*, 2019, Drexel University, Thomas R. Kline School of Law. Firstly, I would like to thank God for not only making me a black woman, but also continuously showing me how beautiful and powerful it is to be one. I would like to thank my family, friends, coworkers, classmates, and all who have supported me through this process. I especially want to thank the Drexel Law Review for having faith in my Note and working tirelessly to ensure it was published at its best. I am so inspired by the history of black women and how it impacts how we navigate through society, and I am so grateful I have had the opportunity to share a portion of my thoughts with others through this Note. Lastly, I would like to give a shout out to all of the girls and women spreading Black Girl Magic wherever they go, keep shining.

jurors are selected from the general public, the misconceptions they may have acquired from television about black women could affect their impartiality and adversely impact black female defendants in trials.

Realizing the detrimental impact this could have on black female defendants begs the question: should voir dire be refined to target the implicit biases jurors may develop by watching television? Because a black female defendant faces a rare struggle due to the intersectionality of her identity and disposition—being black, female, and a defendant—she has the unique challenge of fighting racism, sexism, and other preconceptions and stereotypes attached to her identity. This Note will explore the history and current state of black women in society and in the criminal justice system, as well as the current state of voir dire as it relates to juror bias. Ultimately, this Note proposes changes to voir dire that could expose the discrete but salient implicit biases of jurors adversely impacting black female defendants.

TABLE OF CONTENTS

INTRODUCTION	653
I. THE RELATIONSHIP AMONG BLACK FEMALE CHARACTERS, VIEWERS, AND IMPLICIT BIAS	659
A. <i>Television Characters and Stereotypes</i>	659
1. <i>Characters on primetime and reality television</i>	659
2. <i>Jezebel</i>	660
3. <i>Sapphire</i>	661
4. <i>Black female characters and their embodiment of stereotypes</i>	663
B. <i>The Relationship of Television Viewing Statistics to Implicit Bias and Stereotypes</i>	667
C. <i>The Implicit Bias of Jurors</i>	672
II. A BRIEF HISTORY OF THE BLACK WOMAN'S INABILITY TO SEEK REFUGE IN THE LAW	673
A. <i>The Negative Relationship Between Black Women and the Law</i>	674
B. <i>Voir Dire and Juror Bias</i>	678
1. <i>Precedent discussing racial bias as it relates to voir dire</i>	682
2. <i>Explicit bias and voir dire</i>	688
III. POTENTIAL SOLUTIONS	692

A. *Alterations to Voir Dire Questions* 692
 B. *The Implicit Bias Test as a Means of Educating Jurors About Racial Bias* 700
 CONCLUSION 702

INTRODUCTION

You’ve seen her: the eye-rolling, head-bobbing, finger-wagging black¹ female who can’t seem to get along with anyone.² The woman who can’t keep her fists to herself and calls every other person a bitch. If you have caught a glimpse of reality television, you are probably familiar with this “SWA” (Sista with an Attitude).³ Reality television shows reach millions of viewers each week,⁴ but are far from reality. These shows are often heavily scripted and then heavily edited to present narratives that yield high ratings by eliciting drama, often at the expense of black women.⁵ By amplifying and highlighting negative stereotypes of black women as combative, argumentative, and loud, reality television creators have successfully attracted viewers and increased exposure to these negative stereotypes.⁶ While viewers invest themselves in what they know to be a

1. For the purposes of this Note, the use of the term “black” refers to any woman who, based on the pigmentation of her skin, would be considered of African descent. Because this Note solely focuses on American television shows and the American judicial system, the terms “black women” and “black female defendants” include, but are not limited to, African American women.

2. Teresa Wiltz, *The Evil Sista of Reality Television*, WASH. POST (Feb. 25, 2004), https://www.washingtonpost.com/archive/lifestyle/2004/02/25/the-evil-sista-of-reality-television/cb22c1dd-b4b9-4ba8-9785-925d998a7312/?utm_term=.6a6e652d2e57 (“If you’ve ever seen a reality TV show, chances are you’ve seen her: a perpetually perturbed, tooth-sucking, eye-rolling, finger-wagging harpy, creating confrontations in her wake and perceiving racial slights from the flimsiest of provocations.”).

3. *Id.*

4. See Sheila Cordray, *Reality TV—A Brief History*, OR. ST. U., <https://oregonstate.edu/instruct/soc499/cordray/media/Realitytv.html> (last visited Mar. 31, 2019).

5. Wiltz, *supra* note 2; Tom Jacobs, *Reality TV Perpetuates the Stereotype of the Angry African American*, PAC. STANDARD (Aug. 2, 2018), <https://psmag.com/social-justice/reality-tv-perpetuates-the-stereotype-of-the-angry-african-american>.

6. See generally Jervette R. Ward, *Introduction: The Real Scandal: Portrayal of Black Women in Reality TV*, in REAL SISTER: STEREOTYPES, RESPECTABILITY, AND BLACK WOMEN IN REALITY TV 1, 1–15 (2015) (explaining how the portrayal of black women in reality television perpetuates negative stereotypes and addressing the potential widespread ramifications of this portrayal).

contrived reality,⁷ “their gaze is focused on Black women,”⁸ and they may be subconsciously internalizing stereotypes, leading viewers to create or affirm beliefs about black women in society.

Reality television is defined as “programm[ing] about ordinary people who are filmed in real situations, rather than actors.”⁹ It has become a sinful pleasure, providing viewers the “ultimate escape” and allowing them to live vicariously through reality television stars.¹⁰ Reality television—which depicts anything but reality—has the potential to seem more believable than reality, especially because of its ability to respond to social issues¹¹ and its purported purpose of broadcasting the “real” lives of its cast members.¹² Despite its problematic nature, reality television has a large fan base,¹³ which suggests that the shows appeal to many different types of people—people with different levels of exposure to diverse people, experiences, and opinions.

It is possible that some viewers interact with black women on a regular basis, allowing them to cultivate non-stereotypical opinions about black women as a group.¹⁴ However, there may

7. See Arielle Tschinkel, *So, Here's the Science Behind Why We're So Obsessed with Watching Reality Shows*, HELLO GIGGLES (Jan. 10, 2018, 7:48 PM), <https://hellogiggles.com/reviews-coverage/tv-shows/science-behind-watching-reality-shows/>.

8. Ward, *supra* note 6, at 7.

9. *Reality TV*, CAMBRIDGE DICTIONARY (2019), <https://dictionary.cambridge.org/us/dictionary/english/reality-tv>.

10. Tschinkel, *supra* note 7.

11. See Eveline Versluys, *Stereotypes of African American Women in US Television: Analysis of Scandal and Hawthorne*, at 2, 9 (2014) (unpublished Masters thesis, University of Ghent).

12. See Ben Bowman, *From 'The Real World' and 'American Idol' to 'Kardashians,' How Has Real TV Changed Us?*, CHI. TRIB. (Nov. 13, 2015, 7:30 AM), <https://www.chicagotribune.com/red-eye/redeye-evolution-deevolution-of-reality-tv-20151108-story.html> (illustrating the evolution of reality television with a closer look toward popular reality television shows and discussing the spread of social awareness to viewers).

13. See *id.*

14. This concept has been discussed in the specific context of juries, with research showing that exposure to black women can impact jurors' ultimate decision in a case involving a black female defendant. See, e.g., Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. 180, 182 (2015) (“[R]esearch into jury trials demonstrates that juries formed out of all-white jury pools convict African-American defendants more often than white defendants. This phenomenon is eliminated when at least one African-American is in the jury pool. This suggests

be viewers whose exposure to black women is limited to the portrayal of black women in television and other media.¹⁵ Viewers may internalize the stereotypes of black women portrayed by reality television, buying into its false sense of reality.¹⁶ Although internalizing these stereotypes could adversely impact how people treat black women generally, jurors who internalize and act upon these stereotypes can be particularly detrimental to the treatment of black female defendants.¹⁷

This Note argues that the unconscious absorption of negative stereotypes concerning black women may leave a black female defendant more vulnerable to preconceived judgment if jurors with inaccurate beliefs are not either (1) made aware of their biases, or (2) filtered out prior to sitting on the jury. Therefore, this issue can be mitigated not only by identifying potential jurors who may have developed biases due to their television-watching habits and do not interact with black women on a regular basis, but also by creating awareness of those biases.

The jury selection process does not target implicit bias in an effective manner. If a juror believes black women are hot-tempered, combative, and uncooperative, that juror may import his or her bias, and believe punishment is appropriate without giving credence to the facts of the individual case.¹⁸ As it stands, the jury-selection process does not target implicit bias to the degree necessary to identify jurors who—due to great

that the presence of African-Americans in the jury venire can have an effect on outcomes at trial even when African-Americans are not on the jury." (footnotes omitted)).

15. Sheena Harris, *Black Women: From Public Arena to Reality TV*, in REAL SISTER: STEREOTYPES, RESPECTABILITY, AND BLACK WOMEN IN REALITY TV 16, 19 (2015) ("Black women's reality and the media's portrayal of them are sometimes at odds with one another.").

16. See *Cultivation Theory*, MASS COMM. THEORY, <https://masscommtheory.com/theory-overviews/cultivation-theory/> (last visited Mar. 26, 2019).

17. See Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 LAW & CONTEMP. PROBS. 93, 107–08 (2008); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142–46 (2012).

18. See Tameka T. Price, *The Impact of Racial Stereotyping on Juror Perception of Criminal Offenders*, at 21–28 (2017) (unpublished Ph.D. dissertation, Walden University).

exposure to stereotypes and limited exposure to black women—may be biased during decision-making.¹⁹

Because implicit bias impacts an individual's ability to be impartial,²⁰ voir dire should be executed in a way that includes targeting implicit bias.²¹ Criminal defendants have a constitutional right to trial by an impartial jury²² and juries are selected using voir dire; however, the questions asked during voir dire are not tailored to exposing implicit bias.²³ As a result, judges and lawyers can select a rather biased and partial jury.

If the judicial system does not work to identify and strike jurors with deeply-engrained biases about black women, it is violating black female defendants' constitutional right to an impartial jury.²⁴ Black women have a unique history due to the intersectional nature of their identity.²⁵ This history has led to the development of pervasive and harmful stereotypes that are unique to black women,²⁶ and for that reason, the issues facing black female defendants because of their identity warrant special attention. If implicit bias is tolerated, black women are being failed by the legal system and denied justice. Voir dire must evolve to target implicit bias in order to ensure more impartial juries.

19. *Id.* at 23–25.

20. *Understanding Implicit Bias*, KIRWAN INST. (2015), <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

21. Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 859–860 (2015).

22. U.S. CONST. amend. VI.

23. See Linda Mar, *Probing Racial Prejudice on Voir Dire: The Supreme Court Provides Illusory Justice for Minority Defendants*, J. CRIM. L. & CRIMINOLOGY 1444, 1456 (1981) (discussing a Ninth Circuit case affirming a trial court's decision to refuse to permit voir dire questions concerning the racial biases of the jurors).

24. See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (noting that a defendant's constitutional right to a fair trial can be violated by racial bias in the jury room).

25. See Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 22 (1989).

26. See MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 54–55 (2013).

Black women account for 13.7% of the U.S. population,²⁷ yet constitute 36% of female inmates in prison.²⁸ Research has not explicitly correlated negative perceptions of black women with higher rates of imprisonment and longer sentences. The racial disparity demonstrated statistically, however, suggests that factors other than the facts of a case—such as societal perceptions of black women, as argued here—contribute to the racial disparity in the prison population. Although the rate of imprisonment of black women has decreased overall, black women are still imprisoned at twice the rate of white women.²⁹ Black women are also given sentences that are, on average, four to five months longer than those given to white women.³⁰ Although this Note does not focus on the harsher sentencing of black women, these statistics demonstrate the importance of exploring the intangible factors that impact black female defendants' liberty.

Statistics demonstrate that white Americans support harsher punishments for black Americans due to their perceptions concerning the amount of crime committed by black people.³¹ In fact, one report found that “[w]hite Americans consistently overestimate the proportion of crime committed by persons of color.”³² Further, black people are more likely to be considered “violent, hostile, and aggressive” by white people.³³ The fact that non-black individuals harbor these perceptions about black

27. *Quick Take: Women of Color in the United States*, CATALYST (Nov. 7, 2018), <http://www.catalyst.org/knowledge/women-color-united-states-0>.

28. Charise Frazier, *Here Is Why Women of Color Are the Fastest Growing Jail Population*, NEWSONE (Aug. 18, 2016), <https://newsone.com/3511585/women-of-color-are-the-fastest-growing-jail-population/>.

29. *Incarcerated Women and Girls*, SENTENCING PROJECT (Nov. 2015), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>.

30. Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 JUST. Q. 1, 11 (2010); see also Ann Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERKELEY J. CRIM. L. 43, 53 (2006).

