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## YALE LAW & POLICY REVIEW

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### Social Dominance Orientation: Detecting Racial Bias in Prospective Jurors

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*The selection of an impartial jury is fundamental to the fair and equitable administration of justice. Though the criminal justice system purports to be “racially blind,” research shows that racially biased jurors negatively impact the lives of people of color, especially Black people, involved with the criminal justice system. Due to the detrimental effect that juror bias has on communities of color, litigators must accurately detect and remove biased jurors.*

*This Note proposes social dominance orientation as a new mechanism to detect and remove biased jurors in racially charged cases. Although research about social dominance orientation has been overlooked by legal scholars, social science research demonstrates that social dominance orientation is correlated with anti-Black racism, racially biased perceptions of evidence and guilt, and racially biased sentencing recommendations. Importantly, social dominance orientation can even predict how a juror is likely to behave in racially charged cases. Due to social dominance orientation’s predictive value, and the inadequacy of other alternatives, this Note argues that lawyers should incorporate questions aimed to determine the social dominance orientation of prospective jurors in the voir dire and juror questionnaires of racially*

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*charged cases. Lawyers can then use this information to detect and remove racially biased jurors and, most importantly, help ensure defendants' constitutional right to an impartial jury.*

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## INTRODUCTION

On January 4, 2008, Officer Joseph Chavalia shot and killed twenty-six-year-old Tarika Wilson<sup>1</sup> in front of her children.<sup>2</sup> Ms. Wilson, a mother of six, was in her bedroom with her children when a SWAT team raided her home in search of her boyfriend.<sup>3</sup> During the raid, Chavalia blindly fired into the room three times, killing Ms. Wilson and severely injuring her fourteen-month-old son, whom she had been holding in her arms.<sup>4</sup> As in many instances of police brutality, the victim, Ms. Wilson, was Black; the officer who shot her was White.<sup>5</sup>

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1. Though Tarika Wilson was killed over a decade ago, her story remains widely unknown. Like the stories of so many Black women murdered at the hands of the police, Tarika Wilson's story is not often highlighted in the national discourse surrounding police violence against Black people. Black women are too often neglected in discourse about racialized policing and juries. *See, e.g.*, Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*, 109 NW. U. L. REV. 163 (2015) (highlighting the story of Michael Brown); Darren L. Hutchinson, "Continually Reminded of Their Inferior Position": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23 (2015) (highlighting the stories of Jordan Davis, Eric Garner, Trayvon Martin, and Tamir Rice); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) [hereinafter Lee, *Making Race Salient*] (highlighting the story of Trayvon Martin). To honor these women and their stories, I dedicate this Note to Black women murdered by the police and the #SayHerName movement which seeks to raise awareness about Black women victims of police and anti-Black violence.
  2. Christopher Maag, *Police Shooting of Mother and Infant Exposes a City's Racial Tension*, N.Y. TIMES (Jan. 30, 2008), <https://www.nytimes.com/2008/01/30/us/30lima.html> [<https://perma.cc/5S24-QZBT>].
  3. *Id.*
  4. *Id.*; Jag Davies, *Officer Acquitted in Fatal Shooting of Unarmed Woman and Baby*, AM. C.L. UNION (Aug. 7, 2008, 5:18 PM), <https://www.aclu.org/blog/mass-incarceration/officer-acquitted-fatal-shooting-unarmed-woman-and-baby> [<https://perma.cc/JBX8-C5EY>].
  5. *Ohio Officer Acquitted in Killing of Woman*, NBC NEWS (Aug. 4, 2008, 7:43 PM EST) <https://www.nbcnews.com/id/wbna26014951> [<https://perma.cc/UH2K-AGW9>].

After weeks of protests rocked Lima, Ohio, the State tried Chavalía for Ms. Wilson's murder.<sup>6</sup> The State's case was simple: the officer acted recklessly because he could not possibly have seen whether Ms. Wilson was armed,<sup>7</sup> and he did not stop to identify her—let alone her children—before shooting into the bedroom.<sup>8</sup> But Chavalía claimed that he feared for his life after hearing gunshots and seeing a shadow coming from the bedroom.<sup>9</sup> For the jury hearing the case, this was sufficient: Exactly seven months after Officer Chavalía killed Ms. Wilson and shot her son, Sincere Wilson, the jury acquitted him of all charges.<sup>10</sup>

While the circumstances of Tarika Wilson's death are distressing, her story is not uncommon. "The number of Black[] [people] killed by police has reached epidemic proportions."<sup>11</sup> The summer of 2020 was a stark reminder that the police view Black lives as disposable. The violent murders of Breonna Taylor, George Floyd, and Rayshard Brooks awakened many people to the reality that Black Americans have faced for centuries:<sup>12</sup> Black people are killed and brutalized by police officers at a significantly higher rate than any other race.<sup>13</sup> In 2020, Black people were 28 percent of those killed by police, despite comprising only 13 percent of the population.<sup>14</sup> The

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6. *Id.*

7. *Id.*

8. Davies, *supra* note 4.

9. *Ohio Officer Acquitted in Killing of Woman*, *supra* note 5.

10. *Id.*

11. Cassandra Chaney & Ray V. Robertson, *Armed and Dangerous? An Examination of Fatal Shootings of Unarmed Black People by Police*, 8 J. PAN AFR. STUD. 45, 46 (2015).

12. *Protests Break Out Around the US Following Deaths of George Floyd, Breonna Taylor*, USA TODAY (July 23, 2020, 8:14 PM EST), <https://www.usatoday.com/picture-gallery/news/nation/2020/05/28/protests-break-out-around-us-following-death-george-floyd/5278673002> [<https://perma.cc/X2FA-ERU8>].

13. *Id.*; *Number of People Shot to Death by the Police in the United States from 2017-2021, By Race*, STATISTA (Mar. 31, 2021), <https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race> [<https://perma.cc/7QQG-RT4L>].

14. MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org> [<https://perma.cc/EU97-JGT2>]; see also Deidre McPhillips, *Deaths From Police Harm Disproportionately Affect People of Color*, U.S. NEWS (June 3, 2020, 4:07 PM), <https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color>

officers who kill Black women and men are rarely, if ever, charged,<sup>15</sup> and those who are charged are often acquitted.<sup>16</sup> The frequent acquittal of these officers can be tied to several factors, one of which is juror bias.<sup>17</sup>

Juror bias does not only impact the verdicts of police brutality cases, it permeates the entire justice system.<sup>18</sup> Studies show that Black defendants are more likely to be convicted<sup>19</sup> and receive the death penalty<sup>20</sup> than their White counterparts.<sup>21</sup> Similarly, a person who commits a crime against a White victim is seen as more culpable than one who commits a crime against a Black victim.<sup>22</sup> Due to the significant impact that juror bias has on the lives

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[<https://perma.cc/237G-T2YT>] (noting that about 33 percent of the over 1,000 unarmed people killed by police between 2013 and 2019 were Black).

15. Ursula Perano, *Deaths Without Consequences*, AXIOS (May 30, 2020), <https://www.axios.com/police-killings-black-lives-8fbd7c70-486a-4231-824f-fbd9faa4a817.html> [<https://perma.cc/US9X-3GBA>]; see also Chaney & Robertson, *supra* note 11, at 57 (finding that officers were not indicted or charged in 63 percent of police killings of Black people); Hutchinson, *supra* note 1, at 24 (noting that police killings of Black men has sparked controversy because the police who kill them “have been acquitted, not charged by prosecutors or grand juries, or charged only after sustained public criticism”).
16. Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html> [<https://perma.cc/GCP8-6VKF>].
17. *E.g.*, Chaney & Robertson, *supra* note 11, at 60; Lee, *Making Race Salient*, *supra* note 1, at 1556.
18. Robert T. Carter & Silvia L. Mazzula, *Race and Racial Identity Status Attitudes: Mock Jury Decision Making in Race Discrimination Cases*, 11 J. ETHNICITY CRIM. JUST. 196, 197 (2013).
19. Markus Kemmelmeier, *The Effects of Race and Social Dominance Orientation in Simulated Juror Decision Making*, 35 J. APPLIED SOC. PSYCHOL., 1030, 1030 (2005).
20. Kenneth Williams, *Why and How the Supreme Court Should End the Death Penalty*, 51 U.S.F. L. REV. 271, 275 (2017).
21. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT’G PROJECT (Apr. 19, 2018) <https://www.sentencingproject.org/publications/un-report-on-racial-disparities> [<https://perma.cc/R9T8-VUMS>].
22. Denis Chimaeze E. Ugwuegbu, *Race and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 139 (1979).

of many people, especially people of color, it is imperative that lawyers accurately and adequately detect and remove biased jurors.

Litigators and judges currently use voir dire and juror questionnaires—a process that involves questioning potential jurors about their suitability for jury service—to identify and dismiss biased jurors. But while these mechanisms can effectively remove biased jurors writ large, there are several issues that prevent them from achieving maximum efficacy with respect to racially charged cases—cases where the racial dynamics are salient and/or where the defendant and victim are of different races. For one thing, most defendants do not have a constitutional right to ask prospective jurors questions regarding their racial bias.<sup>23</sup> And for these defendants, some judges go so far as to prohibit lawyers from mentioning race at all in the courtroom.<sup>24</sup> Even when race is discussed, voir dire and juror questionnaires are predominantly equipped to detect explicit bias.<sup>25</sup> However, as explicit expressions of racial bias become less socially acceptable and racism manifests more in subtle, unconscious biases, the efforts of courts and legislators to eliminate bias have become less effective.<sup>26</sup> Thus, addressing only outright expressions of discrimination is merely a surface-level fix to a deep-seated problem.<sup>27</sup> Indeed, research has shown that these more subtle, unconscious forms of bias, such as implicit bias, are prevalent in juror decision-making, but voir dire and juror questionnaires are “largely unable to detect or correct implicit bias in jurors.”<sup>28</sup> Academics have responded to the deficiencies in voir dire and juror questionnaires by proposing the use of implicit bias tests to screen jurors in racially charged cases. However, as this Note will show, these tests

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23. *Turner v. Murray*, 476 U.S. 28 (1986) (establishing a constitutional right for capital defendants accused of an interracial crime to have prospective jurors questioned about racial bias); *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (“As *Ristaino* states there is no *per se* constitutional rule in such circumstances requiring inquiry as to racial prejudice.”); *Ristaino v. Ross*, 424 U.S. 589, 597 (1976) (holding that voir dire questioning into racial bias is not constitutionally required in all cases).

