

# Michigan Journal of Race and Law

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Volume 20

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2015

## Blackness as Character Evidence

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### Recommended Citation

Mikah K. Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321 (2015).

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# BLACKNESS AS CHARACTER EVIDENCE

*Mikah K. Thompson*\*

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## INTRODUCTION

Federal Rule of Evidence 404 severely limits the government's ability to offer evidence of a defendant's character trait of violence to prove action in conformity with that trait on the occasion in question.<sup>1</sup> The Rule states that such character evidence is generally inadmissible when offered to

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\* Adjunct Professor of Law, University of Missouri-Kansas City School of Law. I would like to thank my colleague, Professor Jasmine Abdel-khalik, for all of your support and motivation during the writing process. I would also like to thank the individuals at the University of Missouri-Kansas City who have supported my scholarship for the past nine years. They are Dean Ellen Suni and Associate Dean Barbara Glesner-Fines. Finally, I would like to thank my husband, Brandon P. Thompson, and my four children for your love, support, and inspiration. You are my greatest blessings.

1. FED. R. EVID. 404(a)(1).

prove propensity.<sup>2</sup> The Rule also allows the government to offer evidence of an alleged victim's character for peacefulness in homicide cases where the defendant asserts the self-defense privilege.<sup>3</sup> Although criminal defendants may offer character evidence under limited circumstances, Rule 404 creates a significant disincentive for doing so. Where a defendant offers evidence of an alleged victim's character trait to prove action in conformity therewith, this decision not only opens the door for the prosecution to offer positive character evidence on behalf of the victim but it also allows the prosecutor to offer bad character evidence against the defendant.<sup>4</sup> Similarly, if the government offers evidence of a homicide victim's character for nonviolence to rebut a claim of self-defense, doing so opens the door to the introduction of the victim's bad character evidence.<sup>5</sup>

Now, consider the widely held stereotype or belief that African-Americans are inherently violent.<sup>6</sup> Scholars sometimes deem beliefs or biases like this one to be "implicit" in that they often exist on a subconscious level.<sup>7</sup> The individuals who harbor such biases may not even know they are doing so.<sup>8</sup> The implicit belief that African-Americans are inherently violent can be used as both a sword and a shield in a trial concerning a violent criminal act. Rather than offering inadmissible evidence of a Black defendant's character for violence, the government can instead offer evidence of the defendant's stereotypical Blackness, thereby playing upon the jurors' implicit biases to establish the guilt of the defendant. Likewise, a non-Black defendant need not offer evidence of a Black victim's violent character to support a claim of self-defense. Rather, the victim's stereotypical Blackness is sufficient character evidence. Because stereotypical Blackness implies a propensity for violence (among other character traits), a non-Black defendant can benefit from this character evidence without having to take the risk that his or her own violent past might be offered at trial. The *State v. George Zimmerman*<sup>9</sup> trial is a recent example of this strategy.<sup>10</sup>

While most scholars acknowledge the existence of certain stereotypes and biases against African-Americans and even recognize that those biases may have an impact on our justice system, the covert and silent nature of implicit biases makes them more difficult to ferret out. How can a trial

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2. *Id.*

3. *Id.* at (a)(2)(C).

4. See discussion, *infra* Section I.A.2.

5. *Id.*

6. See *infra* note 36 and accompanying text.

7. See *infra* notes 33 and 34 and accompanying text.

8. *Id.*

9. Eighteenth Judicial Circuit Courts, *State v. Zimmerman*, No. 2012-CF-001083-A, <http://www.flcourts18.org/page.php?129> (media advisories and public record documents pertaining to the trial) (last visited Mar. 20, 2015).

10. *State v. Zimmerman* is discussed in greater detail in Section III.

judge successfully stop jurors from considering certain racial stereotypes when many of the jurors do not realize that they harbor those racial stereotypes? This Article will explore solutions that may serve to eliminate or rebut the unspoken evidence that is often at play when African-Americans navigate through our justice system. Part I of the Article will focus on the development of the Federal Rule of Evidence that prohibits the use of propensity evidence to prove action in conformity therewith. Part II of the Article will define the concepts of implicit bias and transparency phenomenon and explore how those concepts can come together to create evidence of stereotypical Blackness. Part III of the Article will discuss the use of Blackness as character evidence in the State v. George Zimmerman trial. Lastly, Part IV of the Article will analyze possible solutions that may eliminate jurors' consideration of evidence of stereotypical Blackness or at least reduce its probative value.

## I. FEDERAL RULE OF EVIDENCE 404(A) AND ITS RATIONALE

### A. *The Rule*

Federal Rule of Evidence (F.R.E.) 404(a) states:

Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.<sup>11</sup>

Subsection (1) of the Rule articulates the general prohibition against the use of propensity evidence to prove action in conformity with a given

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11. FED. R. EVID. 404(a).