31. Lee, *supra* note 21, at 865.

32. *Id.*

33. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 833 (2012).

people emphasizes the need for voir dire to identify potential jurors who harbor implicit biases.³⁴

This Note discusses how narrating black women through two contrived stereotypes—the “Jezebel” and the “Sapphire”—can have a detrimental effect on black female defendants. Part I explores current images of black women on television and the stereotypes explicitly perpetuated through black female characters. It then discusses the television-watching habits of Americans and how these habits relate to the internalization of stereotypes and the formation of implicit bias. Part II provides a brief history of how the legal system has treated black women, including past and current case law about juror bias. It goes on to explain how discriminatory legal precedent relates to the current voir dire process. Finally, Part III of this Note analyzes how voir dire fails to attack implicit bias to the degree necessary to protect black female defendants, and argues that change is needed in the voir dire process to ensure that black female defendants are not unjustly evaluated.

While there is potential for lawyers to abuse their ability to eliminate jurors based on implicit and explicit racial bias,³⁵ this Note suggests that any information revealing juror bias not be a determinative factor for excluding a person to serve on the jury, but rather be used to identify potential jurors who may have biases toward black women. The revelation of these biases and the identification of these jurors should be followed by questions to gauge jurors’ ability to be impartial, while educating them about the impact of their implicit biases.³⁶ These additions to the voir dire process would not only inform jurors

34. Mar, *supra* note 23, at 1455 (noting that racial prejudice creates “a constant need for a searching voir dire examination” (quoting *U.S. v. Robinson*, 475 F.2d 376, 381 (D.C. Cir. 1973))).

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

36. See generally Jeff Robinson, Deputy Legal Dir., Am. Civil Liberties Union, *Jury Selection and Race—Discovering the Good, the Bad, and the Ugly* (unpublished manuscript), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_01_jpr_race_and_jury_selection_materials.authcheckdam.pdf (suggesting questions lawyers should ask prospective jurors to reveal biases).

about biases they may possess, but also challenge jurors to hold themselves accountable when evaluating the defendant.

This Note focuses primarily on non-black jurors. It functions under the assumption that non-black people have a more limited experience with and are less exposed to black people than black jurors—who not only live as black people, but are also more likely to be exposed to black women.

I. THE RELATIONSHIP AMONG BLACK FEMALE CHARACTERS, VIEWERS, AND IMPLICIT BIAS

A. *Television Characters and Stereotypes*

1. *Characters on primetime and reality television*

Reality television often portrays black women as one-dimensional characters, and one-dimensional portrayals of black women can “become[] [society’s] collective view” of black women.³⁷ Author K. Sue Jewell has argued:

Mainstream media have historically served the interest of the privileged, who have defined African American women . . . as possessing certain values, belief systems and lifestyles that do not entitle them to receive societal resources, but account for their *marginal status in salient societal institutions*.³⁸

Jewell highlights the essence of this Note to perfection. She explains that after absorbing images of black women on television, people may obtain, maintain, and affirm the belief that black women are appropriately situated in society because of their “values, belief systems, and lifestyles.”³⁹ Not only have black women not had the privilege of balanced representation,

37. Harris, *supra* note 15, at 25.

38. *Id.* at 21.

39. *Id.*

as do their white counterparts,⁴⁰ but the “contradiction of public visibility [of black women] and actual disempowerment [of black women also] remains unresolved . . . and unexamined.”⁴¹ Nonetheless, negative stereotypes have the potential to reinforce long held beliefs about “black women [being] second class citizens,” and the resulting justification of their low placement in society.⁴²

There are two main stereotypes that are relevant to this Note: Jezebel and Sapphire.⁴³ Although the inception of these stereotypes is dated, they remain relevant in the portrayal of black female characters on television.

2. Jezebel

Jezebel was a biblical character, a queen, who had a powerful influence over her husband, King Ahab.⁴⁴ She was disliked by many, and after the death of her husband, and the murder of her sons years later, she anticipated her own death shortly thereafter.⁴⁵ When the man who killed her sons, Jehu, came to her chamber to kill her, she was found sitting by her window, beautified with a painted face and flawless hair.⁴⁶ Some scholars interpret her actions as an attempt to seduce Jehu and preserve her life, hence the birth of the seductress element of Jezebel’s character.⁴⁷

40. Cynthia Davis, *The Semiotics of Fashion and Urban Success in The Real Housewives of Atlanta*, in REAL SISTER: STEREOTYPES, RESPECTABILITY, AND BLACK WOMEN IN REALITY TV 68, 71 (2015) (quoting African American actress and activist Holly Robinson Peete).

41. *Id.* (quoting author Beretta Smith-Shomade, and citing actress and activist Holly Robinson Peete’s statements to support Smith-Shomade’s assertion that black women in television are under-studied).

42. Harris, *supra* note 15, at 25.

43. Mahassen Mgadmi, *Black Women’s Identity: Stereotype, Respectability and Passionlessness (1890-1930)*, OPENEDITION.ORG (2009), <http://journals.openedition.org/lisa/806>.

44. 1 Kings 16-22; 1 Kings 21:25 (“No one else so completely sold himself to what was evil in the Lord’s sight as Ahab did under the influence of his wife Jezebel.”).

45. 2 Kings 9. The Bible does not clearly explain how Jezebel knew her death was forthcoming, only that she knew the man seeking to take the throne, Jehu, had arrived in her city and killed her sons prior to going to her chamber.

46. 2 Kings 9:30–33.

47. *Jezebel Biography*, BIOGRAPHY.COM (Apr. 2, 2014), <https://www.biography.com/people/jezebel-9354524>.

The Jezebel stereotype is a distorted characterization of black women as “primitive, lustful, seductive, physically strong, domineering, unwomanly and dirty”⁴⁸ and is prevalent on television in the form of countless characters.⁴⁹ This sexually-deviant persona harkens back to the days of Sara Baartman. Sara Baartman, a South African woman, was put on display naked in different town squares around Europe to affirm that black women are sexual deviants due to their enlarged genitalia, breasts, and buttocks.⁵⁰ Sara Baartman’s story exemplifies how black women’s physical appearance has been used to reinforce negative beliefs about black women. The Jezebel stereotype, however, has developed into a character who sexualizes herself, and is attractive, light-skinned,⁵¹ and promiscuous.⁵² She is now a temptress, and often uses her sexuality in order to reap benefits from men who are helpless victims to her allure.⁵³

3. *Sapphire*

Another pervasive stereotype is “Sapphire,” more commonly known as the “angry black woman.”⁵⁴ The name “Sapphire” is derived from a character of the same name, who appeared in the 1950’s television show *Amos n’ Andy*.⁵⁵ Sapphire “was the epitome of the angry black woman stereotype,”⁵⁶ and represents the “black bitch” image.⁵⁷ She is the woman who is volatile,

48. Mgadmi, *supra* note 43.

49. See HARRIS-PERRY, *supra* note 26, at 57; see also *The Story of a Black Woman Sarah Baartman Whose Body Was in French Zoos Being Used as an Exhibition*, FACE MALAWI (Nov. 25, 2015), <http://www.faceofmalawi.com/2015/11/the-story-of-a-black-woman-sarah-baartman-whose-body-was-in-french-zoos-being-used-as-an-exhibition/> [hereinafter *Sarah Baartman Exhibition*].

50. See HARRIS-PERRY, *supra* note 26, at 57; see also *Sarah Baartman Exhibition*, *supra* note 49.

51. See HARRIS-PERRY, *supra* note 26, at 57.

52. See *id.*; see also Marilyn Yarbrough & Crystal Bennett, *Cassandra and “the Sistahs”*: The Peculiar Treatment of African American Women in the Myth of Women as Liars, 3 J. GENDER RACE & JUST. 625, 636–38 (2000).

53. See Yarbrough & Bennett, *supra* note 52, at 637–38.

54. Versluys, *supra* note 11, at 12.

55. *Id.* at 13.

56. *Id.*

57. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 540.

difficult to get along with, verbally abusive, loud, critical, and tough-skinned.⁵⁸ The Sapphire stereotype indirectly promotes the belief that black women are emotionally irrational and devoid of sensitivity.⁵⁹ Unlike the Jezebel (and Mammy⁶⁰) stereotype, the origin of the Sapphire stereotype is unclear.⁶¹ However, the Sapphire stereotype also contains characteristics reminiscent of the slavery era.⁶²

The Sapphire stereotype seems to have developed due to the role black women played during the slavery era.⁶³ At that time, white women were considered more pure, virtuous, and dainty⁶⁴ than black women, and black women needed to “harden” or “toughen” themselves so they could work in the fields.⁶⁵ More recently, this Sapphire stereotype has evolved from black women being “tough” to being angry, specifically toward black men.⁶⁶ The societal belief that black men lacked integrity fueled the Sapphire stereotype, granting Sapphires a justification for emasculating and insulting black men.⁶⁷ Unlike the Jezebel stereotype with a clear, historically-based physical description, not much is known about Sapphire other than the fact that she has dark skin.⁶⁸

The Sapphire stereotype is present in movies and television characters like Omarosa Manigault, a contestant on the reality show the *Apprentice*.⁶⁹ On the show, contestants compete for an

58. Versluys, *supra* note 11, at 12–14.

59. *Id.*

60. The mammy stereotype is a depiction of an older black woman, devoid of sexual desire. She is portrayed as overweight, obedient, and a domestic worker. HARRIS-PERRY, *supra* note 26, at 72–77.

61. Versluys, *supra* note 11, at 12.

62. *Id.*

63. *See id.*

64. *See* Mgadmi, *supra* note 43 (“The bipolar conceptualization of Black and White womanhood assigned Black women all the negative traits of disgrace whereas White women were attributed all the idealized aspects of ‘true womanhood,’ such as piety, deference, domesticity, passionlessness, chastity, cleanness and fragility.”).

65. Versluys, *supra* note 11, at 12.

66. Yarbrough & Bennett, *supra* note 52, at 638.

67. *Id.*

68. *Id.*

69. *See, e.g., The Apprentice* (NBC television broadcast).

opportunity to be the apprentice to Donald Trump.⁷⁰ Omarosa, who successfully embodied the Sapphire stereotype,⁷¹ quickly gained a poor reputation.⁷² “She shout[ed], lie[d], undermine[d] other contestants, and earn[ed] everyone’s contempt.”⁷³ She breathed life into the Sapphire stereotype and made it seem as though she, the embodiment of the Sapphire stereotype, was a *real* black woman.⁷⁴

4. Black female characters and their embodiment of stereotypes

Some of television’s most empowering black female actresses are not exempt from having the stereotypes that plague black women written into their roles. Kerry Washington made history by being the first black female lead on a network drama in almost forty years when she was cast as Olivia Pope on Shonda Rhimes’ hit TV series, *Scandal*.⁷⁵ Olivia Pope, or “Liv,” is a crisis manager in the White House, often getting her clients out of seemingly impossible situations all while having a steamy affair with the president.⁷⁶ To some, Olivia Pope is a “shero,” a representation of an empowered woman, which could be considered a win for black women in the television industry.⁷⁷ However, she is also Jezebel and Sapphire uniquely combined into one black woman.⁷⁸

70. *The Apprentice*, IMDB, <https://www.imdb.com/title/tt0364782/> (last visited Mar. 29, 2019).

71. HARRIS-PERRY, *supra* note 26, at 92.

72. See Jack O’Keeffe, *What Happened to Omarosa on ‘The Apprentice’? ‘Celebrity Big Brother’ Is a Whole Different Ball Game*, BUSTLE (Feb. 7, 2018), <https://www.bustle.com/p/what-happened-to-omarosa-on-the-apprentice-celebrity-big-brother-is-a-whole-different-ball-game-8139288>.

73. HARRIS-PERRY, *supra* note 26, at 92.

74. See *id.*

75. Versluys, *supra* note 11, at 17; Tazina Vega, *A Show Makes Friends and History: ‘Scandal’ on ABC Is Breaking Barriers*, N.Y. TIMES (Jan. 26, 2013), <http://www.nytimes.com/2013/01/17/arts/television/scandal-on-abc-is-breaking-barriers.html> (portraying Kerry Washington’s achievement as the first black woman in a leading role on network television for the first time in more than forty years).

76. See *Scandal* (ABC television broadcast).

77. See Jennifer Zimmerman, *The Rise of the ‘Shero’ in Culture and Advertising*, FORBES (May 7, 2015), <https://www.forbes.com/sites/onmarketing/2015/05/07/the-rise-of-the-shero-in-culture-and-advertising/#63b71f2913bc>.