24. See Brayer, *supra* note 1, at 166.

25. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 839 (2012).

26. Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN’S L.J. 79, 79-80 (2020).

27. See *id.*

28. Roberts, *supra* note 25, at 840.

are not a useful solution to detecting biased jurors largely due to their inability to predict juror behavior.

Practicing attorneys need new mechanisms to detect biased jurors. This Note argues that social dominance orientation is a promising new avenue to help practitioners detect biased jurors in racially charged cases.<sup>29</sup> Social dominance orientation identifies “the extent to which one desires that one’s in-group dominate and be superior to out-groups.”<sup>30</sup> It is a strong predictor of generalized prejudice against minority groups and is related to attitudes in favor of punitive criminal justice policies and the death penalty.<sup>31</sup> Additionally, research shows that social dominance orientation is related to racially biased perceptions of a criminal defendant’s guilt and racially biased sentencing recommendations.<sup>32</sup>

While social dominance orientation has been extensively examined by social scientists, it has been largely overlooked by legal scholars, despite its promising practical applications.<sup>33</sup> This Note aims to fill this gap by explaining how attorneys can leverage social dominance orientation to improve the effectiveness of voir dire and juror questionnaires in identifying racially biased jurors.

This Note proceeds in five parts. Part I opens by discussing the racialized nature of juries and the impact of biased jurors on Black defendants and other people of color in racially charged cases. Part II describes the law on the use of voir dire and juror questionnaires to detect racial bias in jurors and highlights how the evolution of this doctrine has made detecting racially biased jurors more challenging for litigators. Part III explains the deficiencies in the current voir dire process and in the juror questionnaire’s ability to detect racial bias. It then explains why the popular alternative—implicit bias testing—does not adequately capture juror bias. Part IV seeks to remedy the dearth of viable solutions currently used to detect racially biased jurors. It does so by introducing social dominance orientation and explaining its predictive value in detecting racism and biased decision-making. Part V argues that because social dominance

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29. Hutchinson, *supra* note 1, at 35.

30. Felicia Pratto et al., *Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes*, 67 J. PERSONALITY & SOC. PSYCHOL. 741, 742 (1994) [hereinafter Pratto et al., *SDO: A Personality Variable*].

31. Arnold K. Ho et al., *Social Dominance Orientation: Revisiting the Structure and Function of a Variable Predicting Social and Political Attitudes*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 583, 584 (2012).

32. Kimmelmeier, *supra* note 19, at 1036.

33. Hutchinson, *supra* note 1, at 56.

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orientation can reliably explain and predict juror behavior, especially as it relates to racism, litigators should include questions aimed at calculating social dominance orientation in voir dire and on juror questionnaires when litigating racially charged cases. Once litigators calculate prospective jurors' social dominance orientation, they can more extensively question or eliminate prospective jurors with relatively high social dominance orientation scores.

### I. THE RACIALIZED NATURE OF JUROR DECISION-MAKING

Racial bias against Black Americans is pervasive throughout every stage of the criminal justice system. For example, Black people are five-to-ten times more likely to be arrested than their White counterparts,<sup>34</sup> and Black men are nearly seven times more likely to be incarcerated than White men.<sup>35</sup> Moreover, Black people are indicted and convicted at higher rates than White people.<sup>36</sup> Black people are also less likely to secure bail in the course of pre-trial detention and less likely to be placed on probation or considered for parole than White Americans.<sup>37</sup>

In theory, the Sixth Amendment right to a fair and impartial jury should mitigate the effects of racial disparities in the criminal justice system.<sup>38</sup> (After all, a jury biased against a defendant because of her race can hardly be called impartial.) However, research shows that racial bias is just as pervasive in juror decision-making as it is in other stages of the justice

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34. Anagha Srikanth, *Black People 5 Times More Likely to be Arrested than Whites, According to New Analysis*, HILL (June 11, 2020), <https://thehill.com/changing-america/respect/equality/502277-black-people-5-times-more-likely-to-be-arrested-than-whites> [<https://perma.cc/6PZ9-GXH3>].

35. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 4 (2013).

36. Taunya Banks, *Discretionary Justice and the Black Offender*, in BLACKS AND CRIMINAL JUSTICE 37, 37-38 (Jimmy Bell & Charles E. Owens eds., 1977).

37. *Id.* at 38.

38. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the State and district wherein the crime shall have been committed.") (emphasis added).

system.<sup>39</sup> In fact, biased juror decision-making is the cause of some of the racial disparities in the justice system.<sup>40</sup>

Negative stereotypes about certain minority groups can impact one's perception of a member of that group.<sup>41</sup> For example, the stereotype that Black Americans are more prone to engage in criminal behavior "may cause people to perceive ambiguously hostile acts . . . as violent when a Black person engages in these acts and non-violent when a non-Black person engages in the same acts."<sup>42</sup> Although juries are constitutionally mandated to be fair and impartial, jurors are not immune to implicit bias and the racial stereotypes that are prevalent in society. Because of the history and perpetuation of negative stereotypes about African Americans in particular,<sup>43</sup> explicit and implicit racial bias in jurors disparately and negatively impact Black Americans in several ways.<sup>44</sup> Mock juror studies show that when a Black person and White person exhibited the same behavior, the action was seen as more threatening and violent when exhibited by a Black person than when exhibited by a White person.<sup>45</sup> Specifically, researchers found that when a Black person shoved a White person mock jurors voted that the action was violent 75 percent of the time, whereas when a White person shoved a Black person, the jurors voted that the action was violent only 17 percent of the time.<sup>46</sup> This finding indicates

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39. Carter & Mazzula, *supra* note 18, at 197.

40. *Id.* (finding that racial disparities in how harshly defendants are treated are partially caused by racial bias in juror decision-making).

41. Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. 180, 181 (2015).

42. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 404-05 (1996) [hereinafter Lee, *Race and Self-Defense*].

43. Hutchinson, *supra* note 1 (detailing the long and pervasive history of discrimination against African Americans in the United States and the negative stereotypes that developed as a result).

44. Lee, *Race and Self-Defense*, *supra* note 42, at 402-07; Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. & HUM. BEHAV. 621 (2005) (finding that racial bias in decision-making adversely impacts Black defendants).

45. Birt Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1976).

46. *Id.* at 595.

that “if juries evaluate behavior following similar racial cues, then these biases could influence their verdicts.”<sup>47</sup>

Similarly, research shows that negative depictions of Black women on television may adversely impact Black women defendants.<sup>48</sup> A study focused on the perceptions of Black people based on portrayals of Black characters on television<sup>49</sup> found that the test subjects—college students—held negative and “low expectations of Black people in real life due to the negative portrayals of Black people on television.”<sup>50</sup> The students also believed that positive stereotypes associated with Black people were not realistic or accurate.<sup>51</sup> Based on the results of this study one scholar found that “[i]f jurors, like the 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.”<sup>52</sup>

Additional research supports the claim that racial bias influences juror decision-making. Researchers found that racial bias impacts jurors’ evaluation of the evidence, which makes mock jurors more likely to believe that Black defendants are guilty.<sup>53</sup> Another study found that “pure racism accounts for a major portion of the observed correlation between race and punishment severity in the American criminal justice system.”<sup>54</sup> There is also racial discrimination in the administration of the death penalty by

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47. Hutchinson, *supra* note 1, at 59.

48. Fanta Freeman, Note, *Do I Look Like I Have an Attitude? How Stereotypes of Black Women on Television Adversely Impact Black Female Defendants Through Implicit Bias of Jurors*, 11 DREXEL L. REV. 651, 667-73 (2018-19).

49. Narissa M. Punyanunt-Carter, *The Perceived Realism of African American Portrayals on Television*, 19 HOW. J. COMM. 241 (2008).

50. Freeman, *supra* note 48, at 668.

51. Punyanunt-Carter, *supra* note 49.

52. Freeman, *supra* note 48, at 668-69.

53. Justin D. Levinson, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010) [hereinafter Levinson, *Guilty*]; see also Ugwuegbu, *supra* note 22, at 140 (finding that a White juror was more likely to give a White defendant the benefit of the doubt when presented with ambiguous evidence than a Black defendant).

54. Jim Sidanius, *Race and Sentence Disparity: The Case of American Justice*, 18 J. BLACK STUD. 3 (1988).

juries, as evidenced by the fact that Black Americans are more likely to be sentenced to capital punishment for the same crimes as White people.<sup>55</sup>

Racial bias does not only impact a jurors' view of Black defendants but also their view of victims of different races. For instance, a mock jury study found that jurors perceived a person who raped a White victim as more culpable than a person who raped a Black victim.<sup>56</sup> Due to a legislative mandate, the United States General Accounting Office conducted a study on the racial disparity of capital punishment. The study found that "those who murdered . . . [White people] were found to be more likely to be sentenced to death than those who murdered" Black people.<sup>57</sup> The aforementioned studies show that juror bias is prevalent. Although juries are intended to be a constitutional protection against racial bias, they instead perpetuate, and even cause, the problem. As a result, it is crucial that litigators find a way to detect racial bias in jurors and remove them before trial.