character trait. For example, if Donald the Defendant were on trial for assault and battery against Victor the Victim, Rule 404(a)(1) would generally prohibit the prosecution from offering evidence, through either reputation or opinion testimony, that Donald is a violent person.<sup>12</sup> Subsection (2) states two exceptions to the general rule prohibiting the use of propensity evidence. In the context of criminal cases only, the defendant may offer evidence of any relevant character trait. For example, Donald may choose to offer reputation or opinion testimony that demonstrates his peaceful character; however, if he does so, he invites the prosecution to rebut his evidence of peacefulness with evidence of his violent character. The defendant may also offer evidence of the victim's relevant character trait subject to Rule 412, the rape shield law.<sup>13</sup> For example, Donald may offer evidence, through opinion and reputation testimony, that Victor is a violent person; however, if Donald offers this character evidence, then he "opens the door" or makes admissible any evidence demonstrating Victor's character for peacefulness or Donald's character for violence.<sup>14</sup> Moreover, in a homicide case where the defendant has asserted the self-defense privilege, the prosecution may offer evidence of the alleged victim's peaceful character to rebut the defendant's claim that the victim was the first aggressor.<sup>15</sup> Finally, subsection (3) provides that evidence of a witness's character for truthfulness or untruthfulness may be admissible pursuant to Rules 607, 608, and 609.<sup>16</sup>

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12. To the extent the Rule would allow for such evidence (typically when offered to prove something other than action in conformity therewith), Rule 405 would require the prosecution to offer the character evidence through opinion or reputation testimony rather than through testimony regarding specific prior acts. *See* FED. R. EVID. 405 (stating that character evidence related to prior acts may only be explored on cross-examination or where the defendant's character trait is an essential element of the charge, claim, or defense).

13. The rape shield law generally prohibits evidence of an alleged victim's prior sexual behavior or sexual predisposition in a civil or criminal trial involving allegations of sexual misconduct. *See* FED. R. EVID. 412(a). In a criminal case involving allegations of sexual misconduct, a defendant may offer evidence of an alleged victim's prior sexual behavior to prove that another individual was the source of any physical evidence or that the alleged victim and the defendant had engaged in consensual sex in the past. *Id.* at 412(b). Finally, a criminal defendant may offer such evidence if the exclusion of the evidence would violate the defendant's constitutional rights. *Id.*

14. *See* FED. R. EVID. 404(a)(2)(B).

15. *See* FED. R. EVID. 404(a)(2)(C).

16. Rule 607 provides that any party may impeach a witness. *See* FED. R. EVID. 607. Rule 608 states that evidence of a witness's character for untruthfulness may be offered through opinion or reputation testimony and that a witness's character for truthfulness may be offered only after the witness's credibility has been attacked. *See* FED. R. EVID. 608(a). Rule 608 also prohibits the parties from establishing a witness's character for truthfulness or untruthfulness through extrinsic evidence of prior acts; however, the Rule does allow the witness to be cross-examined concerning prior acts relevant to his or her character for truthfulness or untruthfulness. *Id.* at 608(b). Rule 609 provides that, in a criminal case, a non-defendant witness's character for truthfulness may be attacked using evidence of a felony conviction where the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. With regard to a

### 1. The Rationale Supporting the Prohibition

Today, Rule 404(a) prohibits the use of propensity evidence to prove action in conformity therewith despite the fact that an individual's prior behavior carries some probative value. F.R.E. 401 defines relevant evidence as evidence having "any tendency to make a fact more or less probable than it would be without the evidence."<sup>17</sup> Thus, if Donald, the defendant in our hypothetical assault and battery trial, has a general reputation in his community as a violent, aggressive, and confrontational person, his reputation would be relevant evidence in his current trial because it increases the likelihood that he committed the assault and battery with which he is charged. Despite the obvious relevance of the evidence, Rule 404(a) calls for its exclusion in an effort to preserve the presumption of innocence.<sup>18</sup> The prohibition against the government's use of propensity evidence is a corollary to the presumption of innocence in that no such presumption can exist if the defendant is proven guilty using evidence of his or her violent nature.<sup>19</sup>

Another justification for the prohibition against propensity evidence can be found in Rule 403, which calls for the exclusion of evidence where its probative value is substantially outweighed by the danger of unfair prejudice.<sup>20</sup> Rule 404(a)'s prohibition against propensity evidence likely reflects the drafters' application of Rule 403's balancing test. Thus, despite the probative value of propensity evidence, the danger of unfair prejudice associated with such evidence will always outweigh its probative value, at least when the evidence is offered by the government to establish that the defendant acted in conformity with his or her character trait on the occasion in question.

The unfair prejudice associated with propensity evidence is varied. Most obviously, there is a risk that the jury will conclude that the defen-

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defendant-witness, the felony conviction is admissible if the probative value of the evidence outweighs its prejudicial effect in any respect. *See* FED. R. EVID. 609(a).

17. FED. R. EVID. 401(a). Subsection (a) of Rule 401 indicates that the evidence must have probative value in establishing a certain fact, while subsection (b) states that the fact established by the evidence must be material or "of consequence in determining the action." *Id.* at 401(a)-(b).

18. *See* FED. R. EVID. 404(a)(1) (prohibiting the use of propensity evidence in order to prevent jurors from using a defendant's character to assess whether he or she is guilty of the crime charged).

19. *See* *Coleman v. People*, 55 N.Y. 81, 90 (N.Y. App. Div. 1873) ("It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one.").