78. See Versluys, *supra* note 11, at 19–23. The “mammy” stereotype is not being analyzed in this Note.

Although Pope's character is not written as a "man-eating Jezebel," her relationship with the president causes others to impose that stereotype upon her.⁷⁹ Despite the president's love for Liv and emphasis on the non-sexual aspects of their relationship, Olivia is still the "whore" and the "mistress" to others.⁸⁰ Pope's character takes an interesting spin on the Sapphire stereotype. Although she is not loud and rambunctious,⁸¹ she tends to emasculate her colleagues with ease⁸² which is reminiscent of Sapphire's interactions with black men.⁸³ She is "bossy," "annoying," "guided by her emotions," and too "persistent."⁸⁴ Even Olivia Pope, with her pristine wardrobe and tall wine glass,⁸⁵ cannot escape this judgment.⁸⁶

Reality television has more directly portrayed the Sapphire stereotype, especially through shows like the *Bad Girls Club*.⁸⁷ *Bad Girls Club* puts seven self-proclaimed "bad girls" in a house together.⁸⁸ The show juxtaposes "sweeter, kinder" white bad girls with "aggress[ive], loud, . . . angry," and violent black bad girls.⁸⁹ Season one's cast was composed of a "rich, [white] spoiled alcoholic from wealthy, small town Massachusetts," a "[black] in-and-out jail bird," a "[black] stripper," and other

79. *Id.* at 19–21.

80. *Id.*

81. *Id.* at 21.

82. *Id.*

83. See Yarbrough & Bennett, *supra* note 52, at 638 (explaining how Sapphire was conceived to verbally debilitate her African American male counterpart).

84. Versluys, *supra* note 11, at 11.

85. Madison Rosinski, *A Guide to All Things Olivia Pope and Wine*, WINESTYR (Feb. 19, 2015), <https://www.winestyr.com/wine-guide/a-guide-to-all-things-olivia-pope-and-wine>.

86. See Versluys, *supra* note 11, at 28; Brandon Maxwell, *Olivia Pope and the Scandal of Representation*, FEMINIST WIRE (Feb. 27, 2013), <https://thefeministwire.com/2013/02/olivia-pope-and-the-scandal-of-representation/>.

87. See Sewit Tresfalue, *The Portrayal of Black Women in Reality TV Shows*, U. STUD.: LOOKING IN THE POPULAR CULTURE MIRROR (Dec. 4, 2016), <https://lookinginthepopularculturemirror.wordpress.com/2017/03/15/the-portrayal-of-black-women-on-tv-by-black-producers/> (explaining the purpose of the reality show to demonstrate the rehabilitating journey seven "bad girls" undertake throughout the season).

88. *Id.*

89. *Id.*

white women with miscellaneous issues.⁹⁰ As the show progressed, there were more black women added to the cast and with that, more violence, more drama, and higher ratings.⁹¹

It is important to note that negative stereotypes about black women are not limited to those shows in which black women are heavily cast or protagonists, or shows dedicated to perpetuating the stereotypes themselves.⁹² In fact, in these shows, the stereotypes are often so seamlessly woven into the black female characters⁹³ that the characters appear heroic or successful⁹⁴ while being riddled with historically-based oppressive stereotypes.⁹⁵ The fact that these stereotypes are present in leading and supporting black-female characters suggests the stereotypes, if black women are in the cast of a show, may be reaching a variety of viewers, potentially consequently enlarging the pool of biased potential jurors.

There were only two shows with black women in the March 2018 Nielson Report of the top ten primetime shows: *Bull*, a show that follows the life of the founder of a trial consulting firm,⁹⁶ and the *Good Doctor*, a show about a young doctor with

90. Elijah Mercer, *Good Girls Gone Bad: Race and Gender in Oxygen's The Bad Girls Club*, INQUIRIES J. (2012), <http://www.inquiriesjournal.com/articles/668/good-girls-gone-bad-race-and-gender-in-oxygens-the-bad-girls-club>.

91. *Id.*

92. This Note does not suggest the presence of negative stereotypes is always negative for black women. In some ways, the presence of such stereotypes highlights the complexity and beauty of black women as people. However, it is not the stereotypes themselves that are the issue, but rather the imbalance of positive and negative portrayals of black women. See generally Jacobs, *supra* note 5 (detailing a recent study finding "African Americans on reality television are more likely to be both the victim and perpetrator of verbal aggression").

93. Davis, *supra* note 40, at 71 ("[I]n the case of African American women on television, the 'contradiction of public visibility and actual disempowerment remains unresolved . . . and unexamined.'). Unlike black women, white women have roles in which they are portrayed as leaders and entrepreneurs. Hence their antics are diluted due to balanced representation, a privilege black women do not currently have.

94. E.g., Zimmerman, *supra* note 77.

95. See Mgadmi, *supra* note 43, at 15 ("[T]he politics of respectability first emerged as a way to counter the negative stereotypes of Black Americans as lazy, stupid and immoral, as well as the racist discourses of the nineteenth century. Paradoxically, this tactic also reflected an acceptance and internalization of such representations by attempting to reform the behavior of individuals and erasing structural forms of oppression such as racism, sexism and poverty.').

96. See *Bull* (CBS television broadcast).

autism.⁹⁷ In these shows, the supporting black female characters contain hints of historically-based stereotypes of black women.⁹⁸

For example, in the *Good Doctor*, Antonia Thomas, a black woman, plays Claire, a loving, caring, and hard-working woman who is the only female on her medical team.⁹⁹ While this is precisely the type of positive portrayal black women need, even Antonia Thomas's character is not exempt from stereotypes.¹⁰⁰ Although Claire has a big heart, "she's pretty shut off and she can't connect"¹⁰¹ in her personal life, qualities similar to those of Olivia Pope (from *Scandal*) who was described as emotionless and cold; a true Sapphire woman.¹⁰² The discrete inclusion of these stereotypes in mainstream television shows disguises the stereotypes themselves, normalizing the stereotypes and presenting them as actual characteristics of black women which can ultimately make the character more believable.¹⁰³ While these characteristics can be found in black women, or all women, the consistent and constant inclusion and normalization of these stereotypes, without the presence of

97. Paulette Cohn, *Antonia Thomas Reveals What's Coming Up on The Good Doctor and Lovesick*, PARADE (Jan. 1, 2018, 10:05 AM), <https://parade.com/633849/paulettcohn/antonia-thomas-reveals-whats-coming-up-on-the-good-doctor-and-lovesick/>.

98. See, e.g., *id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Although this Note is not focused on portrayals of black women in the news, it is important to note that new stories also frame and promote narratives of black women that are present in the television shows being discussed. Maxine Waters, Michelle Obama, and Cynthia McKinney were women who came up in a Fox news cast. HARRIS-PERRY, *supra* note 26, at 87. In the course of the story, these women, in some form or fashion, along with other black women in the news were said to "usually be angry about something. They've had a son who has been shot in a drive by shooting. They are angry at Bush. So you don't really have a profile of non-angry black women . . . [except] Oprah Winfrey." *Id.* To oversimplify the emotion of these women, misinterpret their passion and *joie de vivre* for their work, and simply classify them as angry demonstrates the scope of the angry black woman stereotype, derived from fiction yet transferred on to political figures. *Id.*; Versluys, *supra* note 11, at 13.

103. See generally Narissa M. Punyanunt-Carter, *The Perceived Realism of African American Portrayals on Television*, 19 HOW. J. COMM. 241 (2008) (detailing the findings of a study which examined the impact negative portrayals of African Americans on TV had on college students' perceptions of black people in America).

alternative and more favorable characteristics, is the danger this Note argues poses a risk to the perceptions of black women.

B. *The Relationship of Television Viewing Statistics to Implicit Bias and Stereotypes*

Statistics about the television-viewing habits of Americans support the contention that millions of Americans may regularly consume negative stereotypes about black women.¹⁰⁴ Although the presence of black actresses has increased on television, the quality of the portrayals have not.¹⁰⁵ This is particularly concerning because television shapes ideas and perceptions about black people, especially for viewers who do not regularly encounter and interact with black people.¹⁰⁶ The portrayals of black people on television and the stereotypes that viewers develop are closely linked.¹⁰⁷ White Americans in particular are more likely than other race to draw negative conclusions based on the negative portrayals of black people on television,¹⁰⁸ hence this Note's focus on non-black jurors and how they evaluate black female defendants.

Overall, research shows that negative images and portrayals of black people on television misshape perceptions.¹⁰⁹ A study was conducted to determine whether college students' perceptions of black people were impacted by exposure to negative portrayals of black people.¹¹⁰ The study focused on four types of portrayals of black characters, those: (1) in occupational roles, (2) with negative personality characteristics, (3) with low

104. See *Daily Time Spent Watching TV Per Capita in the United States from 2013 to 2020 (in Minutes)*, STATISTA, <https://www.statista.com/statistics/186833/average-television-use-per-person-in-the-us-since-2002/> (last visited Mar. 27, 2019).

105. Punyanunt-Carter, *supra* note 103, at 242.

106. *Id.* at 244; see also Yurii Horton et al., *Portrayal of Minorities in the Film, Media, and Entertainment Industries*, EDGE (June 1, 1999), https://web.stanford.edu/class/e297c/poverty_prejudice/mediarace/portrayal.htm.

107. Horton et al., *supra* note 106.

108. *Id.*

109. Punyanunt-Carter, *supra* note 103, at 242.

110. *Id.* at 246.

achievements, and (4) with positive stereotypes.¹¹¹ The Perceived Realism Scale (PRS) was used to measure how real students believed the images and portrayals of the black characters to be.¹¹² Using a series of statements to assess the students' perceived realism,¹¹³ researchers found that the black characters in occupational roles and with negative personality traits were considered an accurate reflection of black people in real life.¹¹⁴ The students also believed the positive stereotypes associated with black people on television were not realistic or accurate depictions of black people in real life.¹¹⁵

Consider the information above with the following statistics: there are an estimated 119.6 million American households with a television.¹¹⁶ In 2017, American consumers averaged three hours and fifty-eight minutes of daily television watching time.¹¹⁷ Furthermore, in 2017, 89% of consumers, ages eighteen to over-fifty, watched television at least once a week.¹¹⁸ Based on these statistics, it follows that there is a *possibility* 89% of the eighteen to over-fifty population are exposed to negative images of black women on television *if* they are watching shows with black female characters. Consequently, these viewers may develop negative stereotypes about black women.

The PRS indicated that viewers had negative beliefs and low expectations of black people in real life due to the negative portrayals of black people on television.¹¹⁹ If jurors, like the

111. *Id.*

112. *Id.* at 247.

113. These include statements such as “[t]he people I see on TV are just like people I meet in real life” and “[t]he programs I see on TV tell about life the way it really is.” *Id.* at 245.

114. *Id.*

115. Viewers believed the “low-achieving status” of black people was not true to reality, perhaps because of high profile black people and entertainers. *Id.* at 247.

116. *Number of TV Households in the United States from Season 2000-2001 to Season 2017-2018 (in Millions)*, STATISTA, <https://www.statista.com/statistics/243789/number-of-tv-households-in-the-us/> (last visited Mar. 29, 2019).

117. *Daily Time Spent Watching TV Per Capita in the United States from 2010 to 2018 (in Minutes)*, STATISTA, <https://www.statista.com/statistics/186833/average-television-use-per-person-in-the-us-since-2002/> (last visited Mar. 29, 2019).

118. *Weekly TV Reach in the United States in March 2017, by Age*, STATISTA, <https://www.statista.com/statistics/468360/tv-reach-usa/> (last visited Mar. 29, 2019).

119. Punyanunt-Carter, *supra* note 103, at 251–52.

average television watcher, are consistently exposed to negative portrayals of black women, they may potentially internalize these negative, broadcasted stereotypes, develop misinformed beliefs about black women, and impose these beliefs upon black female defendants. Furthermore, and most importantly, jurors may not recognize that watching television influences how they evaluate a defendant, which would cause them not to hold themselves accountable for potential biases they may have developed. Howard University professor Tia Tyree embodies this concept well, stating:

When African Americans are framed in stereotypical ways within reality television, those actions and behaviors can be translated as “real” elements of the programming by those who engage in the people-watching process. Further, if these distorted negative images of African Americans go unchecked in the lives of some audience members, it can cause issues when they interact with members of the stereotyped group.¹²⁰

Therefore, potential jurors’ exposure to negative stereotypes exhibited in reality television could inform their decisions when determining the criminal culpability of a black female defendant.¹²¹

The Cultivation Theory partially explains the concern with jurors unknowingly imposing skewed beliefs about black women onto black-female defendants. The late George Gerbner, a researcher and professor, developed the Cultivation Theory to

120. Ward, *supra* note 6, at 6.

121. The Jury Act, codified in title 28 of the U.S. Code, requires that juries be selected from a pool of competent citizens who are at least eighteen years old. *FAQs: Juror Information*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/faqs-juror-information> (last visited Mar. 29, 2019). While a little under thirty-two million citizens are summoned for jury duty each year, only 1.5 million citizens are ultimately impaneled for trial. JUDGE GREGORY E. MIZE ET AL., CTR. FOR JURY STUDIES, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: EXECUTIVE SUMMARY 1, 2* (2007), http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/sos_exec_sum.ashx.

explain how television impacts our perceptions of reality.¹²² This theory is premised on the belief that our perception of reality is largely cultivated by the images to which we are exposed on television.¹²³ Viewers are susceptible to unknowingly absorbing information from the media and eventually believing the information accurately reflects real life.¹²⁴ To some degree, this phenomenon depends on how realistic a person believes television images are,¹²⁵ but at face value, the Cultivation Theory is “about the implications of stable, repetitive, pervasive, and virtually inescapable patterns of images and ideologies that television provides.”¹²⁶ The media reinforces societal attitudes through images, viewers capture these images, and the images become cultivated beliefs about reality.¹²⁷ Despite the critiques of Cultivation Theory, the most relevant being that researchers fail to consider other factors that contribute to viewers being affected by the media, researchers continue to support the belief that television greatly influences people’s beliefs about reality.¹²⁸

Television has also been considered a storyteller, a method of providing information, entertainment, and access to society,¹²⁹ and its increasingly integral role in society allows for more ideas to be influenced. The late Michael Novak, a noted cultural theorist, suggests we are what we watch, stating:

122. See generally George Gerbner et al., *Living with Television: The Dynamics of the Cultivation Process*, in PERSPECTIVES ON MEDIA EFFECTS 17 (Jennings Bryant & Dolf Zillman eds., 1986) (coining the term “cultivation” to explain that television contributes to conceptions of social reality).