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55. Williams, *supra* note 20, at 275; see also Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes* 383 (Cornell L. Fac. Pub'n, Paper No. 41, 2006) (finding that in capital cases involving White victims, Black defendants who have stereotypically Black facial features are at a higher risk of receiving the death penalty). Black people are also more likely to receive harsher sentences in non-capital cases, however sentencing decisions for non-capital cases are made by judges, not juries, and are therefore outside of the scope of this Note. Jim Sidanius et al., *Social Dominance Orientation: Hierarchy Attenuators and Hierarchy Enhancers: Social Dominance Theory and the Criminal Justice System*, 24 J. APPLIED SOC. PSYCHOL. 338, 340 (1994) [hereinafter Sidanius et al., *SDO: Hierarchy Attenuators*]; Carter & Mazzula, *supra* note 18, at 197; see also German Lopez, *Report: Black Men Get Longer Sentences for the Same Federal Crimes as White Men*, VOX (Nov. 17, 2017 10:00 AM EST), <https://www.vox.com/identities/2017/11/17/16668770/us-sentencing-commission-race-booker> [<https://perma.cc/4EVB-FZ8Q>] (highlighting the U.S. Sentencing Commission's finding that Black men received 19.1 percent longer sentences for the same federal crimes as White men between 2012 and 2016).
56. Ugwuegbu, *supra* note 22, at 139.
57. U.S. GOV'T GENERAL ACCOUNTING OFF., GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 4 (1990); see also David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (finding that killing a White person as opposed to a Black person increased the likelihood of a death sentence).

II. VOIR DIRE AND JUROR QUESTIONNAIRES

“It is often said that a trial is won or lost when the jury is selected.”<sup>58</sup> Due to the negative impact of juror decision-making on Black Americans, it is critical that litigators effectively employ all available mechanisms to detect juror bias. Securing an impartial jury, especially as it relates to race, at the very beginning of the trial process is necessary to ensure equality and justice.

A. *The Importance of Detecting Bias at the Outset of a Trial*

Selecting an impartial jury is critically important. Evidence shows that pre-trial attitudes and biases impact juror decision-making and can be determinative of the verdict.<sup>59</sup> Researchers have concluded that it is preferable to address the possibility of implicit bias before the jury is impaneled because waiting longer “may be too late . . . to undo its effects.”<sup>60</sup>

The importance of selecting an impartial jury at the outset is enhanced because of Supreme Court doctrine and the Federal Rules of Civil Procedure which have made it difficult to inquire into the jury deliberation process and reverse a potentially biased verdict. Federal Rule of Civil Procedure 606(b), also known as the no-impeachment rule, bars jurors from testifying about “statements made or incidents that occurred during the jury’s deliberation.”<sup>61</sup> Until the Supreme Court’s *Pena-Rodriguez v. Colorado* decision in 2017,<sup>62</sup> this rule had been interpreted to prohibit the disclosure of jurors’ statements and actions during the deliberative process regardless

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58. Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 847 (2015) [hereinafter Lee, *A New Approach*].

59. Arthur H. Patterson & Nancy. L. Neuffer, *Removing Juror Bias by Applying Psychology to Challenge for Cause*, 7 CORNELL J. L. & PUB. POL’Y 97, 98 (1997) (“Extensive evidence that pre-trial attitudes will impact jurors’ verdicts can be found in the research on the impact of pre-trial publicity.”).

60. Lee, *A New Approach*, *supra* note 58, at 847.

61. FED. R. CIV. P. 606(b).

62. 137 S. Ct. 855 (2017).

of the circumstances,<sup>63</sup> including explicitly racist and/or biased statements made by jurors that could negatively sway a jury verdict.<sup>64</sup>

In *Pena-Rodriguez*, the Supreme Court made an exception to the no-impeachment rule for explicitly racist statements made by jurors because “racial bias . . . implicates unique historical, constitutional, and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice.”<sup>65</sup> The case involved a Mexican man who was convicted of several sexual assault charges.<sup>66</sup> After the trial, two jurors informed the defense counsel of racist statements made during deliberation.<sup>67</sup> Specifically, one juror stated that he believed “Mexican men had a bravado that caused them to believe they could do whatever they wanted with women,” and that “[the defendant] did it because he’s Mexican and Mexican men take whatever they want.”<sup>68</sup> Due to America’s extensive history of racism and the Court’s “duty to confront racial animus in the justice system,”<sup>69</sup> the Supreme Court held that in cases “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 an exception to the no-impeachment rule.<sup>70</sup> The exception permits trial courts to hear evidence of a juror’s statements and “any resulting denial of the jury trial guarantee.”<sup>71</sup>

Although the decision may serve to protect defendants of color from explicitly biased jurors after the jury is selected, it does not address the much more common problem of jurors who hold implicit biases. The ruling is only protective in the small number of cases in which a juror makes explicitly racist statements. However, racial bias in juror decision-making today is not always a result of explicit racial animus. Rather, it is frequently

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63. *Tanner v. United States*, 483 U.S. 107 (1987) (prohibiting the impeachment of the jury verdict despite alleged juror drug and alcohol intoxication).

64. Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 166, 167-68 (2011).

65. *Pena-Rodriguez*, 137 S. Ct. at 859.

66. *Id.* at 861.

67. *Id.*

68. *Id.* at 862.

69. *Id.* at 867.

70. *Id.* at 869.

71. *Id.*

a function of deeply entrenched stereotypes that manifest themselves in the form of differential perceptions and treatment.<sup>72</sup> Because of the difficulty of mitigating the effects of a biased jury after the jury has been chosen, it is necessary to detect bias and compose an impartial jury at the outset of a trial.

*B. Composing an Impartial Jury*

Currently, there are two mechanisms available to detect juror bias at the beginning of a trial. The first mechanism is voir dire, which is “the process of [orally] questioning prospective jurors to ensure that those chosen to sit on the jury will be impartial and unbiased.”<sup>73</sup> Through voir dire, litigators are able to learn about prospective jurors’ backgrounds and beliefs and influence the composition of the jury.<sup>74</sup> The second mechanism that litigators can use to compose an impartial jury is the juror questionnaire. Juror questionnaires are written inquiries into the backgrounds and biases of the jurors.<sup>75</sup> Their use is so prevalent that some large law firms and corporations consider the failure to use a juror questionnaire in large civil cases equivalent to malpractice.<sup>76</sup> Research suggests that juror questionnaires may be more effective than voir dire for several reasons. First, juror questionnaires are often more expansive than voir dire, which allows litigators to get more information about potential jurors.<sup>77</sup> Second, juror questionnaires are more efficient, resulting in many judges “encourag[ing] such questionnaires because of their enormous time-saving features.”<sup>78</sup> Lastly, written questionnaires increase the likelihood of jurors giving more honest information reflective of their true beliefs.<sup>79</sup>

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72. *See supra* Part I.

73. Lee, *A New Approach*, *supra* note 58, at 845.

74. *Id.* at 847.

75. Matthew L. Larrabee & Linda P. Drucker, *Adieu Voir Dire: The Jury Questionnaire*, 21 LITIG. 37, 37 (1994).

76. *Id.*

77. *Id.*

78. *Id.* at 38.

79. Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451, 460 (1991).

Once a litigator obtains the relevant information from voir dire or the juror questionnaire, she has two options to remove prospective jurors from the jury pool. One, she can remove the juror for cause by communicating to the trial judge a good reason the juror should not be allowed to serve on the jury, such as the juror's inability to serve as an impartial decision-maker.<sup>80</sup> Two, the litigator can use one of the limited number of peremptory challenges allotted to both parties.<sup>81</sup> Peremptory challenges can be used to remove jurors for any reason, or no reason at all, excluding race and gender.<sup>82</sup> Both voir dire and juror questionnaires can be effective tools to detect different types of juror bias. Supreme Court doctrine dictates how these tools can be used to detect a particularly harmful type of juror bias: racial bias.

### C. Supreme Court Jurisprudence on Voir Dire

The Supreme Court has long recognized that “voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.”<sup>83</sup> Over the past eighty years, the Court has taken steps to protect a defendant's right to an impartial jury, especially as it relates to racial bias. However, more recently, these protections have been limited by the Court and are either not available to all defendants or must be explicitly invoked to trigger any constitutional protection. The evolution of the Court's jurisprudence in this area has significant consequences for the efficacy of voir dire and juror questionnaires, and it informs the recommendation proposed in Part V.

Between 1931 and 2017, the Supreme Court has wrestled with whether a defendant has a per se constitutional right to ask prospective jurors questions about racial bias during voir dire. Initially, the Court answered in

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80. *How Courts Work*, AM. BAR ASS'N. (Sept. 09, 2019) [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/juryselect](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect) [https://perma.cc/NTD5-RFU6]; *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (explaining that for-cause challenges “permit rejection of jurors on a narrowly specified . . . and legally cognizable basis of partiality”).
81. Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020).
82. *How Courts Work*, *supra* note 80; *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986).
83. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

the affirmative. However, since 1975, the Court has curtailed the scope of a defendant's constitutional right to have prospective jurors questioned about racial bias.

In 1931, the Supreme Court held that courts must allow inquiries about the racial prejudice of prospective jurors during voir dire.<sup>84</sup> The Court in *Aldridge v. United States* "established the right of a black defendant, charged with the murder of a white policeman, to have prospective jurors questioned about possible racial prejudice,"<sup>85</sup> noting that "if any one of [the jury members] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit."<sup>86</sup> The Court further explained that permitting biased jurors to remain on the jury and barring inquiries about racial bias in voir dire are the surest ways to "bring the processes of justice into disrepute."<sup>87</sup>

In 1973, in *Ham v. South Carolina*,<sup>88</sup> the Supreme Court constitutionalized the ruling in *Aldridge*. In this case, a Black man was convicted of possession of marijuana in violation of state law.<sup>89</sup> The defendant, a well-known civil rights activist, claimed that he was being framed because of his activism.<sup>90</sup> During trial, the defendant requested that the judge ask questions in voir dire that would elicit possible bias against Black people and people with beards, but the judge refused and instead asked three general questions about bias, prejudice, and partiality.<sup>91</sup> The Supreme Court later reversed the defendant's conviction due to the trial judge's refusal to inquire about racial prejudice.<sup>92</sup> The Court held that the Due Process Clause of the Fourteenth Amendment creates a constitutional requirement for the trial judge to permit questions of prospective jury

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84. *Aldridge v. United States*, 283 U.S. 308, 313 (1931).