20. FED. R. EVID. 403. The advisory committee notes following Rule 403 define unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note.

dant has a “proclivity for criminality” and thereby assume that the defendant acted in conformity with that character trait on the relevant occasion.<sup>21</sup> Similarly, the jury may conclude that because the individual exhibited a particular character trait in the past, he or she must have also done so on the occasion in question. Essentially, the jury may conclude, “If she did it before, she’ll do it again.” Another risk is that the jury will convict in order to punish the defendant for his or her prior crimes, even where the government has failed to prove that the defendant committed the crime with which he or she is charged.<sup>22</sup> In this instance, the evidence should be excluded due to the risk that the jury may use the evidence to make a decision based on emotion or passion.<sup>23</sup>

## 2. The Exceptions to the Prohibition Against the Use of Propensity Evidence

Despite the risks discussed above, Rule 404(a)(2), called the “mercy rule” by some scholars,<sup>24</sup> allows for the admissibility of propensity evidence in criminal cases where: (1) the defendant offers evidence of his or her pertinent character trait; (2) the defendant offers evidence of an alleged victim’s pertinent character trait subject to the rape shield law; or (3) the government in a homicide case offers evidence of an alleged victim’s character trait of peacefulness to rebut a claim of self-defense.<sup>25</sup> In each of these scenarios, the party against whom the evidence is offered may rebut the evidence with additional propensity evidence.<sup>26</sup>

The 404(a)(2) exceptions exist for several reasons. First, unlike negative propensity evidence that might be offered against a defendant by the government, positive propensity evidence, when offered by the accused, is not likely to result in unfair prejudice.<sup>27</sup> For example, if our defendant Donald offers evidence to establish his peaceful character to show that he

21. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 672 (John W. Strong et al. eds., 5th ed. 1999).

22. See *State v. Kerby*, 118 P.3d 740, 747 (N.M. Ct. App. 2005) (stating that evidence of prior bad acts or convictions “may unfairly prejudice a defendant by emotionally predisposing the jury against the defendant”).

23. See *United States v. Rogers*, 587 F.3d 816, 822 (7th Cir. 2009) (“Even if the evidence does not create unfair prejudice solely because it rests on propensity, it may still risk a decision on the basis of something like passion or bias—that is, an improper basis.”); see also FED. R. EVID. 404 (advisory committee’s note) (stating that propensity evidence “subtly permits the trier of fact to reward the good man [and] to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.” (quoting *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence*, CAL. L. REV. COMM’N, REP., RECOMMENDATION & STUD. 615 (1964))).

24. See, e.g., Colin Miller, *Justice of the Peace? Why Federal Rule of Evidence 404(a)(2)(C) Should be Repealed*, 91 N.C. L. REV. 1161, 1167 (2013).

25. FED. R. EVID. 404(a)(2).

26. *Id.*

27. See FED. R. EVID. 404 (advisory committee’s notes).

did not assault Victor on the occasion in question, there is very little risk that the jury will give too much weight to this evidence by acquitting Donald in spite of evidence that clearly establishes his guilt. If Rule 403's balancing test is applied to a defendant's positive character evidence, the probative value of the evidence would not be substantially outweighed by the danger of unfair prejudice. Similarly, evidence of an alleged victim's peaceful character would not result in unfair prejudice to the defendant, especially when offered to rebut the defendant's claim that the victim was the first aggressor.

Second, Rule 404(a)(2)'s exceptions are as much a part of the American legal tradition as the prohibition against propensity evidence itself.<sup>28</sup> The Federal Rules of Evidence Advisory Committee noted that Rule 404(a)(2)'s exceptions were "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence."<sup>29</sup> The Committee's decision to codify the 404(a)(2) exceptions decreases the risk that a defendant's Sixth Amendment confrontation or due process rights might be violated.<sup>30</sup>

Finally, the Rule 404(a)(2)(A) and (B) exceptions may exist simply to provide additional assistance to criminal defendants. The exceptions likely reflect the drafters' decision "to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the fact-finder just what sort of person he really is."<sup>31</sup>

While Rule 404(a) limits the admissibility of character evidence offered against defendants or alleged victims, my hypothesis is that the application of implicit bias, transparency theory, and racial stereotypes creates an alternative method for offering propensity evidence that might otherwise be inadmissible or quite risky if offered pursuant to the Rule. With the overall framework and rationale supporting Rule 404(a) in mind, I will now explore the concepts of implicit bias and transparency theory and discuss the effect that these phenomena have in the criminal cases involving African-Americans.

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28. *Id.*

29. *Id.*

30. *Cf.* Miller, *supra* note 24 (noting that "[i]t could be said that a court precluding a defendant from presenting evidence of the victim's character for violence similarly deprives the defendant of his right to confrontation." Furthermore, the preclusion of such evidence or evidence of the defendant's good character could deprive the defendant of his right to present a defense or his right to due process. Miller also notes that, while 404(a)(2)(A) and (B) provide additional tools for a criminal defendant, 404(a)(2)(C) "is a windfall for the government, allowing it to prove the victim's character for peacefulness even without the defendant asserting that the victim was generally a violent person. It thus subverts the general understanding that the Constitution is designed to protect the people from the government rather than the other way around.").

31. H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 855 (1982).



## II. IMPLICIT BIAS, TRANSPARENCY THEORY AND RACIAL STEREOTYPES AGAINST AFRICAN-AMERICANS

In order to fully understand the manner in which common stereotypes of African-Americans take on the role of character evidence at trial, it is important to explore two concepts that, in my opinion, are at play whenever a criminal case involves an African-American defendant or victim—implicit bias and transparency theory.