123. Punyanunt-Carter, *supra* note 103, at 244–46.

124. *Cultivation Theory*, *supra* note 16.

125. Punyanunt-Carter, *supra* note 103, at 245.

126. JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS: CULTIVATION THEORY AND RESEARCH 5 (1999).

127. *Cultivation Theory*, *supra* note 16; see also SHANAHAN & MORGAN, *supra* note 126, at 17 (explaining that the theory, much like the word “cultivate,” implies a “slow, steady and cumulative internalization” of the images people are exposed to through television).

128. See *Cultivation Theory*, COMM. STUD., <http://www.communicationstudies.com/communication-theories/cultivation-theory> (last visited Mar. 29, 2019). See generally SHANAHAN & MORGAN, *supra* note 126.

129. Gerbner et al., *supra* note 122, at 18–20.

If you practice the craft of writing sedulously, you begin to think and perceive differently. If you run for twenty minutes a day, your psyche is subtly transformed. If you work in an executive office, you begin to think like an executive. And if you watch six hours of television, on the average, every day . . . ?¹³⁰

When our days are spent engaging in this particular “practice”—watching television—this practice can influence how “we think of ourselves, our lives, our society, and our world,” and ultimately, how we judge others.¹³¹ Although television is not the sole means through which viewers may develop biases, viewers may develop more, or reinforce, biases through television.¹³² Because biases based on negative stereotypes have the potential to breed prejudice, they could affect people’s behavior toward others, perceptions of others, and conclusions drawn about others.¹³³ Jurors are expected to maintain a level of impartiality, but they are not exempt from internalizing the stereotypes they see on television, and they are not required to abstain from this pastime which could taint their ability to be neutral.¹³⁴ However, as it stands, the biases a juror may have developed through television will (likely) not prevent him from sitting on a jury considering his biases will (likely) not be revealed through general voir dire questioning.

130. SHANAHAN & MORGAN, *supra* note 126, at 2.

131. *Id.* Studies also show that once children are exposed to stereotypes of others through television, especially people with whom they have had little to no contact, these misconceptions become “self-perpetuating,” suggesting that the reality created by television will be reflected on to real life, making it more difficult to distinguish fact from fiction. See Horton et al., *supra* note 106.

132. See *Cultivation Theory*, *supra* note 128.

133. See, e.g., CHERYL STAATS ET AL., KIRWIN INST. FOR THE STUDY OF RACE AND ETHNICITY, OHIO STATE UNIV., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 24 (2017), <http://kirwaninstitute.osu.edu/implicit-bias-training/resources/2017-implicit-bias-review.pdf>.

134. See Gillian Daly & Rosemary Pattenden, *Racial Bias and the English Criminal Trial Jury*, 64 CAMBRIDGE L.J. 678, 680 (2005).

C. *The Implicit Bias of Jurors*

All people have biases,¹³⁵ and jurors cannot be faulted for bringing their biases into the courtroom. Implicit biases are the “attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”¹³⁶ It is possible that, due to implicit biases, jurors decide their votes based on the defendant’s race, class, and more, prior to the commencement of trial.¹³⁷ Implicit biases can also impact how jurors evaluate the accused’s (and the witnesses’) credibility.¹³⁸ Implicit bias not only impacts the outcome of a trial, but also how the jury understands the evidence and arguments presented during the trial.¹³⁹ For example, implicit bias

can affect how jurors react to assertions that someone acted in self-defense[,] . . . that there was excessive force by the police[,] . . . whether there really is a presumption of innocence . . . [and] whether the jury believes that remaining silent, which is a defendant’s constitutional right, is an admission of guilt.¹⁴⁰

Implicit bias is particularly important in a trial setting because of the ability of biases to change how jurors empathize with defendants.¹⁴¹ Our survival instincts teach us to be wary of people with whom we do not physically identify, which has led to ingroup/outgroup bias research—specifically, research focused on the biases that lead people to judge those with whom

135. *Understanding Implicit Bias*, *supra* note 20.

136. *Id.*

137. *See* Lee, *supra* note 21, at 843–47.

138. *See* Richard Gabriel, *Race, Bias and the Zimmerman Jury*, CNN (July 16, 2013, 4:14 PM), <https://www.cnn.com/2013/07/16/opinion/gabriel-bias-zimmerman>. (explaining the potential implicit racial bias that likely influenced the jury paneled for George Zimmerman’s trial for the murder of Trayvon Martin).

139. Roberts, *supra* note 33, at 837.

140. *Id.* (quoting Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama’s Election*, 37 N. KY. L. REV. 243, 256–57 (2010)).

141. *See* Gabriel, *supra* note 138.

they identify (their ingroup) more favorably than those with whom they do not (their outgroup).¹⁴² Additionally, racial identity is often indicative of shared culture, experiences, and values.¹⁴³ For that reason, jurors are more likely to empathize with those with whom they racially identify.¹⁴⁴ While empathy can lead to favorable treatment amongst similar individuals, it can also cause hostile feelings about different individuals to fester.¹⁴⁵

Studies have shown that implicit biases also amplify perceptions of behavior, causing white people to believe behavior is more hostile coming from black actors.¹⁴⁶ This Note recognizes the difficulty in detecting implicit bias, as implicit bias is by nature incompatible with self-reporting.¹⁴⁷ In response, this Note suggests a way in which voir dire may be altered to address the discrete yet powerful presence of implicit bias in the courtroom.

II. A BRIEF HISTORY OF THE BLACK WOMAN'S INABILITY TO SEEK REFUGE IN THE LAW

Stereotypes about black women have historically impacted the level of legal protection black women receive.¹⁴⁸ The courts have also historically ignored black women's need for legal protection.¹⁴⁹ Failing to protect black women from the harsher treatment they may receive from heavily-biased jurors is a new-age form of the historical disregard the courts have displayed for black women.

142. *Id.*

143. *See id.*; *see also* Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 893 (1996).

144. Linder, *supra* note 143, at 900.

145. *Id.* at 893.

146. Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 CT. REV. 116, 117 (2015) (describing how implicit biases and stereotypes can influence how people interpret ambiguous behaviors).

147. *Understanding Implicit Bias*, *supra* note 20.

148. *See infra* Section II.A (exploring the history of black women and the law's failure to protect them).

149. *See* HARRIS-PERRY, *supra* note 26, at 55.

A. *The Negative Relationship Between Black Women and the Law*

There is a well-documented “tendency of white jurors to treat black defendants more harshly than white defendants.”¹⁵⁰ In her book *Sister Citizen*, Melissa Harris-Perry explores the position of black women in society, specifically how black women relate to society and how they engage politically.¹⁵¹ Perry outlines the history of how black women have been treated in America, focusing on the relationship to their white counterparts.¹⁵² She goes on to explain how the negative stereotyping of black women’s characteristics translated into poor treatment and weak protection from the law.¹⁵³

The differences between how black women and white women are treated not only date back to the slavery era but are also deeply-engrained in historical beliefs about black femininity. During the slavery era, white women set a wholesome, virtuous standard for femininity while the black female body was put on display.¹⁵⁴ Black women were publicly characterized as sub-human due to their voluptuous features and sexual organs.¹⁵⁵ This later primed and reinforced the perception that black women did not deserve full legal protection, particularly in relation to crimes of sexual violence.¹⁵⁶

The juxtaposition of black women as brute sexual beings against a “pure,” “Victorian,” and “white” standard of sexuality emphasized the discrepancy between the perceptions of black women and white women.¹⁵⁷ In the nineteenth and early twentieth centuries, this conceptualization of womanhood, based on stereotypes about black women and white women, placed black women at one end of a spectrum — associated with

150. Linder, *supra* note 143, at 901.

151. See generally HARRIS-PERRY, *supra* note 55, at 55 (explaining the traditions, culture, and issues surrounding the lives of African American women in today’s society).

152. See generally *id.* (providing insight into how African American women were treated throughout history and how such treatment affects stereotypes today).

153. *Id.*

154. *Id.*

155. See *Sarah Baartman Exhibition*, *supra* note 49.

156. HARRIS-PERRY, *supra* note 26, at 54–55.

157. *Id.* at 55.

negative traits—while white women were placed at the other end of a spectrum—associated with the expected standard of femininity.¹⁵⁸

These societal beliefs prevented black women from seeking legal protection, specifically in regard to crimes of sexual violence.¹⁵⁹ The hypersexualized image of black women has continuously been used as a means to minimize the intensity of the sexual violence experienced by black women at the hands of men, both black and white.¹⁶⁰ For example, black women were perceived and stereotyped as promiscuous; thus, rape laws were not enforced when the victim was a black woman, because black women *could not be raped*.¹⁶¹ As a result, black women received less sympathy from the judge and jury during sexual violence trials.¹⁶²

Black female defendants have also historically received harsher sentences in criminal trials.¹⁶³ For example, from 1794 to 1835, black female defendants had fewer cases dismissed than any other race or gender, and 72% of black female defendants who faced jury trials were ultimately convicted.¹⁶⁴ This was pervasive throughout the North, South, and Midwest.¹⁶⁵ Black women were not only convicted at a high rate and given longer sentences than any other race or gender—they were also placed in separate correctional facilities, called “custodial institutions.”¹⁶⁶ Considering this history, it is apparent black women have historically lacked the ability seek protection or remedy under the law.

158. Mgadmi, *supra* note 43.

159. HARRIS-PERRY, *supra* note 26, at 56–57.

160. *See, e.g., id.* at 53–55 (discussing the cases of Justice Clarence Thomas and Mike Tyson, two instances where black women launched sexual assault allegations against two well-known black men).

161. *Id.* at 56–57.

162. Kali Nicole Gross, *African American Women, Mass Incarceration, and the Politics of Protection*, 102 J. AM. HIST. 25, 30 (2015).

163. *Id.* at 29.

164. These facts are specific to Philadelphia. *Id.*

165. *Id.*

166. *Id.* at 29–30.

More than 200 years later, it is evident that black women, by default, do not make for sympathetic victims.¹⁶⁷ Marissa Alexander, a mother from Jacksonville, Florida, was sentenced to twenty years in prison for firing a warning shot to protect herself from her abusive husband.¹⁶⁸ Despite her abuse being documented over time, the gun being legally-owned and registered, and no resulting casualties or harm, Marissa Alexander's "Stand Your Ground" defense failed.¹⁶⁹ However, that same year, the "Stand Your Ground" defense was successfully used by George Zimmerman, a white Hispanic man, as a defense to shooting and killing a black teenager, Trayvon Martin.¹⁷⁰ Marissa Alexander's trial raised many questions, not only because her "Stand Your Ground" defense failed, but also because the jury handed down a guilty verdict after only twelve minutes.¹⁷¹ Twelve minutes. On appeal, the judge remanded the case and ordered Alexander be given a new trial due to erroneous jury instructions.¹⁷² The jury was improperly instructed that Alexander must prove, "beyond a reasonable doubt," that she was acting in self-defense *and* the victim must have been injured for the defense to stand.¹⁷³ Alexander eventually accepted a plea deal, and has used her experience as a platform

167. A study discussing the racialization of Hurricane Katrina's media coverage found that media coverage of black woman recovering from the natural disaster provoked less sympathy and a belief that the government did not need to support recovery efforts as heavily. HARRIS-PERRY, *supra* note 26, at 155.

168. Angela Helm, *Marissa Alexander Speaks: The Current System Is 'a Mess,'* ROOT (Mar. 19, 2017, 9:34 AM), <https://www.theroot.com/marissa-alexander-speaks-the-current-system-it-s-a-m-1793417682>.