85. Linda Mar, *Probing Racial Prejudice on Voir Dire: The Supreme Court Provides Illusory Justice for Minority Defendants*, 72 J. CRIM. L. & CRIMINOLOGY 1444, 1448 (1981).

86. *Aldridge*, 283 U.S. at 314.

87. *Id.*

88. 409 U.S. 524 (1973).

89. *Id.* at 524.

90. *Id.* at 525.

91. *Id.* at 525-26.

92. *Id.*

members about racial biases<sup>93</sup> because the “principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race.”<sup>94</sup>

Only three years after *Ham*, however, the Supreme Court began to curtail the rights and protections that it established for defendants of color regarding racial prejudice in prospective jurors. In *Ristaino v. Ross*,<sup>95</sup> the Court narrowed the constitutional protection established in *Ham* by holding that the Constitution does not require prospective jurors to be questioned about racial bias simply because the victim of the crimes alleged was White and the defendants were Black.<sup>96</sup> In *Ristaino*, three Black men were convicted for attacking a White security guard.<sup>97</sup> Each defendant requested that the trial judge specifically ask the prospective jurors about racial prejudice, but the trial judge refused to do so.<sup>98</sup> On appeal, one defendant—James Ross Jr.—contended that the judge’s refusal to inquire into the potential racial prejudices held by prospective jurors violated his constitutional rights. The Court of Appeals held that *Ham* required specific questioning about racial bias, but the Supreme Court reversed, explaining that “*Ham* did not announce a requirement of universal application.”<sup>99</sup> The Court distinguished the facts of *Ham* by highlighting the fact that the defense in *Ham* was that the defendant was being framed because of his civil rights activism.<sup>100</sup> Due to the nature of *Ham*’s defense, the Court held that “racial issues . . . were inextricably bound up with the conduct of the trial.”<sup>101</sup> The mere fact that the defendants in *Ristaino* were Black and the victim was White did not mean that racial issues were inextricably bound with the

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93. *Id.*

94. *Id.* at 526-27. Although *Ham* affirmed the constitutional right of defendants to have jurors questioned about racial bias, it did not require questions about prejudice against people with beards, reflecting the Supreme Court’s understanding of race as an area requiring special treatment by the Fourteenth Amendment.

95. 424 U.S. 589 (1976).

96. *Id.* at 597-98.

97. *Id.* at 590, 594.

98. *Id.* at 590-92.

99. *Id.* at 594-96.

100. *Id.* at 595.

101. *Id.* at 597.

conduct of the trial, and therefore did not trigger the constitutional right to have prospective jurors specifically questioned about racial prejudice.

Thus, the Court created a special circumstances rule for when defendants have the constitutional right to question prospective jurors about racial prejudice.<sup>102</sup> The special circumstances rule states that a defendant has a constitutional right to question prospective jurors about racial bias if there is a “constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as ‘indifferent as [they stand] unsworn[].’”<sup>103</sup> This rule means that a trial judge has the constitutional obligation to permit inquiries about racial bias only if “the circumstances of the case suggest a significant likelihood of prejudice by the jurors,”<sup>104</sup> or a significant likelihood that racial prejudice may “infect [the] trial.”<sup>105</sup> Although the Court did not recognize a universal constitutional right to voir dire on racial prejudice, the Court noted that “the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant.”<sup>106</sup>

In 1981, in *Rosales-Lopez v. United States*,<sup>107</sup> the Supreme Court once again refused to establish a per se constitutional right to inquire about racial prejudice during voir dire. Instead, the Court used its supervisory power over the federal courts to create a non-constitutional rule which states that prospective jury members must be questioned about racial bias when there is a “reasonable possibility that racial or ethnic prejudice would affect the jury.”<sup>108</sup> Here, a Mexican man was convicted for allegedly participating in a plot to bring three Mexican citizens to the United States in violation of federal law.<sup>109</sup> The defendant requested that the judge specifically ask about

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102. *Id.* at 594 (noting that the Constitution “does not always entitle a defendant to have questions posed during voir dire specifically [about racial matters]”); Lee, *A New Approach*, *supra* note 58 at 854.

103. *Ristaino v. Ross*, 424 U.S. 589, 596 (1976).

104. Lee, *A New Approach*, *supra* note 58, at 859.

105. *Ristaino*, 424 U.S. at 598.

106. *Id.* at 597 n.9.

107. 451 U.S. 182 (1981).

108. *Id.* at 194.

109. *Id.* at 184-85.

racial prejudice based on race or Mexican descent, but the judge refused.<sup>110</sup> On appeal, the defendant challenged the judge's refusal to inquire about racial prejudice during voir dire.<sup>111</sup>

In upholding the defendant's conviction, the Supreme Court explained the distinction between constitutionally mandated inquiry into racial bias and the non-constitutional, supervisory standard for inquiry into racial bias. Specifically, the Court explained that *Ristaino* established a constitutional right to ask prospective jurors about racial biases "when there are . . . substantial indications of the likelihood of racial or ethnic prejudice [to] affect the jurors in a particular case."<sup>112</sup> The Court further explained that *Rosales-Lopez* announced a non-constitutional, supervisory rule that prohibits judges from refusing to allow questions about racial bias "where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury."<sup>113</sup> One clear indication of a reasonable possibility that racial or ethnic prejudice may impact the jury is shown when the defendant and victim of a violent crime are members of a different race.<sup>114</sup> Therefore, the Court held that according to the supervisory rule, "federal trial courts must [question prospective jurors about racial bias] when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups."<sup>115</sup> The Court held that *Rosales-Lopez's* case did not

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110. *Id.* at 185. Specifically, the judge refused to ask any questions about racial or ethnic prejudice, and instead asked, "Do you have any feelings about the alien problem at all?" *Id.* at 186.

111. *Id.* at 187.

112. *Id.* at 190 ("Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.").

113. *Id.* at 191 ("Failure to honor [a defendant's request to question prospective jurors about racial bias], however, will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.").

114. *Id.* at 192.

115. *Id.* The Court also acknowledged that other circumstances might satisfy the reasonable possibility standard, however, the reasonable possibility standard remains in the trial court's discretion, subject only to case-by-case review by appellate courts.

meet the reasonable possibility standard because the trial did not involve allegations of racial or ethnic prejudice and the circumstances did not involve interracial violence.<sup>116</sup> Although the Court refused to establish a *per se* constitutional rule, the Court stated that it is usually best to permit *voir dire* questions regarding racial bias.<sup>117</sup>

In the 1986 case *Turner v. Murray*, the Supreme Court established a constitutional right for capital defendants accused of an interracial crime to have prospective jurors questioned about racial bias.<sup>118</sup> Here, a Black man was sentenced to death for killing a White jewelry store owner during the commission of a robbery.<sup>119</sup> The defendant asked the judge to inquire about racial prejudice during *voir dire*, but the judge refused and instead asked general questions about impartiality.<sup>120</sup> The Supreme Court used the analytical framework in *Ristaino* to determine whether the circumstances of this case constituted a constitutionally significant likelihood of prejudice. The Court affirmed that the mere fact that the defendant and victim were different races did not meet the standard announced in *Ristaino*, however, the fact that the defendant was charged with a capital offense did make the circumstances constitutionally significant.<sup>121</sup> The Court held that “because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.”<sup>122</sup> The Court also recognized that implicit and unconscious bias against Black people may negatively influence a juror’s vote in favor of the death penalty.<sup>123</sup> Due to the risk of racial prejudice in capital sentences

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116. *Id.*

117. *Id.* at 191 (“In our judgment, it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued.”).

118. 476 U.S. 28 (1986).

119. *Id.* at 30.

120. *Id.* at 49 (Powell, J., dissenting).

121. *Id.* at 33.

122. *Id.* at 35.

123. *Id.* (“Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved the aggravating factors specified under Virginia law.”).

and the finality of the death sentence, the Court held that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.”<sup>124</sup>

Although Supreme Court jurisprudence establishes a constitutional right to question prospective jurors about racial bias under certain circumstances, the defendant must specifically request that the judge allow such inquiry during voir dire in order to exercise her constitutional right.<sup>125</sup> If the defendant fails to request a voir dire or juror questionnaire that includes questions about racial prejudice, she will not trigger the constitutional rights established in *Ristaino* and *Turner*. If the defendant fails to trigger the constitutional right, she is barred from complaining about a trial judge’s failure to inquire about racial bias.<sup>126</sup> The evolution of the Court’s jurisprudence narrowed the constitutional protections afforded to defendants with regard to questioning prospective jurors about racial bias through voir dire and juror questionnaires. Thus, litigators need a new mechanism to detect racial bias before the jury is impaneled that will be readily available without the need to trigger already narrowed constitutional protections.

### III. APPROACHES TO DETECTING RACIAL BIAS

Racial bias has been present in the criminal justice system since its inception. Litigators have historically attempted to use voir dire and juror questionnaires to detect bias. However, the status quo and other proposed solutions, such as implicit bias tests, have not been successful. This Part will discuss the deficiencies with the status quo and implicit bias tests. The next Part will then introduce a newer, more effective solution: social dominance orientation.

#### A. *Status Quo*

Presently, litigators use voir dire and juror questionnaires to attempt to detect racial bias. However, as they currently stand, voir dire and juror questionnaires suffer from three main deficiencies. First, voir dire and juror

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124. *Id.* at 36-37.

125. Lee, *A New Approach*, *supra* note 58, at 850.

126. *Turner v. Murray*, 476 U.S. 28, 37 (1986).

questionnaires may be less effective in detecting racial bias because questions related to race are not always permitted. Although the Supreme Court advises that judges allow inquiries into racial prejudice, the Court has also consistently reaffirmed the broad discretion that trial judges have regarding voir dire and juror questionnaires.<sup>127</sup> As a result, some judges prohibit litigators from mentioning race altogether during voir dire.<sup>128</sup> Even when a defendant has a constitutional right to question prospective jurors on the issue of racial bias, the defendant has the additional burden of explicitly requesting such questioning to exercise her rights. And though some defendants have a constitutional right to ask race-related questions to prospective jurors, the Supreme Court has not ruled on whether prosecutors have a right to question jurors about racial prejudice.<sup>129</sup> Prosecutors may want to question prospective jurors about racial bias for several reasons. For one thing, in cases with a White defendant and Black victim, jurors may sympathize with the defendant and have less empathy for the victim.<sup>130</sup> Additionally, racial stereotypes about the dangerousness of Black men may cause jurors to misperceive a Black victim's actions as more threatening and a White defendant's actions as reasonable.<sup>131</sup> This second scenario is particularly relevant in cases involving self-defense and cases regarding police shootings and excessive use of force where the officer is White and the victim is Black.