### A. *Implicit Bias*

A great deal of social science research and legal scholarship has focused on the concept of implicit bias. According to Judge Mark W. Bennett,<sup>32</sup> who has researched the effect of implicit bias on jurors, implicit biases are “the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement.”<sup>33</sup> Unlike explicit biases, which are open, overt, and generally disavowed by society, implicit biases exist on a subconscious level. As a result, we often act based on our implicit biases without any awareness that we harbor them.<sup>34</sup> Social scientists believe that we develop implicit biases due to “repeated negative associations—such as the association of a particular race with crime—that establish neurological responses in the area of the brain responsible for detecting and quickly responding to danger.”<sup>35</sup> Thus, with regard to African-Americans, implicit biases are likely formed due to an institutionalized narrative in our society that Blacks are intellectually inferior to Whites, inherently violent, and more likely to commit crimes than Whites.<sup>36</sup>

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32. Bennett is a U.S. District Court judge for the Northern District of Iowa. See U.S. District Court, Northern District of Iowa, Judges Information, <http://www.iand.uscourts.gov/e-web/home.nsf/0/17a5762715fa4c52862573c90079072c?OpenDocument> (last visited Feb. 12, 2015).

33. 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, 149 (2010).

34. *Id.* at 150 (“I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention.”).

35. *Id.* at 152.

36. See R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1172 (2006) (“Psychologists have documented and explored the longstanding stereotype of African Americans as violent and prone to criminality. Indeed, this is the stereotype most commonly applied to Blacks - or at least to young Black males.” (citing Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995) and PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 43-45 (1993))).

### 1. The Implicit Association Test

The most well-known and highly regarded measure of implicit bias is the Harvard Implicit Association Test (“IAT”).<sup>37</sup> Developed by researchers from Harvard University and the University of Washington in the 1990s, the IAT attempts to measure various types of biases, including biases based on race, gender, age, disability, and religion.<sup>38</sup> The IAT’s methodology has been analyzed over the years, and the scientific community has generally found the test to be a valid measure of implicit bias.<sup>39</sup>

Currently, fourteen IATs are available on the Internet, including a Race IAT.<sup>40</sup> The Race IAT seeks to measure whether participants hold an implicit bias against African-Americans.<sup>41</sup> Data collected from the Race IAT indicate that approximately 88 percent of White Americans harbor some level of implicit bias against African-Americans.<sup>42</sup> Interestingly, the data also indicate that 48 percent of African-Americans show a bias in

37. See Banks, Eberhardt & Ross, *supra* note 36, at 1182. See also Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998).

38. Various IATs can be found on the Project Implicit website. Project Implicit, <https://implicit.harvard.edu/implicit/selectatest.html> (last visited Feb. 15, 2015).

39. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1509-11 (2005) (citing to various scientific studies that have found the IAT to be methodologically sound). See also Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 477-81 (2010) [hereinafter *Seeing Through Colorblindness*].

40. See Project Implicit, *supra* note 38. The 14 IATs available on the website are: Race IAT, Weapons IAT, Skin Tone IAT, Asian IAT, Weight IAT, Religion IAT, Sexuality IAT, Age IAT, Gender-Career IAT, Arab-Muslim IAT, Disability IAT, Gender-Science IAT, Native IAT, and Presidents IAT. *Id.*

41. Judge Bennett provides the following basic description of the IAT:

The IAT pairs an “attitude object” (such as a racial group) with an “evaluative dimension” (such as “good” or “bad”) and suggests that the speeds of responses to the association of the two shows automatic attitudes and stereotypes, that is, implicit biases. “The IAT is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with [European American] faces and names than with African American faces and names—and that the same pattern will be found for other traditionally disadvantaged groups.” In other words, implicit bias against African Americans is shown when “African American” is more rapidly paired with “bad” than with “good.” Attributes that are associated with some feature are easier and faster to pair than attributes that are not associated. Once the test is completed, you receive ratings like “slight,” “moderate,” or “strong” as a measure of your implicit bias on the subject tested.

Bennett, *supra* note 33, at 153 (quoting Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971 (2008)).

42. See Maia Svalavitz, *The Authentic Self: How Do You Know If You’re ‘Really’ Racist or Sexist?*, TIME (Oct. 11, 2010), available at <http://healthland.time.com/2010/10/11/seeking-the-authentic-self-how-do-you-know-if-youre-really-racist-or-sexist/> (citing data collected from IAT results).

favor of White Americans.<sup>43</sup> While these statistics are startling, they should not be read to suggest that 88 percent of Whites and 48 percent of Blacks hold racist attitudes toward African-Americans; however, several scientific studies have found that IAT results are at least a moderate predictor of behavior.<sup>44</sup> Thus, in some instances, individuals who hold implicit biases against African-Americans may act upon those biases when engaging in decision-making, including decisions related to guilt or innocence.

## 2. Juror Bias

For many years, social scientists and legal scholars have asserted that White jurors are biased against African-Americans. Professor Sheri Lynn Johnson argues that the race of a witness has a direct impact on whether jurors will find the witness to be credible.<sup>45</sup> Johnson asserts that race influences jurors' credibility assessments in large part due to the history of race relations in the United States.<sup>46</sup> According to Johnson, race may improperly influence credibility determinations even for White fact-finders "who do not seem to manifest any animosity, racial or otherwise, toward African American litigants."<sup>47</sup> Similarly, legal scholars have argued that jurors are less likely to make accurate lie-detecting assessments of witnesses who are of a different race.<sup>48</sup> According to one scholar, White jurors' inability to make accurate credibility judgments for African-American witnesses and defendants may explain the high number of wrongful convictions of African-American defendants.<sup>49</sup>

Empirical evidence supports the existence of White juror bias against African-Americans.<sup>50</sup> A study conducted by Professors Samuel Sommers and Phoebe Ellsworth revealed that White jurors are more likely to be biased against African-American defendants and that this bias is more likely to be present in cases where race is not made salient, or openly discussed, at trial.<sup>51</sup> In another study, Professor Justin Levinson found that implicit

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43. *Id.*

44. *Seeing Through Colorblindness*, *supra* note 39, at 488 (stating that a meta-analysis of 122 scientific studies involving 14,900 subjects revealed a correlation between IAT results and behavior, social judgments, and social action).

45. Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 275 (1996).

46. *Id.*

47. *Id.* at 265.

48. *See, e.g.*, Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection and the Jury*, 33 CONN. L. REV. 1, 4-5 (2000).

49. *Id.*

50. *See, e.g.*, Samuel Sommers & Phoebe Ellsworth, *White Juror Bias: An Investigation of Prejudice against Black Defendants in the American Courtroom*, 7 PSY., PUB. POL. & THE LAW 201 (2001) [hereinafter *White Juror Bias*].

51. *See id.* at 202; *see also infra* notes 155-56 and accompanying text.

racial bias affects jurors' recall of relevant case facts.<sup>52</sup> He noted that "participants who read about an African-American story character were significantly more likely to remember aggressive facts from the story than participants who read about a Caucasian story character. Other results indicated that these racial memory biases were not related to explicit racial preferences."<sup>53</sup> This research provides further support for the notion that, in today's "post-racial" society where Whites largely disavow explicit expressions of racial bias, juror bias against African-Americans likely exists on a subconscious level.

### B. Transparency Theory

While White jurors may be influenced by their implicit biases when acting as fact-finders in criminal cases involving African-Americans, they may be equally affected by a doctrine called "transparency theory."<sup>54</sup> Coined by Professor Barbara Flagg, a Caucasian woman, the term "transparency theory" or "transparency phenomenon" is defined as "the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."<sup>55</sup> Flagg argues that Whites possess a significant societal privilege in that they do not often have to think of themselves in terms of their race.<sup>56</sup> Instead, Whites externalize race, only reflecting on their Whiteness when comparing themselves to people of color.<sup>57</sup> Flagg posits that Whites are usually unconscious of their Whiteness because it is the racial norm, while people of color are racially distinctive and therefore a departure from the norm.<sup>58</sup> Flagg states that, "[T]o be white is not think about it."<sup>59</sup> For these reasons, Whiteness is "a transparent quality when whites interact with whites in the absence of people of color."<sup>60</sup>

At first glance, it would seem that Whites' failure to recognize their Whiteness should be of no consequence to African-Americans; however, Flagg's next proposition should create great concern for African-Americans involved in criminal trials. According to Flagg, because Whites are not conscious of their Whiteness in most circumstances, they are similarly not conscious of certain White-specific norms that they (and society as a

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

53. *Id.*

54. Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

55. *Id.*

56. *See id.*

57. *See id.* at 970.

58. *See id.* at 970-71.

59. *Id.* at 969.

60. Flagg, *supra* note 54, at 970.

whole) impose upon non-Whites.<sup>61</sup> Whites mistakenly believe these White-specific norms are racially neutral and will accordingly make decisions and judgments based on non-Whites' ability or willingness to assimilate to these norms.<sup>62</sup> When non-Whites fail to act in accordance with these White-specific norms, they may face discrimination at the hands of well-intentioned Whites.<sup>63</sup> Flagg notes that "[t]ransparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decisionmakers intend to effect substantive racial justice."<sup>64</sup> I believe that a Black person's failure to assimilate to certain White-specific norms results in a conclusion by Whites that the African-American has a propensity for engaging in stereotypically Black behavior. Moreover, in the context of a criminal case, an African-American who fails to assimilate to White-specific norms will likely face affirmative evidence of stereotypical Blackness including evidence that he or she has a propensity for engaging in certain behavior.

Professor Flagg provides an example of the application of the transparency phenomenon: She describes a real-life story of Black woman who is seeking a seat on the Board of Directors of a public interest organization.<sup>65</sup> The woman has owned her own business for eleven years, and it grosses \$700,000 annually.<sup>66</sup> She employs ten people in addition to herself.<sup>67</sup> The woman dropped out of high school at the age of sixteen and later obtained her high school equivalency diploma.<sup>68</sup> She did not attend college but instead started her own business.<sup>69</sup> The committee considering the woman's candidacy is predominantly White.<sup>70</sup> During the woman's interview with the committee members, several of them question the woman about her decision not to attend college.<sup>71</sup> They also question whether she will feel comfortable serving on a board where most of the directors have obtained college degrees.<sup>72</sup> The woman responds, somewhat defensively, that she does not believe her past educational history is as relevant as her professional experience and that she feels comfortable inter-

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61. *See id.* at 973.

62. *See id.* at 975-76.

63. *See id.*

64. *Id.* at 957.

65. *Id.* at 974-79.