169. Lindsay Peoples, *Marissa Alexander Fired a Warning Shot at Her Abusive Husband and Was Sentenced to 20 Years. Now She's Free.*, CUT (Mar. 29, 2017), <https://www.thecut.com/2017/03/marissa-alexander-case-stand-your-ground-florida.html>.

170. See Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (May 23, 2012, 10:48 AM), <https://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html> (noting that the trial continued until July 2014); see also Greg Botelho & Holly Yan, *George Zimmerman Found Not Guilty of Murder in Trayvon Martin's Death*, CNN (July 14, 2013, 11:50 AM), <https://www.cnn.com/2013/07/13/justice/zimmerman-trial/index.html>.

171. Peoples, *supra* note 169.

172. Sha Be Allah, *Justice Is Served: Court Finally Overturns Marissa Alexander's 20 Year Sentence*, SOURCE (Oct. 17, 2014), <http://thesource.com/2014/10/17/justice-is-served-court-finally-overturns-marissa-alexanders-20-year-sentence/>.

173. *Id.*

from which she provides support for victims of domestic violence.¹⁷⁴

Although the original jury's verdict did not stand, it is worth examining the message the jury sent by administering such a hasty decision. Marissa Alexander's case demonstrates the political impasse and the "exclusionary politics" unique to black women: they are "not entitled to the law's protection" but are still susceptible to the law's consequences.¹⁷⁵ Alexander's gun was legally owned, she rightfully invoked the Stand Your Ground defense, and there were no injuries or deaths as a result of her firing the warning shot.¹⁷⁶ While these facts do not entitle Alexander to a presumption of innocence, they do demonstrate that Alexander's actions were in accordance with the law. With all facts considered, one can only speculate as to the jury's reasoning for declaring Alexander guilty in such a short amount of time. She was a sympathetic, battered woman who fired a warning shot out of desperation.¹⁷⁷ However, Alexander's case may highlight a discrete, lethal mentality that has plagued black women in times past and does still: "there is something about *her* that makes her *deserve* this."

The jury's haste to convict Alexander begs one to wonder what about her case—or possibly *her*—prompted the jury to convict her. For some defendants, jurors' decisions turn on the fact that "jurors bring to the courtroom biases and predispositions [independent from the facts of the case] which largely determine the outcome of the case."¹⁷⁸ Black women have historically "battled a general presumption of their guilt, owing to commonly held notions of their low character and lack of

174. MARISSA ALEXANDER JUSTICE PROJECT, <https://marissaalexander.org/who-we-are/> (last visited Apr. 8, 2019).

175. Gross, *supra* note 162, at 25.

176. Helm, *supra* note 168.

177. Allah, *supra* note 172 (explaining that Alexander's "estranged husband saw the gun and lunged at her, 'in a rage,' yelling, 'B-----, I'll kill you'").

178. Lee, *supra* note 21, at 847 (quoting Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 576 (1985)).

morality, as well as to the popularity of racialized caricatures depicting their purported fiendish, criminal ways.”¹⁷⁹

Juror bias is more than a fabricated belief: the scale may tip toward guilt simply because of any one juror’s implicit bias toward the defendant’s identity. While racial juror bias has been presented and discussed in select case law,¹⁸⁰ television watching habits, internalization of stereotypes from television, and juror implicit bias have not been greatly researched. However, the discrepancies between how black and white women have been, and continue to be, treated supports the hypothesis that stereotyped black female identities may have played a role in how jurors evaluate black female defendants. These historical stereotypes continue to develop and be reinforced through the media to which jurors are exposed.¹⁸¹ Therefore, voir dire must be altered to better identify jurors with problematic, inaccurate beliefs about black women who, as a result, may treat black female defendants more harshly.

B. *Voir Dire and Juror Bias*

It is possible for voir dire to target juror bias, explicit and implicit, but only at the discretion of a trial judge.¹⁸² The trial judge decides the scope of the attorneys’ involvement during voir dire, including if the attorneys conduct voir dire at all.¹⁸³ If the judge does allow the attorneys to conduct voir dire, she still has the ability to control the content and number of questions

179. Gross, *supra* note 162, at 26.

180. See, e.g., Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (holding that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee”).

181. See Andrea D. Lyon, *Mixed Media: Popular Culture and Race and Their Effect on Jury Selection*, 58 DEPAUL L. REV. 681, 683–84 (2008).

182. See Beverley Petersen Jennison, *Trial Court Discretion in Conducting the Voir Dire Subjected to More Stringent Scrutiny*, 33 CATH U. L. REV. 1121, 1123 (1984).

183. Brian J. McKeen & Phillip B. Toutant, *The Case for Attorney-Conducted Voir Dire*, MICH. BAR. J. (Nov. 2011), <https://www.michbar.org/file/journal/pdf/pdf4article1936.pdf> (explaining one state’s system of voir dire).

asked.¹⁸⁴ This means that a judge may preclude and include questions targeting juror bias as appropriate, preventing jurors with implicit and explicit bias from joining the jury.¹⁸⁵

The voir dire process begins with lawyers and/or judges questioning a group of jury-eligible citizens to determine which citizens can form an impartial jury.¹⁸⁶ After they are selected, the jurors are placed in the jury box, and the judge will explain the case generally and ask questions to determine whether any potential juror has conflicts that would make him unable to serve.¹⁸⁷ The lawyer will then, with the judge's permission, ask the potential jurors questions to determine who is capable of being impartial when determining and weighing the facts presented at trial.¹⁸⁸

In federal court, judges generally conduct voir dire, which often involves the judge inquiring into potential jurors' experiences and lifestyles, and whether the juror believes he or she can be impartial when considering the facts.¹⁸⁹ If the potential juror answers affirmatively, the judge will likely choose that potential juror to serve on the jury, unless he or she is permissibly stricken by a lawyer.¹⁹⁰ Judges tend to avoid prying into the private lives or psyches of jurors which, in turn, may make judges hesitant to ask jurors questions about implicit and explicit bias.¹⁹¹

The purpose of voir dire questions is to reveal jurors' biases in order to remove jurors who cannot be impartial.¹⁹² However, the questions asked during voir dire require jurors to assess their own ability to be impartial, rather than inquiring about

184. Jennison, *supra* note 182, at 1123.

185. *Id.*; see also Michael D. Mulvaney & John A. Little, Jr., *The Importance of Voir Dire: Essential Techniques for Choosing Finders of Fact*, 39 AM. J. TRIAL ADVOC. 313, 316 (2015).

186. See Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI-KENT L. REV. 1179, 1182–84 (2003).

187. *Id.*

188. *Id.*

189. Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI-KENT L. REV. 927, 931 (2015).

190. See *id.*

191. See *id.* at 931, 933.

192. *Id.* at 929–30.

aspects of the jurors' lives that may prevent them from being neutral.¹⁹³

Although lawyers are not required to ask potential jurors about their television-watching habits, the influence of daily media consumption on a juror's perception of a defendant and ability to be impartial cannot be underestimated. Courts may not be able to deconstruct a potential juror's beliefs about black women during voir dire, but they can gain insight into how prospective jurors perceive black women based on the juror's exposure to black women. Consequently, courts can use that information to determine whether a juror has developed perceptions that indicate they harbor implicit biases, and whether a juror could impartially evaluate a black female defendant.

Implicit biases cannot be self-reported because they cannot be discovered through introspection.¹⁹⁴ They are held unconsciously, which means jurors are incapable of reporting their biases or ability to be impartial.¹⁹⁵ Not only are jurors asked to assess their impartiality, but they are also asked to do so *amongst others and in real time*, which doesn't allow for thorough self-reflection.¹⁹⁶ Furthermore, jurors are unlikely to reveal socially unacceptable beliefs and ways of thinking in front of the other potential jurors and the judge.¹⁹⁷

The fate of black female defendants cannot rely on a single judge's decision to permit questions that will reveal juror bias. Potential jurors should always be asked about aspects of their lives, especially television and media habits, which may cause implicit biases to develop.¹⁹⁸ If judges do not feel comfortable inquiring into juror bias, they should not, at the very least, have the ability to deny lawyers an opportunity to ask such

193. *See id.* at 933–34 (“Voir dire, as it is currently practiced, depends on prospective jurors being able to decide whether they have any biases that will affect their judgment in a particular case.”).

194. *Understanding Implicit Bias*, *supra* note 20.

195. *See id.* (noting one's implicit biases are unintentional and occur without voluntary control).

196. Marder, *supra* note 189, at 933.

197. *See id.*

198. *See supra* Section I.B.

questions. To do so should be considered an abuse of judicial discretion or unsatisfactory voir dire.

*Cordero v. United States*¹⁹⁹ provides an example of a court tackling the issue of abusive judicial discretion during voir dire. In *Cordero*, the trial judge failed to ask jurors any questions that would indicate potential political biases,²⁰⁰ and the defendant, Rowland Cordero, believed this failure was a violation of his rights.²⁰¹ The D.C. Court of Appeals agreed with Cordero and stated that, although the trial judge was acting within his discretion, voir dire was unsatisfactory.²⁰² The Court held that the trial judge should have asked questions to weed out jurors who held certain political views, especially since the defendant requested these questions be asked.²⁰³

Accordingly, the *Cordero* court created the “essential fairness” standard, which could be used in the face of “substantial prejudice to the accused’s rights.”²⁰⁴ This new standard circumscribed the trial court’s discretion, indirectly forcing trial judges to be more intentional about their questioning during voir dire, especially as it pertained to juror bias.²⁰⁵

Intentional and meaningful questions are necessary to reveal unconscious biases and prejudices that jurors choose not to expose.²⁰⁶ Furthermore, they can reveal biases and stereotypes jurors construe as facts, a mentality that would lead jurors to poorly self-assess because they would not consider themselves

199. 456 A.2d 837 (D.C. 1983).

200. *Id.* at 838–39.

201. *Id.* at 841.

202. *Id.* at 845; Jennison, *supra* note 182, at 1130–31.

203. Jennison, *supra* note 182, at 1131.

204. *Id.*

205. *See id.* at 1134 (“In order to comply with the *Cordero* test, the trial judge must examine prospective jurors more fully with regard to potential areas of prejudice.”).

206. *See generally* Ronald J. Matlon, *Strategies for More Effective Voir Dire*, JURY EXPERT (Aug. 1, 2013), <http://www.thejuryexpert.com/2013/08/strategies-for-more-effective-voir-dire/> (offering recommendations to create effective change in voir dire proceedings); *see also* Mar, *supra* note 23, at 1456 (“We do not believe that a prospective juror is so alert to his own prejudices.” (quoting *U.S. v. Dellinger*, 472 F. 3d. 340, 367 (7th Cir. 1972))).

biased, but instead knowledgeable about people of different races.²⁰⁷

1. *Precedent discussing racial bias as it relates to voir dire*

The relationship between racial bias and its potential to affect the rights of defendants of color is not new. The Supreme Court has addressed the impact a juror's racial bias can have on a defendant's rights in years past, dating as far back as 1931 in *Aldridge v. United States*.²⁰⁸

In *Aldridge*, a black man was sentenced to death for killing a white police officer.²⁰⁹ Aldridge's lawyer was told that one of the jurors, a white woman, had mentioned that the defendant being black and the decedent being white "perhaps" played a role in her decision.²¹⁰ The trial judge had precluded Aldridge's lawyer from asking the potential juror during voir dire whether the defendant's race would influence her decision.²¹¹ When Aldridge appealed the case to the Supreme Court, it considered whether a criminal defendant, by way of his constitutional right to an impartial jury, had a right to have jurors questioned about their potential racial bias.²¹² Ultimately the Court decided in *Aldridge* that the attorney's inquiry into the juror's potential racial prejudice should have been permitted.²¹³

207. See Mar, *supra* note 23, at 1456–57 (explaining more specific questions may reveal a juror's biases).

208. See generally 283 U.S. 308, 314–15 (1931) (finding trial court erred in ruling that defense counsel could not ask questions about jurors' racial prejudices during voir dire); see also *Turner v. Murray*, 476 U.S. 28 (1986) (concluding that defendants charged with capital offenses had a constitutional right to question the jury about racial bias); *Rosales-Lopez v. United States*, 451 U.S. 182, 193, 194 (1981) (holding that the petitioner was not entitled to create a standard requiring trial judges to, upon the defense's request, inquire into racial prejudice during voir dire when the defendant and victim are of different races); *Ristaino v. Ross*, 424 U.S. 589, 597–98 (1976) (advising that although inquiries regarding racial prejudices of potential jurors did not rise to a constitutional requirement, questions regarding such biases should be asked); *Ham v. South Carolina*, 409 U.S. 524 (1973) (reversing the trial court's ruling because the court refused to inquire about potential jurors' racial biases).

209. *Aldridge*, 283 U.S. at 309.

210. *Id.* at 310.

211. *Id.* at 310–11.

212. *Id.* at 314–15; see also Lee, *supra* note 21, at 852–53.