Second, assuming that litigators are permitted to ask about explicit racial bias, oral voir dire can be particularly ineffective because asking jurors to discuss explicit biases may prompt them to conceal such biases.<sup>132</sup> Racially biased jurors may refrain from admitting their prejudices in order to be perceived as socially desirable and receive approval from the judge and other jurors.<sup>133</sup> The pressure of social acceptance in the courtroom has been empirically studied. One study found that 60 percent of people

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127. See *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981); *Ristaino v. Ross*, 424 U.S. 589, 594 (1976); *Aldridge v. United States*, 283 U.S. 308, 310 (1931).

128. Brayer, *supra* note 1, at 166.

129. Lee, *A New Approach*, *supra* note 58, at 859.

130. *Id.*

131. *Id.*

132. Larrabee & Drucker, *supra* note 75, at 37; see also Roberts, *supra* note 25, at 844 (explaining that the process of group voir dire makes disclosure of racial bias less likely).

133. *E.g.*, Patterson & Neuffer, *supra* note 59, at 102; Roberts, *supra* note 25, at 844.

revealed to a stranger that they did not believe in the presumption of innocence, but when asked in a courtroom, virtually no one gave the same answer.<sup>134</sup> Additionally, prospective jurors may not wish to deviate from the actions and answers of other prospective jurors.<sup>135</sup> Research shows that the pressure to conform is increased when it is perceived as coming from someone with high status, such as a judge.<sup>136</sup> Therefore, racially biased jurors may not reveal their explicit biases in order to conform to the judge's demands of fairness and impartiality. As a result, litigators are less likely to detect and remove explicitly biased jurors during voir dire.

Last, a wealth of social science research has shown that bias is not always explicit. In fact, bias is often unconscious or implicit and in tension with one's consciously held beliefs.<sup>137</sup> Although racially prejudiced implicit biases can gravely impact a juror's decision, these biases may be so subtle that they are unrecognizable by the people who hold them.<sup>138</sup> Implicit biases affect verdicts by impacting how jurors view witnesses, evidence, and the parties themselves.<sup>139</sup> For example, implicit bias may cause jurors to misremember facts in a racially biased manner.<sup>140</sup> Additionally, negative implicit biases against people of color, especially Black Americans, may affect a juror's perception of a person's guilt, the excessive use of force by police officers, and a person's use of self-defense mechanisms.<sup>141</sup> Although implicit racial bias in jurors is prevalent and detrimental to Black Americans, "current [practice] fails to address the fact that jurors harbor not only explicit, or conscious bias, but also implicit or unconscious bias."<sup>142</sup>

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134. Roberts, *supra* note 25, at 844 (citing Andrea B. Horowitz, Note, Ross v. Oklahoma: *A Strike Against Peremptory Challenges*, 1990 WIS. L. REV. 219, 224).

135. Patterson & Neufer, *supra* note 59, at 103.

136. *Id.*

137. Lee, *A New Approach*, *supra* note 58, at 860.

138. Roberts, *supra* note 25, at 833.

139. *Id.* at 836.

140. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347 (2007).

141. Roberts, *supra* note 25, at 837; *see also* Levinson, *Guilty*, *supra* note 53, at 190 (finding that people implicitly associate Black and guilty compared to White and guilty).

142. Roberts, *supra* note 25, at 827.

Thus, voir dire and juror questionnaires do not adequately detect implicit bias.<sup>143</sup>

### B. *Implicit Bias Testing*

Several scholars have researched how to account for the difficulties in detecting implicit bias. For example, scholars have proposed that litigators use the Implicit Association Test (IAT), the most prominent and widely employed mechanism to measure implicit bias, as a screening device for jurors.<sup>144</sup> The IAT tests participants' negative and positive associations with particular characteristics through the swiftness and accuracy of their keystrokes.<sup>145</sup> Specifically, participants must strike a certain computer key to match Black faces with negative words such as bad and White faces with positive words such as good.<sup>146</sup> The participants are then asked to do the opposite, match positive words with Black faces and negative words with White faces.<sup>147</sup> At the end, the test reveals the "nature and strength" of the participant's implicit bias.<sup>148</sup>

Various scholars have proposed administering the IAT, or similar implicit bias tests, to prospective jurors and using the results as a factor in formulating the jury.<sup>149</sup> But this proposal has significant disadvantages. First, the IAT lacks measurement reliability.<sup>150</sup> The IAT does not have a high

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143. Mar, *supra* note 85, at 1454-55 (quoting NAT'L JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES 178 (1979)) ("Because most people learn to conceal [racist] beliefs, even from themselves, voir dire on racial prejudice is very difficult.").

144. Judge 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*, 4 HARV. L. & POL'Y REV 149, 170 (2010); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139, 158-69 (2016); see also Roberts, *supra* note 25, at 852-53.

145. Roberts, *supra* note 25, at 848.

146. *Id.*

147. *Id.*

148. *Id.* at 849.

149. Bennett, *supra* note 144, at 170; Larson, *supra* note 144, at 165; Roberts, *supra* note 25, at 853.

150. Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 712 (2016).

“median test-retest reliability coefficient,” which means that a person’s score is likely to change significantly when they take the test again.<sup>151</sup> “Because of the moderate reliability, nearly all scientists have discouraged using the IAT in high-stakes individual selection contexts, such as judicial nominations.”<sup>152</sup>

Second, and most importantly, there is no empirical evidence that has shown that the results of the IAT can reasonably predict juror bias.<sup>153</sup> Thus, even after receiving IAT results for prospective jurors, litigators will not have much useful insight into how that juror is likely to evaluate their client or the facts of the case.

Third, the IAT may present privacy concerns.<sup>154</sup> For example, jurors may feel uneasy about having their implicit bias results revealed. This uneasiness may be enhanced by the fact that several courts have held that the First Amendment provides a public right of access to criminal trials, which extends to voir dire and juror questionnaires.<sup>155</sup> Thus, if the IAT were administered during the voir dire or juror questionnaire process, jurors are at risk of having the results released to the public. In addition, “[n]umerous studies document that perceived insensitivity to the privacy concerns of prospective jurors is one cause of dissatisfaction with jury service.”<sup>156</sup>

Finally, disclosure of implicit biases may actually increase stereotyping rather than decrease it.<sup>157</sup> Research shows that anger and shame increase

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151. *Id.* (citing Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in *AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR* 265, 274 (John A. Bargh ed., 2007)); *see also* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 *UCLA L. REV.* 465, 477-78 (2010).

152. Kang & Lane, *supra* note 151, at 477-78.

153. Roberts, *supra* note 25, at 854; Mitchell, *supra* note 150, at 710.

154. *See* Roberts, *supra* note 25, at 856.

155. *See* *In re Jury Questionnaires*, 37 A.3d 879, 889 (D.C. 2012) (noting that the judge is allowed to refrain from publicizing questions that involve “deeply personal matters”).

156. Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 *JUDICATURE* 18, 18 (2001).

157. Roberts, *supra* note 25, at 854, 856.

the likelihood of stereotyping.<sup>158</sup> Therefore, if IAT results elicit anger and shame, then they may increase stereotyping.<sup>159</sup> It is important to note that, while “no such effect has been demonstrated with the IAT, the specter of jurors provoked into the new depths of bias militates in favor of caution.”<sup>160</sup> Similarly, empirical evidence suggests that jurors may react negatively if they believe a litigator is utilizing a “race-based strategy,” and thus may have a negative reaction to the use of the IAT as a selection mechanism.<sup>161</sup>

Notably, the IAT’s developers and other scientists have indicated that the test is not appropriate for jury selection.<sup>162</sup> When asked whether the IAT should be used for jury selection, the IAT’s developers have explicitly stated:

We assert that the IAT should not be used in any such way. Especially at this early stage of the IAT’s development, it is much preferable to use it mainly to develop awareness of one’s own and others’ automatic preferences and stereotypes. Using the IAT as the basis for making significant decisions about self or others could lead to undesired and unjustified consequences.<sup>163</sup>

In response to a similar question, at least one developer, Mahzarin Banaji, stated that “she and her colleagues [would] testify against any attempt to use the test to identify biased individuals.”<sup>164</sup> She explained that using the IAT to select juries assumes that someone who shows bias on the test will behave in accordance with that bias, which is not necessarily

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158. Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1966 (2009).

159. Roberts, *supra* note 25, at 856.

160. *Id.*

161. *See* Motion to Bar Death Penalty No. 25, *New Hampshire v. Addison* (No. 07-S-0254), 2008 WL 2703965 (N.H. Super. Ct. Jan. 4, 2008).

162. Roberts, *supra* note 25, at 857.

163. *Understanding and Interpreting IAT Results*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/ireland/background/understanding.html> [https://perma.cc/GAC7-8M2H].

164. Shankar Vedantam, *See No Bias*, WASH. POST (Jan. 23, 2005), <https://www.washingtonpost.com/archive/lifestyle/magazine/2005/01/23/see-no-bias/a548dee4-4047-4397-a253-f7f780fae575/> [https://perma.cc/4A4K-XGEE].

true.<sup>165</sup> In other words, the IAT lacks predictive power. She also explained that the IAT should receive limited to no use in this context because research shows that someone can trick the test by temporarily “holding counter-stereotypes in their minds.”<sup>166</sup> Thus, the result itself may not be indicative of a juror’s biases.