66. Flagg, *supra* note 54, at 974.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Flagg, *supra* note 54, at 974.

72. *Id.*

acting with individuals with college degrees.<sup>73</sup> The interview ends on a tense note.<sup>74</sup> The committee forwards the woman's name to the full board but notes that they found her to be "quite hostile."<sup>75</sup> They also conclude that she might be disruptive at board meetings.<sup>76</sup>

Flagg argues that certain elements involved in the committee's decision-making process reflect the transparency phenomenon.<sup>77</sup> She notes that the committee's questions about the woman's choices with regard to education reflect White-specific norms: "Anyone smart enough to attend college surely would do so, they might assume."<sup>78</sup> Flagg notes that this assumption fails to consider the woman's experience with inner-city schools or the reasons for her decision to drop out of high school.<sup>79</sup> The assumption also fails to consider the cost-benefit analysis that the woman may have engaged in when deciding whether she should go to college. Flagg notes that the woman's analysis of the costs and benefits of a college education may have been quite accurate considering the success of her business.<sup>80</sup> Flagg argues that the committee failed to appreciate the woman's decision to fully devote herself to her business rather than dividing her time between her college education and the business.<sup>81</sup> Instead, transparency theory caused the committee to judge the woman for failing to follow their White educational norm.<sup>82</sup> I believe that the woman's failure to assimilate to the White educational norm played upon the committee members' implicit biases against African-Americans and resulted in an unspoken and possibly subconscious conclusion that she was less intelligent than the college-educated White members of the Board. This subconscious conclusion that the woman is less intelligent falls directly in line with the long-held stereotype that African-Americans are intellectually inferior to Whites.<sup>83</sup>

Flagg also notes that the committee's description of the woman as "hostile" is another reflection of the transparency theory.<sup>84</sup> While the adjective "hostile" appears to be race-neutral, Flagg argues that it is actually race-specific because it rests upon certain race-specific norms concerning

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73. *Id.*

74. *Id.*

75. *Id.* at 975.

76. Flagg, *supra* note 54, at 975.

77. *Id.* at 975-76.

78. *Id.* at 976.

79. *Id.*

80. *Id.*

81. *Id.*

82. Flagg, *supra* note 54, at 976.

83. See, e.g., Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 322 (2012) (noting that lower intelligence is a stereotype often applied to African-Americans).

84. Flagg, *supra* note 54, at 976.

appropriate behavior.<sup>85</sup> The term “hostile” implies that the woman’s behavior was somehow inappropriate, and such a determination reflects what is appropriate based on a White experience.<sup>86</sup> Flagg states that the committee members failed to recognize that the woman’s responses to their questions may have been an appropriate response for an African-American, especially considering that she may have believed the committee members’ questions were a reflection of their racial biases against African-Americans.<sup>87</sup> Because Whites do not contend with racial stereotypes on a daily basis, the committee members did not understand the reason for the woman’s so-called hostility.<sup>88</sup> Again, I believe that the committee’s description of the woman as “hostile” reflects baseline implicit bias as well as the application of a common stereotype that Black women are angry, confrontational, and disruptive.<sup>89</sup>

Flagg’s story is a helpful example of the effect that implicit bias, transparency theory, and racial stereotypes can have on Whites’ decision-making processes outside the context of the criminal justice system, but, in my opinion, these theories and concepts also play out in the courtroom where the stakes are much higher. First, social scientists have established that White individuals who are chosen as jurors typically have some level of implicit bias against African-Americans, regardless of whether the defendant or the alleged victim is Black.<sup>90</sup> We can also assume that the White jurors, like others, are unaware that they hold such biases. Additionally, if Flagg’s transparency phenomenon is accurate, we can assume that White jurors will apply some White-specific norms and expectations to the African-Americans involved in criminal cases and that they will do so under the mistaken belief that the White-specific norms are reasonable and race-neutral. Finally, we know that if the African-Americans involved in criminal cases fail to follow the White-specific norms imposed by White jurors, then the jurors will make judgments about the African-Americans that not only will reflect subconscious racial bias but also the application of certain traditionally-held stereotypes of African-Americans.

I believe that the concepts of implicit bias and transparency theory, when combined with the application of traditional racial stereotypes, come together to create affirmative character evidence that jurors will consider in

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. See Marilyn Yarbrough & Crystal Bennett, *Cassandra and the “Sistahs”*: *The Peculiar Treatment of African-American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 633–41 (2000). Yarbrough and Bennett note several stereotypes that have traditionally been attributed to African-American women, including Sapphire, who is described as “evil, bitchy, stubborn and hateful.” *Id.* at 638. The Sapphire stereotype is known for her aggressiveness and anger as well as her ability to emasculate men by engaging in verbal abuse. *Id.*

90. See discussion *supra* Section II.A.2.

criminal cases involving African-Americans. While the evidence is not explicitly introduced at trial, it is admitted nonetheless, and it has a real effect on the outcome of criminal cases involving either an African-American defendant or alleged victim. This evidence of stereotypical Blackness is introduced to jurors outside the confines of Rule 404(a). Thus, courts are not required to engage in any analysis of whether the prejudice associated with the evidence, if any, might result in an unfair outcome. One recent example of the use of stereotypical Blackness is the *State v. George Zimmerman* trial, which concerned the death of 17-year-old Trayvon Martin.<sup>91</sup> My hypothesis is that the doctrines of implicit bias and transparency theory, together with the application of certain racial stereotypes, constituted affirmative evidence of Martin's Blackness and ultimately became a factor that favored the acquittal of George Zimmerman. In the next section, I will discuss some of the evidence of stereotypical Blackness that was admitted during the trial through the testimony of Rachel Jeantel and describe how that evidence likely affected the jury.