213. *Aldridge*, 283 U.S. at 315.

The Court addressed a similar issue and developed a new standard fifty years later in *Rosales-Lopez v. United States*.²¹⁴ In *Rosales-Lopez*, the petitioner, a man of Mexican descent, petitioned the trial court to ask potential jurors during voir dire whether they harbored biases toward Mexicans.²¹⁵ The trial judge refused to ask such questions, and Rosales-Lopez was convicted.²¹⁶ The Court of Appeals affirmed, as did the Supreme Court.²¹⁷ The Supreme Court determined that under limited circumstances, questions about race could be asked if there exists a “reasonable possibility that racial prejudice might influence the jury.”²¹⁸ However, the Court held that Rosales-Lopez’s case was not an instance indicating the need for this type of inquiry.²¹⁹

Justice Stevens’ dissent in *Rosales-Lopez*, relying on *Aldridge*, stated “it would be far more injurious [than inquiries into juror bias] to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred.”²²⁰ Justice Stevens suggested that the majority misinterpreted *Aldridge*, which he believed entitled a minority defendant to inquiry into racial biases and prejudice, even when race was not a material issue in the case.²²¹ Justice Stevens also disagreed with the plurality on the origin of juror bias and prejudice.²²² While acknowledging that the plurality’s opinion about

214. 451 U.S. 182 (1981).

215. *Id.* at 184–85.

216. *Id.* at 182, 185.

217. *Rosales-Lopez*, 451 U.S. at 194.

218. *Id.* at 192–94 (explaining that trial courts must only make an inquiry into racial prejudice when requested by a defendant accused of a violent crime and where the defendant and victim are members of different racial or ethnic groups, or where other circumstances suggest a reasonable possibility that racial or ethnic prejudice will affect the jury).

219. *Id.* at 194.

220. *Id.* at 200–01 (Stevens, J., dissenting) (quoting *Aldridge v. United States*, 283 U.S. 308, 315 (1931)). The Court in *Aldridge* also referred to disqualifying prejudice as a “disqualifying state of mind.” 283 U.S. at 313.

221. *Rosales-Lopez*, 451 U.S. at 201–02 (Stevens, J., dissenting); *see also* Mar, *supra* note 23, at 1453.

222. *Rosales-Lopez*, 451 U.S. at 196–97 (Stevens, J., dissenting); *see also* Mar, *supra* note 23, at 1454.

prejudice derived from the particular facts of the case, he argued that oftentimes the race of the defendant determines a juror's decision,²²³ and that jurors are naturally biased and prejudiced.²²⁴

Rosales-Lopez was one case among multiple in which the Court precluded questions targeting juror bias during voir dire.²²⁵ The following questions relevant to this analysis were prohibited in *Rosales-Lopez* and others to follow:

1. "Have you ever employed or have friends that have employed illegal aliens?"
2. "Have you ever worked for the federal Government? If so, as what? How long?"
3. "Have you ever been the victim of a crime?"
4. "Have you ever sat as a juror in a civil or criminal case? What was the nature of the case and the verdict?"²²⁶

In *Ristaino v. Ross*, the trial court judge precluded the lawyer from asking jurors whether they thought white people were more likely to tell the truth than black people.²²⁷ Instead, he asked general questions and reminded the jury about the importance of the oath they took to be impartial.²²⁸ The Supreme Court later determined that although race was not a salient

223. See *Rosales-Lopez*, 451 U.S. at 202 (Stevens, J., dissenting).

224. See *id.* at 196–97.

225. See, e.g., *Ristaino v. Ross*, 424 U.S. 589 (1976) (holding that absent special circumstances, a judge need not ask specific questions targeting racial bias); *Dukes v. Waitkevich*, 429 U.S. 932, 933 (1976) (Marshall, J., dissenting) (denying certiorari in a case where the trial judge refused to allow voir dire questioning targeting racial bias, thus "empt[ying] of meaning the promise of *Aldridge*").

226. *Rosales-Lopez*, 451 U.S. at 187 n.4.

227. 424 U.S. at 590 n.1.

228. See *id.* at 592 n.4 (reminding the jury that it has an "absolute duty to render a fair and impartial verdict[] based upon the evidence that [it] hear[s] in the courtroom, and *no extraneous factors*" (emphasis added)).

issue in the case, and a black defendant did not have a constitutional right to have potential jurors questioned about racial prejudice, the trial court should have posed the questions to jurors at the petitioner's behest.²²⁹

In *Ham v. South Carolina*, in which a black civil rights activist believed he was being framed by white policemen, the Court, citing *Aldridge*, emphasized the Fourteenth Amendment's purpose of creating "essential demands of fairness" for all citizens.²³⁰ Applying this standard, the *Ham* Court determined the trial court denied the defendant his constitutional right under the Fourteenth Amendment by precluding counsel from asking the following questions to the jury about racial prejudice:

"1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?"

"2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?"

"3. Did you watch the television show about the local drug problem a few days ago when a local policeman appeared for a long time? Have you heard about that show? Have you read or heard about recent newspaper articles to the effect that the local drug problem is bad? Would you try this case solely on the basis of the evidence presented in this courtroom? Would you be influenced by the circumstances that the prosecution's witness, a police officer, has publicly spoken on TV about drugs?"²³¹

229. *Id.* at 597.

230. 409 U.S. 525, 526–27 (1973) (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)).

231. *Id.* at 525 n.2.

The Court determined that the trial judge limited the defendant's rights by precluding these questions.²³² The Court affirmed that the judge has the discretion to ask questions in the way he sees fit and is not obligated to ask a certain number of questions on a subject or in a particular form, but he should have asked questions to examine racial bias.²³³

Of all the cases mentioned above, this Note is proposing that judges and lawyers ask questions similar to those in *Rosales-Lopez* and *Ham* during voir dire, adjusting the questions to address television-watching habits. The questions in the *Rosales-Lopez* and *Ham* cases did not directly target bias—rather, the trial court inquired into the lifestyles and experiences of the jurors that may impact their perceptions of different racial groups, a tactic which is an effective method to discuss prejudice and implicit bias.²³⁴ The more lenient “special circumstances” standard from *Rosales-Lopez*, which establishes that questions regarding racial prejudice should be permitted when race is an issue, was a step in the right direction.²³⁵ However this standard requires a racial bias inquiry *only* when “special circumstances” exist, leaving the majority of defendants of color—specifically black female defendants—susceptible to biases and prejudice that will impact the outcome of their case.²³⁶ The standard suggests that special circumstances are a factor, not a requirement, when evaluating whether potential jurors should be asked questions regarding racial prejudice during voir dire.²³⁷

Racial bias, however, is always an issue because of the prejudices people develop from the stereotypes they absorb and implicit biases they acquire.²³⁸ Jurors are less likely to hold

232. *Id.* at 526–27.

233. *Id.*

234. See generally Robinson, *supra* note 36, at 5–13 (illustrating how questions about life experience and lifestyle can probe racial bias in prospective jurors).

235. See *Rosales-Lopez v. United States*, 451 U.S. 182, 187 (1981).

236. See *id.*; see also Kang et al., *supra* note 17, at 1142–46 (“[T]he general research consensus is that jurors of one race tend to show bias against defendants who belong to another race . . .”).

237. See *Rosales-Lopez*, 451 U.S. at 192.

238. See Carolyn Y. Johnson, *Everyone Is Biased: Harvard Professor's Work Reveals We Barely Know Our Own Minds*, BOSTON.COM (Feb. 5, 2013), <https://www.boston.com/news/science/2013>

themselves accountable for implicit bias when race is not at issue in the case, and as such jurors may evaluate cases without recognizing how their implicit biases impact their decision.²³⁹ In fact, an experiment found that white jurors displayed more racial bias when race was not a salient issue in the case and less racial bias when race was an issue.²⁴⁰ The impact that hyper-consciousness has on implicit racial biases when race is a salient issue should be applied in all cases with black female defendants.

Race salience is the process through which one emphasizes the potential for racial bias in one's own attitudes and beliefs.²⁴¹ Studies have shown that when race is made salient during a trial, white jurors exhibit more impartiality toward black defendants.²⁴² Race salience has allowed jurors to be "more conscious of and thoughtful about their biases."²⁴³ This discovery is exciting, but it should apply to black defendants, specifically black women, at all times.

Black women are members of two distinct groups, both plagued by their own deep history of discrimination and stereotyping.²⁴⁴ These stereotypes always have the potential to adversely affect black women. Thus, because of the negative stigma and stereotypes associated with black women, race will always be salient and must be brought to the attention of jurors.²⁴⁵ In particular, jurors should be made aware of how the information they absorb through the media may impact their

/02/05/everyone-is-biased-harvard-professors-work-reveals-we-barely-know-our-own-minds (describing an interview conducted with Professor Mahzarin R. Banaji of Yale University, who completed a study on implicit biases).

239. See Phoebe C. Ellsworth & Samuel R. Sommers, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attitudes*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1378 (2000).

240. Randy Furst & Stephen Montemayor, *Black Defendants, White Jurors: Does Race Make a Difference in the Courtroom?*, STARTRIBUNE (May 15, 2016, 8:51 PM), <http://www.startribune.com/black-defendants-white-jurors-does-race-make-a-difference-in-the-courtroom/379597921/>.

241. Lee, *supra* note 21, at 861.

242. *Id.*

243. *Id.* at 866.

244. See *supra* Section I.A.

245. See Scales-Trent, *supra* note 25, at 22.

judgments about black women, their understanding of the case, and their ultimate decision.

Neither the nature of questions asked nor the setting of voir dire are conducive to receiving honest answers from potential jurors.²⁴⁶ The typical questions asked by attorneys are general²⁴⁷ and “will probably not extract any meaningful responses about racial prejudices.”²⁴⁸ Not only are the questions general, but they are often asked in a group setting which may not elicit the most honest answers due to a juror’s fear of being perceived as racist by others.²⁴⁹ Because of the nature of the questions and the format of the process, jurors who may harbor problematic biases toward black women could be selected for juries in cases involving black female defendants.

2. *Explicit Bias and Voir Dire*

Courts have addressed the issue of explicit bias exhibited by jurors in recent case law, providing hope that courts are willing to tackle the issue of bias in jury decision making. Most recently, the Supreme Court addressed the issue of explicit racial bias expressed by jurors in *Peña-Rodriguez v. Colorado*.²⁵⁰ In *Peña-Rodriguez*, a Hispanic man was found guilty of unlawful sexual contact and harassment.²⁵¹ After the verdict was entered, two jurors approached counsel and explained how a particular juror, referred to as “H.C.,” made anti-Hispanic statements during deliberations.²⁵² The jurors’ affidavits highlighted biased re-

246. See Ira Mickenberg, *Voir Dire and Jury Selection*, U.N.C. SCH. GOV’T, 2, <http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf> (last visited Apr. 8, 2019) (examining how the open environment of voir dire is an artificial setting, unlikely to produce insightful and honest responses from jurors regarding bias).

247. *Id.* at 4.

248. Mar, *supra* note 23, at 1456.

249. See Matlon, *supra* note 206 (stating there are other factors that contribute to dishonesty such as wanting to please the judge, or simply not wanting to expose bias).

250. 137 S. Ct. 855, 869–70 (2017).

251. *Id.* at 861.

252. *Id.*

marks which demonstrated that anti-Hispanic bias played a role in juror H.C.'s decision.²⁵³

The Court started its opinion by emphasizing the purpose of voir dire, and how it is an opportunity for counsel to select an impartial jury.²⁵⁴ According to the Court, the impartiality of the jury is crucial to ensure "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"²⁵⁵

The Court specifically discussed the importance of targeting racial bias in the justice system,²⁵⁶ and laid out the following standard for juror impeachment:

[T]here must be a *showing* that one or more jurors made statements exhibiting *overt* racial bias that cast *serious doubt* on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a *significant motivating factor* in the juror's vote to convict.²⁵⁷

Unlike the illusory "reasonable possibility" standard in *Rosales-Lopez*,²⁵⁸ the Court in *Peña-Rodriguez* explicitly stated what a petitioner is required to show in order to meet the standard.²⁵⁹ However, this standard is insufficient for targeting implicit bias. There are numerous issues with applying the standard laid out by the Court to target juror bias. First, there must be a *showing* of overt bias,²⁶⁰ a requirement that runs counter to implicit bias.²⁶¹ Psychological research also shows

253. The statements referenced how, in H.C.'s experience as a former law enforcement officer, Hispanic men "had a bravado that caused them to believe they could do whatever they wanted with women" and that H.C. believed Peña-Rodriguez was guilty "because he's Mexican and Mexican men take whatever they want." *Id.* at 862.

254. *Id.* at 866.

255. *Id.* at 868 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987)).

256. *Id.*

257. *Id.* at 869 (emphasis added).