These disadvantages have led at least one scholar to assert that “the IAT should be rejected as a screening device for potential jurors, because the[] disadvantages outweigh the advantages of the proposal.”<sup>167</sup> Therefore, the IAT should not be used to detect implicit bias and is thus, not a sufficient remedy to the shortfalls of the current voir dire process and juror questionnaires.

#### IV. SOCIAL DOMINANCE ORIENTATION

##### A. Overview

Due to the current deficiencies in voir dire and juror questionnaires, it is imperative that lawyers employ new mechanisms to detect and remove biased jurors. Because racial bias in juror decision-making is a systemic and institutional issue, theories that address institutional racism in the jury system should inform the new mechanism. One such theory that meets this criterion is social dominance theory.

According to social dominance theory, societies organize themselves into group-based social hierarchies that contain dominant and subordinate social groups.<sup>168</sup> While violence and force can be used to achieve group dominance and inequality, social dominance theory postulates that other forces create inequality as well.<sup>169</sup> Specifically, the theory posits that dominance and inequality are achieved through society’s attempt to decrease group conflict by adopting ideologies that advocate for the

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165. *Id.*

166. *Id.*

167. Roberts, *supra* note 25, at 857.

168. Pratto et al., *Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward*, 17 *EUR. REV. SOC. PSYCHOL.* 271, 275 (2006) [hereinafter Pratto et al., *Dynamics*]; see also Hutchinson, *supra* note 1, at 47.

169. Pratto et al., *Dynamics*, *supra* note 168, at 275.

superiority of one group over others.<sup>170</sup> These ideologies serve as legitimizing myths which are "consensually held values, attitudes, beliefs, stereotypes, and cultural ideologies."<sup>171</sup> Legitimizing myths can be used to legitimize discrimination and provide justifications for group-based social inequality.<sup>172</sup> In other words, social dominance theory proposes that societies create and maintain inequality by adopting a set of beliefs that one group is superior to the others. Societies then use these beliefs to justify the unequal treatment and subordination of some groups over others.

There are two types of legitimizing myths. Hierarchy-attenuating legitimizing myths oppose group dominance and advocate for equality.<sup>173</sup> Some examples of hierarchy-attenuating legitimizing myths include equalitarianism, support for human rights, and support for providing for low-income people.<sup>174</sup> On the other hand, hierarchy-enhancing legitimizing myths "provide moral and intellectual justification for group-based oppression and inequality."<sup>175</sup> Hierarchy-enhancing legitimizing myths help to stabilize oppression by influencing individual and institutional behavior in a manner that maintains group dominance.<sup>176</sup> Examples of hierarchy-enhancing legitimizing myths include racism, sexism, and homophobia.<sup>177</sup> Hierarchy-enhancing legitimizing myths are so powerful and pervasive that they often lead to the maintenance of oppression by subordinate groups as well.<sup>178</sup>

Social dominance theory applies to institutional racism because hierarchy-enhancing and hierarchy-attenuating legitimizing myths are not solely held by individuals; they are present within institutions as well. Thus, institutions can be classified as hierarchy-enhancing or hierarchy-

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170. Pratto et al., *SDO: A Personality Variable*, *supra* note 30, at 741.

171. Pratto et al., *Dynamics*, *supra* note 168, at 275.

172. *Id.*; Hutchinson, *supra* note 1, at 47; Sidanius et al., *SDO: Hierarchy Attenuators*, *supra* note 55, at 341.

173. Pratto et al., *Dynamics*, *supra* note 168, at 276.

174. *See id.*

175. *Id.* at 275.

176. *Id.*; Pratto et al., *SDO: A Personality Variable*, *supra* note 30, at 742.

177. Pratto et al., *Dynamics*, *supra* note 168, at 276.

178. *E.g.*, Levin et al., *Social Dominance Orientation and Intergroup Bias: The Legitimation of Favoritism for High-Status Groups*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 144, 146 (2002); Pratto et al., *Dynamics*, *supra* note 168, at 276.

attenuating.<sup>179</sup> Hierarchy-enhancing institutions—such as the criminal justice system, the military, and the police<sup>180</sup>—support hierarchy-enhancing legitimizing myths because they promote and sustain inequality by disproportionately allocating positive and negative social goods.<sup>181</sup> Specifically, these institutions consistently and systemically give positive social goods to dominant groups and negative social goods to subordinate groups. On the other hand, hierarchy-attenuating institutions—such as labor unions, social services, and humanitarian organizations<sup>182</sup>—attempt to aid members of subordinate groups and facilitate open access to resources.<sup>183</sup>

According to social dominance theory, one's belief in hierarchy-attenuating or hierarchy-enhancing legitimizing myths can be measured by their social dominance orientation.<sup>184</sup> Social dominance orientation is “the extent to which one desires that one's in-group dominate and be superior to out-groups.”<sup>185</sup> In other words, it is a person's general orientation towards group-based hierarchy and group supremacy or dominance.<sup>186</sup> Social dominance orientation is commonly measured with a sixteen-point value scale.<sup>187</sup> The scale was created using data from over eighteen thousand respondents in eleven countries.<sup>188</sup> The sixteen values on the scale measure “intergroup relations and ‘assess[] orientations toward

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179. Pratto et al., *Dynamics*, *supra* note 168, at 276.

180. See Pierre De Oliveira, Serge Guimond & Michael Dambrun, *Power and Legitimizing Ideologies in Hierarchy-Enhancing vs. Hierarchy-Attenuating Environments*, 33 POL. PSYCHOL. 867, 869 (2012); see also Sidanius et al., *SDO: Hierarchy Attenuators*, *supra* note 55 at 342.

181. Pratto et al., *Dynamics*, *supra* note 168, at 276.

182. *Id.*

183. Pratto et al., *Dynamics*, *supra* note 168, at 277.

184. Pratto et al., *SDO: A Personality Variable*, *supra* note 30, at 741-42.

185. *Id.* at 742.

186. Jim Sidanius, Shana Levin, James Liu & Felicia Pratto, *Social Dominance Orientation, Anti-Egalitarianism and the Political Psychology of Gender: An Extension and Cross-Cultural Replication*, 30 EUR. J. SOC. PSYCHOL. 41, 43 (2000).

187. See App. A; Sidanius et al., *SDO: A Personality Variable*, *supra* note 30, at 760-63 (“Items [1-8] were measured on a *very negative* (1) to *very positive* (7) scale . . . Items 9-16 should be reverse-coded. The response scale was *very negative* (1) to *very positive* (7).”).

188. Hutchinson, *supra* note 1, at 49; Ho, *supra* note 31, at 584.

group domination rather than just toward equality.”<sup>189</sup> Eight of the values correlate with high social dominance orientation and the remaining values correlate with low social dominance orientation.<sup>190</sup> The test asks respondents questions such as whether they believe that some groups are simply inferior to other groups, whether they believe that no one group should dominate in society, and whether they believe in increased social equality.<sup>191</sup> The scale is not a test that can be “passed” or “failed”—rather, it places people on a relative spectrum. The higher a person scores on the social dominance orientation scale, the more likely they are to hold beliefs that reinforce group dominance and inequality, whereas people lower in social dominance orientation are more likely to hold beliefs that favor equality.<sup>192</sup> Thus, someone who scores a four in social dominance orientation is more likely to hold egalitarian beliefs than someone who scores a ten, but there is no cut-off at which someone will be labeled as racist.

The social dominance orientation scale has been found to be highly reliable and valid.<sup>193</sup> Indeed, numerous studies have shown that social dominance orientation is a powerful predictor of various types of prejudice.<sup>194</sup> For example, high social dominance orientation is correlated with several hierarchy-enhancing legitimizing myths such as racism, sexism, classism, cultural elitism, ethnic prejudice, and nationalism.<sup>195</sup> And high social dominance orientation has been proven to be most strongly correlated with anti-Black bias.<sup>196</sup> Additionally, social dominance orientation can predict support for various social policies, such as punitive

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189. Hutchinson, *supra* note 1, at 49 (internal citation omitted).

190. *Id.* at 49.

191. For the full scale, see App. A.

192. *Id.*

193. Jim Sidanius, Felicia Pratto & Michael Mitchell, *In-Group Identification, Social Dominance Orientation, and Differential Intergroup Social Allocation*, 134 J. SOC. PSYCHOL. 151, 156 (1994); Pratto et al., *Dynamics*, *supra* note 168, at 283.

194. Bo Ekehammar, Nazar Akrami, Magnus Gylje & Ingrid Zakrisson, *What Matters Most to Prejudice: Big Five Personality, Social Dominance Orientation, or Right-Wing Authoritarianism*, 18 EUR. J. PERS. 463, 466 (2004); Ho et al., *supra* note 31, at 584.

195. Pratto et al., *SDO: A Personality Variable*, *supra* note 30, at 748; Sidanius et al., *SDO: Hierarchy Attenuators*, *supra* note 55, at 357.

196. Pratto et al., *SDO: A Personality Variable*, *supra* note 30, at 754.

criminal justice policies, ameliorative racial justice policies, and chauvinist policies.<sup>197</sup> Social dominance orientation may not only predict racial bias, it is hypothesized to function as the primary catalyst for racial bias and other hierarchy-enhancing attitudes.<sup>198</sup>

Research shows that the ability of social dominance orientation to predict prejudice has a baseline level of consistency.<sup>199</sup> This means that, unlike the IAT, social dominance orientation can predict prejudice, specifically racist attitudes, regardless of specific salient social identities in a given situation.<sup>200</sup> In one study, researchers primed subjects with either “ethnic identity” or “personal identity” before or after assessing their social dominance orientation and levels of racism.<sup>201</sup> The researchers found that although there were differences in the levels of racism depending on what was primed, social dominance orientation remained a stable predictor of racism across all scenarios.<sup>202</sup> These findings indicate that social dominance orientation is a consistent and strong predictor of racial prejudice regardless of situational factors.

### *B. Social Dominance Orientation and the Criminal Justice System*

Social dominance orientation is particularly relevant to the criminal justice system. According to social dominance theory, the criminal justice

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197. *Id.* at 748-49; Sidanius et al., *SDO: Hierarchy Attenuators*, *supra* note 55, at 341.