### III. EVIDENCE OF STEREOTYPICAL BLACKNESS OFFERED DURING THE STATE V. ZIMMERMAN TRIAL

On February 26, 2012, a 17-year-old African-American male named Trayvon Martin and a 28-year-old Hispanic male named George Zimmerman, who were strangers to each other, became involved in a physical altercation that resulted in the shooting death of Martin.<sup>92</sup> The altercation took place inside a gated community in Sanford, Florida.<sup>93</sup> Zimmerman was a resident of the neighborhood, and Martin was in the area to visit his father, whose girlfriend lived in the neighborhood.<sup>94</sup> Zimmerman claimed that he shot Martin in self-defense, and, for the first six weeks following Martin's death, the Sanford Police Department chose not to charge Zimmerman with a crime.<sup>95</sup> However, following protests throughout the country and significant media coverage, special prosecutor Angela Corey announced that the State of Florida would charge Zimmerman with second-degree murder.<sup>96</sup>

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91. Eighteenth Judicial Circuit Courts, *State v. Zimmerman*, No. 2012-CF-001083-A, <http://www.flcourts18.org/page.php?129> (media advisories and public record documents pertaining to the trial) (last visited Mar. 20, 2015).

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

93. *Id.*

94. *Id.*

95. *Id.*

96. Sari Horwitz, *Charge Filed in Martin Killing*, WASH. POST, Apr. 12, 2012, at A1. Legal scholars and others have suggested that Trayvon Martin's race was a factor in the six-week lapse between his death and the State's decision to charge Zimmerman with a crime. See, e.g., Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1566 (2013) ("Race may have also influenced the government's decision



The trial of George Zimmerman took place in late June and early July 2013.<sup>97</sup> Many believed that the jury's verdict would be a litmus test for whether African-Americans could obtain fair outcomes in the American criminal justice system.<sup>98</sup> Would the six-person jury find Zimmerman's use of deadly force against an unarmed Black teenager unlawful?

Despite the widespread belief that the Zimmerman trial would serve as some sort of commentary on race relations in America, the three-week trial included very few overt references to race. During pre-trial motions in limine, Zimmerman's defense team convinced Judge Debra Nelson that prosecutors should not be able to argue that Zimmerman racially profiled Martin.<sup>99</sup> Instead, prosecutors could only argue that Zimmerman "profiled" Martin.<sup>100</sup> During the presentation of the evidence, jurors heard various 911 calls from Zimmerman wherein he described suspicious individuals as African-Americans but he did not do so pejoratively.<sup>101</sup> Also, during the cross-examination of prosecution witness Rachel Jeantel, Zimmerman's attorney questioned her on her and Martin's use of the term "cracker" to describe Caucasians.<sup>102</sup> Finally, during the prosecution's closing argument rebuttal, prosecutor John Guy stated that the case was *not* about race and asked the jury to consider what the outcome of the trial would be if Martin had shot and killed Zimmerman.<sup>103</sup> Other than these isolated references to race, the trial did not explicitly focus on whether

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not to arrest Zimmerman. Had Zimmerman been an African American man who followed and then shot an unarmed Caucasian teenager during a fist-fight, it is unlikely that police would have released Zimmerman without any charges. When there is a dead victim and police know who killed the victim, they usually arrest the obvious perpetrator of the homicide and then investigate.").

97. Eighteenth Judicial Circuit Courts, *State v. Zimmerman*, No. 2012-CF-001083-A, <http://www.flcourts18.org/page.php?129> (media advisories and public record documents pertaining to the trial) (last visited Mar. 20, 2015).

98. See, e.g., Jenée Desmond-Harris, *Zimmerman Trial: Race Verdict Already In*, *THE ROOT* (July 11, 2013, 11:07 AM), available at [http://www.theroot.com/articles/culture/2013/07/zimmerman\\_trial\\_and\\_race\\_verdict\\_is\\_already\\_in.html](http://www.theroot.com/articles/culture/2013/07/zimmerman_trial_and_race_verdict_is_already_in.html) (noting that "Zimmerman targeted Trayvon because Trayvon was black. If he walks, it means you can racially profile and get away with murder."); David Ovalle, *Race Will Be Key in George Zimmerman Trial*, *TAMPA BAY TIMES* (June 9, 2013), available at <http://www.tampabay.com/news/courts/criminal/race-will-be-key-in-george-zimmerman-trial/2125775> (stating that "Zimmerman's trial is shaping up to be a test of both criminal justice and modern-day race relations.").

99. See Manuel Roig-Franzia, *George Zimmerman Trial: Race is a Subtext, Not the Focus*, *WASH. POST* (July 2, 2013), available at [http://www.washingtonpost.com/national/george-zimmerman-trial-race-is-a-subtext-not-the-focus/2013/07/02/a296611e-e262-11e2-a11e-c2ea876a8f30\\_story.html](http://www.washingtonpost.com/national/george-zimmerman-trial-race-is-a-subtext-not-the-focus/2013/07/02/a296611e-e262-11e2-a11e-c2ea876a8f30_story.html).

100. *Id.*

101. *Id.*

102. *Id.*; see also *infra* note 116 and accompanying text.

103. Jonathan Capehart, *Race and the George Zimmerman Trial*, *WASH. POST* (July 12, 2013), available at <http://www.washingtonpost.com/blogs/post-partisan/wp/2013/07/12/race-and-the-george-zimmerman-trial>.

Martin's race played any role in Zimmerman's decision to use deadly force against him.