258. See 451 U.S. 182, 193–94 (1981).

259. See 137 S. Ct. at 869.

260. See *id.*

261. See *Implicit Bias: Is Everyone Racist?*, BBC NEWS (June 5, 2017), <https://www.bbc.com>

that there is a legitimate reluctance to discuss bias and show personal prejudice.²⁶² As such, it is unlikely jurors will express their biases externally even though biases will influence their decision-making. Second, the bias must be *overt*.²⁶³ The Court made clear that the biased statement(s) must be “grave,” “serious,” “egregious and unmistakable in their reliance on racial bias.”²⁶⁴ According to the American Psychological Association, people fear discussing bias due to a fear of exposure of their own biases and beliefs which may reflect poorly on them.²⁶⁵ Consequently, few individuals will overtly express their distaste for people of other races, even if they hold such beliefs and especially if they are aware of their prejudice.²⁶⁶

The Court also requires that the statement cast “serious doubt” and that animus must be a “significant motivating factor.”²⁶⁷ Not only has this subjective language been left unexplained by courts, but the standard as written also leaves it to judges, independently, to determine whether the standard is met, which can create a lack of uniformity.²⁶⁸ In addition to judges having their own implicit biases which may interfere with their analyses, jurors, as stated above, may not express their animus.²⁶⁹ A juror’s internal disdain for others may very well cast “serious doubt” and constitute a “significant motivating factor” in his or her decision-making, but may not meet the judge’s standard.

Another issue with the outcome of *Peña-Rodriguez* is the fact that defendants of color are forced to depend on a brave juror,

/news/magazine-40124781.

262. See *Discussing Discrimination*, AM. PSYCHOL. ASS’N, <https://www.apa.org/helpcenter/keita-qa> (last visited Apr. 8, 2019).

263. *Peña-Rodriguez*, 137 S. Ct. at 869.

264. *Id.* at 868, 870.

265. *Discussing Discrimination*, *supra* note 262.

266. See *Implicit Bias: Is Everyone Racist?*, *supra* note 261.

267. *Peña-Rodriguez*, 137 S. Ct. at 869.

268. See *id.* at 869 (explaining that the racial bias inquiry is left to the discretion of the trial court).

269. See Sonia Chopra, *Challenging Legal Assumptions About Juror Bias*, PLAINTIFF (Feb. 2013), <https://www.plaintiffmagazine.com/recent-issues/item/challenging-legal-assumptions-about-juror-bias>.

and not the courts, to recognize the bias of another juror. Further, that juror must be willing to speak up in order to ensure the defendant receives just treatment. In the *Peña-Rodriguez* opinion, the Court acknowledged that jurors have no obligation to come forward.²⁷⁰ Because of the stigma attached to racial bias, a juror may have difficulty discussing biased statements with counsel.²⁷¹ Through this process, jurors assume the responsibility of ensuring that the jury is impartial. Ultimately, this shifts the onus off the judicial system and to jurors to enact justice for defendants.

The show *Black-ish* light-heartedly and accurately illustrates the issue with relying on a juror to provide the impartiality of a jury.²⁷² In one episode, Dre, an African American father, reluctantly attends jury duty and ultimately ends up being the primary advocate for a black male defendant.²⁷³ During deliberations, the other jurors, all of whom are white, vote to send the defendant to jail and Dre refuses to conform.²⁷⁴ By preventing the jury from being unanimous, deliberations continue and Dre advocates for the defendant.²⁷⁵ The other jurors explain what they believe to be truths about black people to support their decisions, and Dre fights these assumptions, slowly helping the jurors realize the errors in their thought processes.²⁷⁶

Ultimately, the jurors change their minds and find the defendant innocent.²⁷⁷ Similar to *Peña-Rodriguez*, this episode highlighted the pivotal difference one juror could make when he not only recognized bias, but also responded to it. However, this idealistic method as the means to execute justice is weak and flawed. The presence of a socially conscious juror should not

270. 137 S. Ct. at 870.

271. *Id.* at 869.

272. *Black-ish: One Angry Man* (ABC television broadcast Feb. 22, 2017).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. Sesali Bowen, *Black-ish Just Proved (Again) that We Should Trust Black People*, REFINERY29 (Feb. 23, 2017, 9:30 AM), <https://www.refinery29.com/2017/02/142333/blackish-racist-jury-episode-recap-white-savior-complex?bucketed=true>.

determine whether the jury will ultimately be impartial. Therefore, it is important for the jury selection process, not an individual juror, to ensure the defendant is receiving a fair trial.

Notwithstanding its failure to address implicit bias consistently, the Supreme Court justices have recognized how the implicit bias of jurors can impact the course and outcomes of a trial and how it can affect jurors' perception of defendants.²⁷⁸ However, eliminating implicit bias is a conscious effort which involves interventions and discussions targeting bias; hence, the court must first recognize the need for a change in the voir dire process, and be proactive in ensuring a change occurs.²⁷⁹

III. POTENTIAL SOLUTIONS

There are many factors involved in successfully encouraging jurors to acknowledge their biases, a key element being the word choice of questions targeting bias.²⁸⁰ Open-ended questions are crucial for targeting a juror's true feelings,²⁸¹ as well as for creating an environment in which people do not feel attacked, but rather understand that bias is something all possess.²⁸² If jurors are asked questions regarding their television-watching habits in an effective manner, it may not only reveal biases jurors did not believe they had, but also help lawyers and judges to more effectively identify biased jurors and select a more impartial jury.

A. Alterations to Voir Dire Questions

As it stands, voir dire is an expeditious and superficial process composed of basic questions which are asked in an envi-

278. See Roberts, *supra* note 33, at 836.

279. See 1 RACHEL D. GODSIL ET AL., PERCEPTION INST., THE SCIENCE OF EQUALITY, ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE 12–13 (2014), <https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Vol.-1-Perception-Institute-2014.pdf>.

280. Christina Marinakis, *How Do I Get Jurors to Reveal Their Biases?*, LITIG. INSIGHTS BLOG (Mar. 3, 2017), <http://litigationinsights.com/jurors/get-jurors-reveal-biases/>.

281. Matlon, *supra* note 206.

282. Marinakis, *supra* note 280.

ronment unlikely to evoke true responses.²⁸³ Not only are jurors asked to self-assess their ability to be impartial, but they are also asked questions amongst a group, making them more unlikely to expose themselves.²⁸⁴ The purpose of voir dire is to ensure a potential juror is capable of being an impartial evaluator at trial,²⁸⁵ but even tactful questions about bias and prejudice may not lead jurors to acknowledge or admit to their prejudices.²⁸⁶ Therefore, the questions need not directly ask jurors about their biases, but rather holistically evaluate jurors to help lawyers and judges better identify biased jurors. The questions also must not “prime” jurors, but instead cause them to reflect on their experiences with racial prejudice as they have known it.²⁸⁷

A more extensive voir dire process should be normalized in order to accommodate the extensive questioning needed to determine juror bias. Not only do lawyers ask a wider variety of questions to give themselves a holistic sense of the jurors’ attitudes, they also follow-up with jurors.²⁸⁸ At that point, jurors can disclose more information which helps lawyers to make more informed decisions about selecting the ultimate jury.²⁸⁹

Lawyers and judges should ask questions about jurors’ television-watching habits to get a sense of who may have implicit biases of which they are not aware. These questions should not target jurors directly, or ask them to assess themselves, but rather ask questions that give the lawyer and judge a sense of context for how the juror lives.²⁹⁰ Getting to know the juror’s environment, daily activities, etc. can provide insight from which lawyers can not only infer how the juror lives, but

283. Marder, *supra* note 189, at 933.

284. *Id.*

285. *Id.* at 930.

286. Mar, *supra* note 23, at 1456.

287. See Marinakis, *supra* note 280 (arguing that lawyers should avoid priming questions during the voir dire process).

288. Matlon, *supra* note 206 (explaining the concept of expanded voir dire).

289. *Id.*

290. See generally Robinson, *supra* note 36 (suggesting a series of questions about the prospective juror’s neighborhood, work, and social life that lawyers should ask during voir dire).

the kinds of people with whom the juror interacts on a daily basis and the nature of those interactions.

Although problematic stereotypes are an issue, they are not the only issue. Stereotypes may not be combated in real life, and jurors may have limited interactions with black women that would cause television to be their primary source of information about black women.²⁹¹ For that reason, it is important to determine what shows jurors watch, how they navigate their daily lives, who they interact with, and the extent to which they interact with them.

Jeff Robinson, Deputy Legal Director for the American Civil Liberties Union, released an article with suggestions of questions lawyers should ask during voir dire to gain a more holistic understanding of jurors and more accurately assess their ability to be impartial.²⁹² The questions challenge jurors to think of the nature and magnitude of their interactions with people of color as well as their opinions on current racially-charged events.²⁹³ This style of questioning should be adjusted to target television-watching habits, alongside questions regarding jurors' daily interactions with others to gauge not only how exposed they may be to negative stereotypes of black women, but whether those stereotypes are negated through their daily lives. While racially homogenous surroundings and interactions are not per se indicative of bias, questions of this nature are likely more effective to discover bias than self-reporting.²⁹⁴

It is important jurors understand that all people have biases,²⁹⁵ that biases do not make them bad people, and that they must answer questions honestly. Lawyers and judges must make ju-

291. See Punyanunt-Carter, *supra* note 103, at 241 ("Black images on television may cause viewers to conceive, alter, or even reinforce their beliefs and opinions about Blacks.").

292. See Robinson, *supra* note 36, at 5–13.

293. See *id.* at 5–13 (suggesting a series of questions lawyers should ask during voir dire that may be helpful in getting prospective jurors to discuss race).

294. See, e.g., *id.* at 4 (discussing how it is a mistake to assume a juror's opinion based on racial stereotypes).

295. *Understanding Implicit Bias*, *supra* note 20.

rors understand that talking about race is necessary,²⁹⁶ and that they should not feel attacked or targeted by the questions. Robinson's article, which highlights the different categories of questions lawyers should use if they want to weed out jurors with stereotypes and prejudices that will adversely impact their cases,²⁹⁷ is used as a template from which the questions below are molded. These questions challenge jurors to empathize with a defendant of a different race,²⁹⁸ explain their familiarity (or lack thereof) with minorities,²⁹⁹ discuss personal experiences,³⁰⁰ and explain personal beliefs. The questions below are some examples of how similar voir dire questions related to television viewing and a juror's environment can be asked to understand jurors and their biases more holistically:

1. On average, how many hours of television do you watch a day?
2. What are your five favorite television shows?
3. Do any of your favorite shows contain black female characters?
4. If yes, how would you describe those characters?

296. See Gabriel, *supra* note 138 (opining that it is time to talk about race and "how our biases affect how we see and interact with strangers").

297. See Robinson, *supra* note 36, at 14.

298. *Id.* at 5–6 ("Right now, as I describe this courtroom in which you are the only (juror ethnicity) face, what is going through your mind?" "Have you ever been in a situation, like a group, or an attendee at a meeting, or a social gathering where you were in the minority racially?").

299. *Id.* at 6–7 ("Do you live in a racially integrated area? . . . Do you belong to any social club, political organization, or religious groups that have no (insert race/ethnicity of victim/defendant/plaintiff) members? Why do you think no (insert race/ethnicity of victim/defendant/plaintiff) are members of this club?")

300. *Id.* at 12 ("Please tell us about experiences you have had where other people expressed racially prejudice[d] beliefs or opinions?").

5. If no, have you ever watched a show (on a regular basis) with a black female character?

6. If yes, how would you describe those characters?

In order to learn about whether jurors interact with black women on a regular basis, the following questions could be asked:

1. What do you do for a living?

2. How many hours a day do you spend at work/school?

3. Would you consider your place of work/school diverse?

4. About what percentage of people in your daily environment (work/school) are black women? Circle one (25%/50%/75%/100%)

1. What is your race?

2. Where do you live (neighborhood)?

3. Please fill out the following chart about the five closest people to you (in your life):

Name	Relationship	Race

Open-ended questions like these serve two purposes. First, they elicit more honest responses by challenging jurors to truly reflect on their experiences and interactions with people of another race.³⁰¹ Second, although jurors may be capable of accurate introspection, research shows implicit bias is unlikely to be self-reported.³⁰² Hence these questions may provide a better sense of juror bias by extracting more accurate information that does not rely on introspection. Unlike current voir dire questions, these questions give a sense of who jurors engage with daily and how their limited (or extensive) exposure to black women may affect how they perceive a black female defendant.³⁰³ Furthermore, the answers speak for themselves, and if jurors see how racially homogenous their lives are, they may be more likely to accept that they truly don't know much about black women, and for that reason, they may be more likely to recognize that they may have biases about black women.³⁰⁴

In addition to targeted questions, courts should educate jurors about implicit bias to initiate the discussion about the juror's potential biases. Research shows egalitarian-minded individuals are more likely to "counteract stereotypical thinking when made aware of the possibility of racial bias."³⁰⁵ Prior to asking the jurors questions, courts should follow Washington's lead and create, or show, a video on implicit bias.³⁰⁶ The state of Washington has attempted to ensure impartiality on the jury through the creation of an informative video shown to prospec-

301. See Lee, *supra* note 21, at 867–69.

302. *Understanding Implicit Bias*, *supra* note 20.