198. Pratto et al., *SDO: A Personality Variable*, *supra* note 30, at 756 (“We believe political conservatism and racism are spuriously correlated and that both are ‘driven’ by [social dominance orientation].”).

199. Ryan Perry & Chris G. Sibley, *Social Dominance Orientation: Mapping a Baseline Individual Difference Component Across Self-Categorization*, 32 *J. INDIVIDUAL DIFFERENCES* 110, 112 (2011).

200. *Id.* at 114.

201. *Id.* at 112. To prime ethnic identity, the researchers stated that they were interested in “the comparison between the opinions of people from [the participant’s] ethnic group and those from other ethnic groups.” To prime personal identity, the researchers stated that they were interested in “comparisons between [the participant’s] own opinions and those of other individuals.” The researchers further explained that they were specifically interested in “what characteristics describe [the participant] as a unique individual compared to other people with whom [they] are familiar (e.g., friends, family, acquaintances).” *Id.*

202. *Id.* at 114.

system is one of the most hierarchy-enhancing social institutions.<sup>203</sup> Additionally, the criminal justice system is perceived as an important mechanism for reinforcing group dominance.<sup>204</sup> Although policies have been created to ensure that equality is a major value of the criminal justice system, “the net output of this institution will be an unequal distribution of negative social value to members of subordinate groups,” specifically marginalized communities, such as Black Americans.<sup>205</sup> The criminal justice system exhibits racial bias in all stages of the system from arrest to sentencing.<sup>206</sup>

Studies show that social dominance orientation can predict attitudes about criminal justice policies.<sup>207</sup> Social dominance orientation is strongly related to support for punitive criminal justice policies,<sup>208</sup> the death penalty, the torture of wrongdoers,<sup>209</sup> and the Rodney King verdict.<sup>210</sup> Additionally, individuals who are high in social dominance orientation report that racial progress in America is farther along than individuals who are low in social dominance orientation.<sup>211</sup>

Mock jury studies show that social dominance orientation is correlated with juror behavior. One study found that social dominance orientation was related to racially biased perceptions of guilt and sentence recommendations.<sup>212</sup> In this study, the researchers gave White mock jurors a prompt with the details of an assault. Although the prompts contained the same factual pattern, one prompt stated that the defendant was a Black man, and the victim was a White woman, and the other prompt stated that

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203. Sidanius et al., *SDO: Hierarchy Attenuators*, *supra* note 55, at 340.

204. Pratto et al., *Dynamics*, *supra* note 168, at 276.

205. Sidanius et al., *SDO: Hierarchy Attenuators*, *supra* note 55, at 340.

206. Pratto et al., *SDO: A Personality Variable*, *supra* note 30, at 743.

207. *Id.* at 741.

208. *Id.* at 743.

209. Pratto et al., *Dynamics*, *supra* note 168, at 283.

210. Sidanius et al., *SDO: Hierarchy Attenuators*, *supra* note 55, at 341-42; *see also* Sidanius et al., *Support for Harsh Criminal Sanctions and Criminal Justice Beliefs: A Social Dominance Perspective*, 19 *SOC. JUST. RES.* 433, 440 (2006).

211. Richard P. Eibach & Thomas Keegan, *Free at Last? Social Dominance, Loss Aversion, and White and Black Americans' Differing Assessment of Racial Progress*, 90 *J. PERSONALITY & SOC. PSYCHOL.* 453, 462 (2006).

212. Kimmelmeier, *supra* note 19, at 1036.

the defendant was a White man and the victim was a Black woman.<sup>213</sup> The mock jurors were asked nine questions based on the fact pattern and asked to recommend a sentence for the defendant.<sup>214</sup> The researchers found that with the Black defendant individuals with high social dominance orientations were more likely to perceive the defendant as guilty, whereas with the White defendant, individuals with high social dominance orientations were less likely to perceive the defendant as guilty.<sup>215</sup> Similarly, individuals with high social dominance orientations consistently recommended harsher sentences for the Black defendant than the White defendant.<sup>216</sup> Additionally, when presented with the same evidence, individuals that were high in social dominance orientation perceived the evidence to be stronger against the Black defendant than the White defendant.<sup>217</sup> These results indicate that social dominance orientation can impact one's evaluation of evidence.<sup>218</sup> Lastly, individuals with high social dominance orientations were more likely to believe that the Black defendant would recidivate—commit more crime in the future—than the White defendant.<sup>219</sup> These results revealed that the “defendant’s race had a marked effect, especially on guilty judgments and sentence recommendations, but it operated in interaction with juror’s social dominance orientation level.”<sup>220</sup> Because all of the participants were White, the study illustrated that social dominance orientation can predict racially biased juror behavior, even when the race of the juror is held constant.<sup>221</sup> In other words, the participant’s race is not relevant to the predictive power of social dominance orientation. Similarly, another study found that social dominance orientation was related to racial bias in the perceived guilt of a suspect when the mock juror was primed to think about their own

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213. *Id.* at 1034.

214. *Id.* at 1035.

215. *Id.*

216. *Id.* The sentence recommendations available included options involving no punishment, probation, and fines.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1038.

221. *Id.* at 1032 (“Whether or not white jurors discriminate against black defendants can be expected to vary as a function of their social dominance orientation level.”).

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mortality.<sup>222</sup> This research—in conjunction with the research that illustrates social dominance orientation’s ability to predict anti-Black bias—illustrates the predictive power of social dominance orientation in racially charged cases.<sup>223</sup>

#### V. RECOMMENDATION

Mock juror studies illustrate that the strong correlation between social dominance orientation and anti-Black prejudice can result in biased juror decision-making. Because of social dominance orientation’s ability to predict anti-Black bias and racially biased mock juror behavior—in a manner that resolves some of the problems with the status quo approach and the IAT—it should be used as a mechanism to detect and remove racially biased jurors from racially charged cases. Specifically, litigators and judges should add questions from the social dominance orientation value scale to voir dire and juror questionnaires. Knowledge of a prospective juror’s social dominance orientation may provide the litigator with a more comprehensive understanding of the juror’s beliefs.

The primary technique for using social dominance orientation to detect racially biased jurors should be to place the social dominance orientation value scale in juror questionnaires. As noted above, evidence suggests that prospective jurors are more honest when completing written questionnaires than when answering questions orally in a courtroom.<sup>224</sup> Additionally, juror questionnaires are more expansive, which allows for a deeper dive into the prospective juror’s social dominance orientation and biases than voir dire.<sup>225</sup> Once litigators and judges have the results of the written questionnaires, they can calculate a person’s social dominance

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222. See Donna Crawley & Richard Suarez, *Empathy, Social Dominance Orientation, Mortality Salience, and Perceptions of a Criminal Defendant*, SAGE J. 1, 4 (2016) (internal citations omitted).

223. This research suggests that social dominance orientation may be particularly helpful in detecting biased jurors in criminal cases when White police officers are on trial for shooting or otherwise exerting excessive force against a Black person. Specifically, if jurors high in social dominance orientation are less likely to perceive a White defendant as guilty, and likely to view a person who harms a Black victim as less culpable, these jurors may be less likely to view a White officer who harmed a Black person as guilty.

224. Seltzer et al., *supra* note 79, at 460.

225. Larrabee & Drucker, *supra* note 75, at 38. (“In the O.J. Simpson case, jurors were asked to fill out an 80-page questionnaire.”).

orientation score and use that information to make more informed decisions regarding who they would like to strike from the jury. Given that no single score can dictate whether a person is “too high” in social dominance orientation, litigators should focus on the range of scores and direct their attention to the prospective jurors who scored the highest. Alternatively, litigators could use the scores calculated from the juror questionnaires to direct specialized questions about racial bias during voir dire to the jurors who are highest in social dominance orientation and therefore most likely to harbor anti-Black bias, perceive Black defendants as guilty, and recommend longer sentences. This information will guide litigators in the decision of who to strike from the jury pool.

If juror questionnaires are not permitted in a particular trial, litigators and judges can insert questions from the social dominance orientation value scale into voir dire questioning. The litigators and judges can then calculate the prospective juror’s social dominance orientation and make informed decisions about who to strike from the jury. When choosing how to use social dominance orientation in voir dire and juror questionnaires, litigators should be mindful that they are more likely to elicit honest answers in written responses as opposed to oral responses.

Using social dominance orientation in juror questionnaires and voir dire of racially charged cases has several benefits. First, social dominance orientation can help litigators remove racially biased jurors from jury pools. Evidence shows that people who are high in social dominance orientation are more likely to perceive a Black defendant as guilty, recommend longer sentences, believe that Black defendants will recidivate, and support the death penalty. Any insight that a litigator can receive into a prospective juror’s social dominance orientation will likely be helpful in determining whether the litigator should strike the person from the jury.

Second, social dominance orientation does not explicitly ask about race. This is important because it can help litigators sidestep the Supreme Court’s constraining jurisprudence regarding which defendants are constitutionally entitled to ask prospective jurors about racial bias.<sup>226</sup> In other words, the fact that social dominance orientation does not involve an explicit discussion about race may assist litigators in assessing racial bias when judges prohibit them from specifically mentioning race in the courtroom, or when the constitutional rights to question prospective jurors about race established in *Ristaino* and *Turner* are not available or have not been triggered.

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226. See *supra* Part II.