303. See, e.g., Matlon, *supra* note 206 ("As jurors are allowed to talk, their attitudes will be on display.").

304. See generally *Test Yourself for Hidden Bias*, TEACHING TOLERANCE, <https://www.tolerance.org/professional-development/test-yourself-for-hidden-bias> (last visited Mar. 29, 2019) ("If people are aware of their hidden biases, they can monitor and attempt to ameliorate hidden attitudes before they are expressed through behavior.").

305. Lee, *supra* note 21, at 868.

306. See generally Marella Gayla, *A Federal Court Asks Jurors to Confront Their Hidden Biases*, MARSHALL PROJECT (June 21, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/06/21/a-federal-court-asks-jurors-to-confront-their-hidden-biases> (discussing video shown to prospective jurors in the Western District of Washington to alert jurors of their potential unconscious biases and prejudices).

tive jurors.³⁰⁷ In the eleven-minute video, three legal practitioners—Jeffery Robinson, U.S. Attorney Annette Hayes, and Judge John Coughenour—introduce the concept of implicit bias and explain its effects on decision-making.³⁰⁸ The video tutorial has received mixed reviews, with some legal practitioners praising its use and others believing it is prejudicial.³⁰⁹ Similar to any element of voir dire, judges have discretion to decide whether the video can be shown to jurors.³¹⁰

The video has made its way across state lines, but to no avail. A lawyer in Nebraska asked a judge if he could show the video to prospective jurors during a trial in which a black man was accused of raping a white woman.³¹¹ The lawyer explained it was imperative, especially because of the racial difference in the case, for jurors to be aware of potential biases they may harbor.³¹² The judge agreed that implicit bias exists, but ultimately said the voir dire process was better suited for addressing implicit bias issues and did not allow the lawyer to show the video.³¹³ Furthermore, he said the jury instruction, which warned jurors to be neutral, was sufficient to address prejudicial decision-making.³¹⁴

A judge in Washington state denied the video's use for other reasons.³¹⁵ While adjudicating a case in which a black man was shot by a white cop, the judge precluded plaintiffs from showing the video, stating "that the video would be 'simply too prejudicial'" toward the officer and would amplify the plaintiffs' argument that the officers targeted and shot the victim due to racial bias.³¹⁶ While the judge's concern about prejudicing the

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. Lori Pilger, *Judge Says No to Video Cautioning Jurors About Implicit Bias Before Trial*, LINCOLN J. STAR (June 27, 2018), https://journalstar.com/news/local/911/judge-says-no-to-video-cautioning-jurors-about-implicit-bias/article_f2dfefb0-6f16-54eb-b6e3-e1bd45eb8ac7.html.

312. *Id.*

313. *Id.*

314. *Id.*

315. Gayla, *supra* note 306.

316. *Id.*

jury was legitimate, her decision to preclude the video could also be deemed prejudicial, especially if jurors indeed harbored implicit biases about black men. Washington has yet to work out the kinks of incorporating the implicit bias video into voir dire statewide but has taken a progressive step in the right direction. This video (or a similar video) should be used as a tool to introduce jurors to the concept of implicit bias and open the floor for discussions about stereotypes, race, bias, and how they can affect decision-making.

Although implementation of new tactics is good in theory, the current state of the justice system would make implementation difficult. There are practical challenges that judges and lawyers face which make it difficult to conduct extensive voir dire for each defendant, as these suggested tactics would require more resources and time. The volume of cases before judges and attorneys pressures them to get through cases quickly.³¹⁷ Lawyers and judges would also need to see the importance of exposing implicit bias in all cases, and not only cases in which race is a salient issue. Furthermore, lawyers are not psychologists, and although they may feel they are capable of inferring and identifying bias properly, they are not as capable as they believe.³¹⁸ As a result, judges and lawyers may strike jurors who are capable of being impartial but appear to be biased because of their answers. This possibility emphasizes the importance of following up with jurors who appear to have high potential for implicit bias, but in reality do not harbor the expected biases or are conscious of them and capable of being impartial. Lawyers may also abuse their ability to strike jurors and use survey answers as a definitive justification to strike certain jurors,³¹⁹ hence the importance in using questions as a tool to indicate

317. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 1, 17 (2007).

318. See Marder, *supra* note 189, at 934–35 (noting that lawyers are not trained to identify potentially biased jurors and generally do not fare any better than other educated adults in spotting juror bias).

319. See Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), <https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors>.

when to follow-up with jurors and not to eliminate them outright.

Although lawyers' ability to identify bias through voir dire and the effectiveness of voir dire generally has been validly doubted,³²⁰ this Note does not suggest it is the only point, but simply one point in the jury selection process that can be used to create a more impartial jury. Implicit bias training or education during voir dire does not place emphasis on lawyers identifying biased jurors, but rather on jurors identifying their own biases and proceeding through the rest of the jury selection process more candidly.³²¹

B. The Implicit Bias Test as a Means of Educating Jurors About Racial Bias

Another potential solution to target uncovering juror bias is the implementation of the Implicit Association Test (IAT).³²² In recent years, the IAT has attracted attention for its ability to measure racial implicit bias.³²³

Every man has reminiscences which he would not tell to everyone but only his friends. He has other matters in his mind which he would not reveal even to his friends, but only to himself, and that in secret. But there are other things which a man is afraid to tell even to himself, and every decent man has a number of such things stored away in his mind.³²⁴

320. Marder, *supra* note 189, at 933–35.

321. *See id.* at 932–35.

322. Roberts, *supra* note 33, at 829.

323. *Id.* at 848.

324. *Origins and Measurement with the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/india/background/posttestinfo.html> (last visited Mar. 29, 2019) (quoting Fyodor Dostoyevsky).

Using the IAT could help capture those things “which [every] man is afraid to tell even to himself” and reveal those biases through voir dire.

The test is conducted in rounds and measures implicit bias through association.³²⁵ Each round requires the test taker to quickly associate different words with certain images.³²⁶ The result of the test taker’s associations “between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)” demonstrates that person’s implicit beliefs and preferences.³²⁷ If the IAT is used as a part of voir dire, lawyers can more effectively gain insight into biases and stereotypes jurors possess but do not willingly admit to, acknowledge, or recognize.³²⁸ Furthermore, through people’s responses, the IAT provides information from which biases can be inferred.³²⁹

Not only may jurors not know their biases, but they may also choose not to reveal them.³³⁰ In a study conducted using the IAT with about 700,000 participants, most people stated they did not have a preference for black or white people, yet 70% of participants’ answers indicated a preference for white people over black people.³³¹ This information reveals either jurors’ failure to recognize their biases or refusal to admit to them.³³² However, either an unfamiliarity with or fear of bias may cause jurors to refrain from being honest during voir dire,³³³ making education about biases key. Not only is it important for jurors to not feel

325. *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html#faq2> (last visited Mar. 29, 2019).

326. *Id.*

327. *Id.*

328. The Court has listened to testimony about the IAT and how it may affect the jury, but simply found it “very interesting.” Roberts, *supra* note 33, at 851.

329. AM. BAR ASS’N, *ACHIEVING AN IMPARTIAL JURY (AIJ) TOOLBOX 10* (2018), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf.

330. *Id.* at 7–8.

331. *Id.* at 9–10.

332. See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 150 HARV. L. & POL’Y REV. 1207, 1211 (2011).

333. Mation, *supra* note 206.

they are bad people for having biases, but learning about biases may also lead jurors to be open to discovering or disclosing them.

Although IAT research is exciting, using it as a tool to scope out implicit bias may be premature.³³⁴ In fact, the makers of the test denounced using the test specifically for jury selection,³³⁵ partially because it espouses science and social science and the law, a connection that “goes too far”³³⁶ and is controversial in legal decision-making.³³⁷ Currently, there is no scientific evidence which explains the meaning or significance of IAT scores in the context of jury selection.³³⁸ Due to the lack of empirical certainty, this Note suggests the IAT be used as a tool to educate jurors on implicit bias, but not as an implicit bias diagnostic tool. Although there is a fear that talking about implicit bias could prime jurors to be hyperaware of biases and cause them to overcompensate, priming, in this circumstance, may be positive. It can make jurors more aware of their biases and this awareness can adjust, not determine, the lens through which they view and understand a trial.³³⁹

CONCLUSION

Black women are situated in a unique position in society and regarding the law. They have been hailed into a position in society which originates from a time in which they did not have control over their bodies, actions, or lives.³⁴⁰ The stereotypes derived from that era continue to plague them, even when they

334. See generally Beth Azar, *IAT: Fad or Fabulous?*, 39 *MONITOR ON PSYCHOL.* 44 (2008), <http://www.apa.org/monitor/2008/07-08/psychometric.aspx> (cautioning that the IAT may need more evaluation before becoming a widely used diagnostic tool).

335. Roberts, *supra* note 33, at 857.

336. Azar, *supra* note 334.

337. Roberts, *supra* note 33, at 875.

338. Azar, *supra* note 334; Roberts, *supra* note 33, at 854–855.

339. Roberts, *supra* note 33, at 864.

340. See generally HARRIS-PERRY, *supra* note 26 (exploring black female identity in American culture).

are productive members of society.³⁴¹ The portrayals of black women on television contribute to these beliefs, and although research has established a connection between television-watching habits and stereotyped notions of reality,³⁴² little has been done to mitigate against these stereotyped views. Consequently, it is imperative that the voir dire process incorporate techniques to reveal prospective jurors' consumption of stereotyped portrayals of black women.

Television exemplifies how black women have been categorized into blunt stereotypes that do not show complex individuals. Recall *Amos n' Andy*, a television show which portrayed a black woman as the "Sapphire" stereotype.³⁴³ Sapphire is brash, loud, emasculating, and angry.³⁴⁴ Today, the Sapphire stereotype is most palpable in reality television shows like *Bad Girls Club*, where the black cast members are portrayed as rough and violent in juxtaposition to the sweeter and kinder white cast members.³⁴⁵ Even when stereotypes are not as explicitly embodied, shows like *Scandal* reveal that the Sapphire and Jezebel remain a subtle specter of historical oppression.³⁴⁶ The consumption of television with these stereotypes provides a skewed sense of black femininity to viewers who do not regularly interact with black women.³⁴⁷

Black women are not just poorly portrayed on television—they suffer immensely when these stereotypes are incorporated into the legal system. History shows that black women have faced difficulty in bringing claims against sexual violence, as the Jezebel stereotype made claims of rape difficult to believe. Instead, the sexual proclivity of the Jezebel seemed to justify the

341. See, e.g., Maura Cheeks, *How Black Women Describe Navigating Race and Gender in the Workplace*, HARV. BUS. REV. (Mar. 26, 2018), <https://hbr.org/2018/03/how-black-women-describe-navigating-race-and-gender-in-the-workplace> (discussing some of the many issues black women face in professional settings and educational settings).

342. See *supra* Part II.

343. See *supra* Section I.A.3.

344. See *supra* Section I.A.3.

345. See *supra* Section I.A.4.

346. See *supra* Section I.A.4.

347. See Joy, *supra* note 14, at 182.

abuse suffered by a black woman. Not only are black women not believed when victimized, but they are also not believed when they are defendants. Black women face more frequent conviction and harsher sentences. When considering the cultural stigma imposed upon black women, and the disadvantaged position they occupy in the legal system, confronting implicit juror bias in an inexorable necessity.

The voir dire system can, and must, be modified to more meaningfully address the implicit bias of jurors. The present voir dire system does little to truly reveal critical racial prejudices harbored by prospective jurors.³⁴⁸ The system as currently practiced asks jurors un-insightful or cryptic questions and expects jurors to provide introspective responses in return.³⁴⁹ Instead of adhering to this system, open-ended lifestyle inquiry can alert judges, lawyers, and jurors alike to previously un-known or unacknowledged racial bias.

As demonstrated in this Note, black femininity is a complex, ever-evolving paradigm. The fact that white women have set the standard of femininity throughout generations requires black femininity to be analyzed on its own, Sapphire, Jezebel, and all. For that reason, this Note focused not on the stereotypes themselves, but rather on the dangers of imbalanced portrayals of a people. Although there is a deficit in the research conducted about black female defendants, there is a surplus of history which demonstrates the harsh realities black women face in American society and in the justice system. Black women's lives hang in the balance, making it imperative to understand how television-watching habits might help reveal the implicit biases of a prospective juror. If America is truly about "liberty and justice for all," that will entail a closer look at a group of mistreated, forgotten citizens and, more importantly, action to restore them to their rightful status as citizens deserving of liberty.

348. *See supra* Section II.B.

349. *See supra* Section II.B.