Third, social dominance orientation does not fall prey to the same issues that undermine the efficacy of the IAT. Unlike the IAT, social dominance orientation has high test-retest reliability.<sup>227</sup> And, most importantly, studies establish that social dominance orientation has predictive value, whereas the IAT does not.<sup>228</sup> This means that a litigator can reasonably predict how a juror is likely to behave with knowledge of the juror's social dominance orientation score, whereas the litigator cannot do the same with knowledge of the juror's IAT results. Finally, social dominance orientation is a race-neutral predictive measure, meaning that it can predict behavior and attitudes regardless of the race of the person being questioned. When using social dominance orientation, the race of the prospective juror does not factor into the results of their social dominance orientation. This is important because, under *Batson*, litigators are prohibited from striking jurors simply because of their race.<sup>229</sup>

Although the use of social dominance orientation in racially charged cases has several advantages, there are also a few disadvantages. First, using social dominance orientation does not prevent jurors from lying or concealing biases due to their interest in receiving or maintaining social acceptance. Second, social dominance orientation cannot dictate precisely what a particular individual would do in a given circumstance; it can only predict what an individual is more likely to do based on their level of social dominance orientation. Third, similar to the IAT, prospective jurors may have privacy concerns related to the release of their social dominance scores. The privacy concerns may be less significant than those accompanying the IAT, as the IAT results provide an explicit statement that someone has a slight, moderate, or strong bias in favor of or against a particular group of people, whereas social dominance orientation results do not provide such an explicit statement and are accompanied by more particularity in details. Still, privacy concerns remain a limitation.<sup>230</sup> Finally, litigators could use social dominance orientation for nefarious purposes. Specifically, litigators could use social dominance orientation to purposefully construct a jury pool of individuals who are more likely to hold racial bias and allow that bias to influence their verdict. Despite the possible

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227. Chris G. Sibley & James H. Liu, *Social Dominance Orientation: Testing a Global Individual Difference Perspective*, 31 *POL. PSYCHOL.* 175, 188 (2010).

228. Perry & Sibley, *supra* note 199, at 112.

229. *Batson v. Kentucky*, 476 U.S. 79 (1986).

230. *See Hutchinson*, *supra* note 1, at 52-53 (explaining that social dominance orientation may face resistance because it is tied to invidious oppression, unlike implicit bias).

disadvantages, social dominance orientation has the potential to be substantially beneficial to helping litigators remove racially biased jurors.

The scope of this Note is limited to evaluating social dominance orientation in racially charged criminal cases—the only context with empirical evidence of its predictive value. Though there is a notable dearth of mock jury studies on social dominance orientation in non-racially charged criminal cases, a small body of related research indicates that social dominance orientation may be helpful in other contexts as well. One such context is civil cases involving racial bias. Indeed, juror bias has been detected in the civil context. For example, research shows that Black defendants receive harsher civil penalties.<sup>231</sup> And while little research has been conducted to test whether social dominance orientation can predict racially biased juror behavior in civil cases, current research about social dominance orientation more broadly suggests that social dominance orientation may impact juror behavior in civil cases. For example, one study found that individuals high in social dominance orientation held negative attitudes against, and were less willing to support ameliorative programs for, subordinate groups which was mediated by the belief that the subordinate group posed an economic threat.<sup>232</sup> Studies have also found that individuals high in social dominance orientation were more likely to believe that resources are zero-sum.<sup>233</sup> This study also found that dominant group members high in social dominance orientation were more likely to perceive progress toward equality as a loss.<sup>234</sup> The results of these studies may be particularly relevant in employment discrimination cases. For example, if people of color, especially Black people, consistently prevail in

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231. Carter & Mazzula, *supra* note 18, at 197.

232. Lynne M. Jackson & Victoria M. Esses, *Effects of Perceived Economic Competition on People's Willingness to Help Empower Immigrants*, 3 GROUP PROCESSES & INTERGROUP REL. 419 (2000); see also John Duckitt, *Differential Effects of Right-Wing Authoritarianism and Social Dominance Orientation on Outgroup Attitudes and Their Mediation by Threat from and Competitiveness to Outgroups*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 684, 694 (2006) (highlighting the results of the aforementioned study and noting that “[t]he effect of [social dominance orientation] on negative attitudes to a bogus immigrant group was mediated by perceived economic competition from that group.”).

233. Eibach & Keegan, *supra* note 211 at 462; Jackson & Esses, *supra* note 232, at 430.

234. Eibach & Keegan, *supra* note 211, at 458.

employment discrimination lawsuits, this may be seen as a step toward racial equality. People who are high in social dominance orientation may perceive the increase of Black people on the job market as an economic threat. Furthermore, people high in social dominance orientation may perceive the step toward equality for a marginalized group, such as Black people, as a loss. Therefore, people who are high in social dominance orientation may be more likely to disagree with Black plaintiffs in employment discrimination suits.

Social dominance orientation may also be helpful in cases involving sexual assault and hate crimes. For example, one study found that social dominance orientation directly influenced whether a person believed that limitation of freedom is a form of violence against women.<sup>235</sup> Other studies have shown that social dominance orientation is positively correlated with the tolerance of sexual harassment of women<sup>236</sup> and victim blaming after sexual assault.<sup>237</sup> Yet another study on hate crimes committed against Black and LGBTQ victims found that while social dominance orientation did not predict sentencing, it “appears to serve a foundational role by establishing and maintaining prejudicial attitudes, which can in turn lead jurors to recommend more lenient sentences to perpetrators of hate crimes.”<sup>238</sup>

Finally, social dominance orientation may be useful in all criminal cases, including where race is not a factor. The fact that social dominance orientation is positively correlated with support for more punitive criminal justice policies is meaningful for litigators seeking to detect overly punitive prospective jurors. Thus, while this paper concerns itself primarily with issues of racial bias in criminal jury selection, social dominance orientation can be applied well beyond this scope. Future studies should be undertaken

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235. Chiara Rollero, Elisa Bergana & Stefano Tartaglia, *What Is Violence? The Role of Sexism and Social Dominance Orientation in Recognizing Violence Against Women*, J. INTERPERSONAL VIOLENCE 1, 12 (2019).

236. Brenda L. Russell & Kristin Y. Trigg, *Tolerance of Sexual Harassment: An Examination of Gender Differences, Ambivalent Sexism, Social Dominance, and Gender Roles*, 50 SEX ROLES 565, 569 (2004).

237. Ogechi Emelle, *The Influence of Social Dominance Orientation and Perspective-Taking on Victim Blaming after Sexual Assault* (Spring 2018) (master's thesis, Lunds University) (on file with Lund University).

238. Bradlee W. Gamblin et al., *A Comparison of Juror Decision Making in Race-Based and Sexual Orientation-Based Hate Crime Cases*, J. INTERPERSONAL VIOLENCE 1, 19 (2018).

to examine the possibility of applying social dominance orientation in such areas.

## CONCLUSION

In March 2021, litigators used a juror questionnaire to select jurors in the much anticipated and highly publicized trial of Officer Derek Chauvin, who murdered George Floyd by kneeling on his neck for a staggering nine minutes and twenty-nine seconds.<sup>239</sup> One month later, the jury found Chauvin guilty of all charges related to Mr. Floyd's murder.<sup>240</sup> Whether the criminal justice system provided a modicum of accountability for Mr. Floyd's death ultimately came down to the decision of twelve jurors, selected on the basis of a juror questionnaire.<sup>241</sup> This trial demonstrates the implications of this Note and the importance that juror questionnaires, and voir dire, play in creating an equitable legal system that lives up to its goal of impartiality, fairness, and justice.

It is clear that explicit and implicit racial bias against Black Americans can substantially impact juror decision-making and jury verdicts. Despite widespread knowledge that racial bias taints juror decision-making, litigators, judges, and legal scholars have not found effective solutions to identify and remove racially biased jurors, especially those who hold implicit biases. This Note demonstrates that the two most commonly considered solutions—the status quo and implicit bias tests—are not viable options. Social dominance orientation, however, is a promising new solution that lawyers should employ. Although research about social dominance orientation has been overlooked by legal scholars, social science

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239. Shaila Dewan & Tim Arango, *What Are the Questions for Potential Jurors in the Derek Chauvin Trial?*, N.Y. TIMES (Mar. 7, 2021), <https://www.nytimes.com/2021/03/07/us/jury-george-floyd-derek-chauvin-trial.html>

[<https://perma.cc/2NZ9-TTVE>]; Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds – Not the Infamous 8:46*, CNN (Mar. 29, 2021, 4:30 PM EST), <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html> [<https://perma.cc/6EVF-L97W>].

240. Tim Arango, Shaila Dewan, John Eligon & Nicholas Bogel-Burroughs, *Derek Chauvin Is Found Guilty of Murdering George Floyd*, N.Y. TIMES (Apr. 20, 2021, 5:07 P.M.), <https://www.nytimes.com/2021/04/20/us/chauvin-guilty-murder-george-floyd.html> [<https://perma.cc/VBR5-XF5F>].

241. Tim Arango, *Twelve Jurors Seated in Chauvin Case*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/us/chauvin-jury-selection-george-floyd.html> [<https://perma.cc/8T7K-TZ22>].

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research demonstrates that social dominance orientation is correlated with anti-Black racism and can predict juror behavior in racially charged cases.<sup>242</sup> As a result of social dominance orientation's predictive value, lawyers should include questions aimed at determining the social dominance orientation of prospective jurors in the voir dire and juror questionnaires of racially charged cases. Lawyers can then use this information to detect and remove racially biased jurors and, most importantly, help ensure defendants' constitutional right to an impartial jury.

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242. Hutchinson, *supra* note 1, at 91.

APPENDIX A: SOCIAL DOMINANCE ORIENTATION VALUE SCALE<sup>243</sup>

1. Some groups of people are simply inferior to other groups.
2. In getting what you want, it is sometimes necessary to use force against other groups.
3. It's okay if some groups have more of a chance in life than others.
4. To get ahead in life, it is sometimes necessary to step on other groups.
5. If certain groups stayed in their place, we would have fewer problems.
6. It's probably a good thing that certain groups are at the top and other groups are at the bottom.
7. Inferior groups should stay in their place.
8. Sometimes other groups must be kept in their place.
9. It would be good if groups could be equal.
10. Group equality should be our ideal.
11. All groups should be given an equal chance in life.
12. We should do what we can to equalize conditions for different groups.
13. Increased social equality.
14. We would have fewer problems if we treated people more equally.
15. We should strive to make incomes as equal as possible.
16. No one group should dominate in society.

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<sup>243</sup> Pratto et al., *SDO: A Personality Variable*, *supra* note 30, at 763.