A. *Rachel Jeantel as an Example of Stereotypical Blackness*

While the trial included very few explicit references to race, evidence was offered at trial that would allow the jury to make certain inferences about Martin's character. This evidence of stereotypical Blackness was offered through the direct and cross examinations of prosecution witness Rachel Jeantel. Jeantel's testimony resulted in the admission of evidence of stereotypical Blackness that likely harmed the prosecution's case.

Jeantel was Martin's friend and the last person to speak with him before his death.<sup>104</sup> Thus, Jeantel was a key prosecution witness because she could provide insight into Martin's state of mind immediately prior to his physical altercation with Zimmerman. Jeantel was 19-years-old at the time she testified and had just completed the eleventh grade.<sup>105</sup> Described as "a young woman, dark-skinned and overweight, her eyes signaling exasperation,"<sup>106</sup> Jeantel was almost immediately attacked on social media for her appearance, speech, and perceived level of intelligence.<sup>107</sup> Twitter users compared Jeantel to Precious, the title character in a 2009 feature film detailing the life of a severely overweight, sexually abused, and illiterate African-American girl portrayed by actress Gabourey Sidibe.<sup>108</sup> Others, including biracial Olympian Lolo Jones, compared Jeantel to the fictional character Madea, an overweight, rambunctious, and stereotypically Black woman portrayed by director, screenwriter, and actor Tyler Perry.<sup>109</sup> Some Twitter users were downright cruel in their criticisms of Jeantel, calling her dumb, stupid, uneducated, hideous, nasty, and stating that she looked like a man.<sup>110</sup> African-Americans tweeted that Jeantel was an embarrassment to the race and nothing more than a stereotypical Black

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104. See Jelani Cobb, *Rachel Jeantel on Trial*, THE NEW YORKER (June 27, 2013) [hereinafter *Rachel Jeantel on Trial*], available at <http://www.newyorker.com/news/news-desk/rachel-jeantel-on-trial>.

105. *Id.*

106. *Id.*

107. See Sherri Williams, *Good, Bad and Ugly Tweets about Rachel Jeantel*, BROWSE, <https://storify.com/SherriWrites/good-bad-and-ugly-tweets-about-rachel-jeantel> (last visited Aug. 3, 2014).

108. *Id.*; see also *Synopsis of Precious: Based on the Novel Push by Sapphire*, IMDB, <http://www.imdb.com/title/tt0929632/> (last visited Aug. 3, 2014).

109. See Williams, *supra* note 107; see also *Biography for Mable "Madea" Simmons from Madea's Family Reunion*, IMDB, <http://www.imdb.com/character/ch0018516/bio> (last visited Aug. 3, 2014) (describing Madea as "a tall (6'5"), overweight, older woman who uses the 'mad black woman' stereotype").

110. See Williams, *supra* note 107.

woman.<sup>111</sup> Indeed, one Twitter user described Jeantel as “the realest thug walking.”<sup>112</sup>

The criticism of Jeantel by the “Twittersphere”<sup>113</sup> is troubling not only because the insults were so harsh but also because the tweets likely provide some insight into the manner in which the Zimmerman jurors viewed Jeantel and possibly Martin. The jurors, five White women and one Puerto Rican woman, were properly charged with judging the veracity of Jeantel’s testimony, but, as Martin’s friend and the last person to speak with him prior to his death, Jeantel became Martin’s proxy. She was the only person who could describe the night’s events from Martin’s perspective. Jurors likely assumed that Martin and Jeantel were of similar character since they were friends. To the extent the jurors made assessments of Jeantel’s character, they may have also believed that Martin possessed some of the same character traits. Thus, the evidence of stereotypical Blackness offered through Jeantel became evidence of Martin’s character.

Jeantel was an overweight Black woman who appeared to have had some irregularity in her education based on her entering twelfth grade at the age of 19. The jurors may have assumed that she had been held back in school and probably perceived her as uneducated or unintelligent. Also, they probably found her demeanor in response to direct and cross examination questioning to be hostile and uncooperative.<sup>114</sup> Jeantel also struggled to read the transcript of her deposition testimony, which defense counsel provided to her during cross-examination, and she later admitted that she had some literacy difficulties.<sup>115</sup> Additionally, she testified that she and Martin sometimes referred to White people as “crackers”<sup>116</sup> and that Martin referred to Zimmerman as a “creepy-ass cracker” on the night of the shooting.<sup>117</sup> Social media was set ablaze with criticism of Jeantel for being stereotypically Black—uneducated, hostile, inarticulate, angry toward Whites, lazy, and a thug—and it is possible that the jurors made similar assessments about Martin’s character.

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111. *Id.*

112. *Id.*

113. “Twittersphere” is defined by the Oxford English Dictionary as “[p]ostings made on the social media website Twitter, considered collectively.” Definition of Twittersphere, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/Twitter\\_sphere](http://www.oxforddictionaries.com/us/definition/american_english/Twitter_sphere) (last visited Aug. 3, 2014).

114. See *Rachel Jeantel on Trial*, *supra* note 104 (stating that Jeantel’s “appearance, diction, size and intelligence were an unspoken but all-encompassing part of the proceedings” and describing her as irritable, reluctant, and antagonistic).

115. *Id.*

116. Gene Demby, *The Secret History of the Word “Cracker”* (July 1, 2013), NPR, available at <http://www.npr.org/blogs/codeswitch/2013/07/01/197644761/word-watch-on-crackers> (noting that the term “cracker” is a pejorative term for “bigoted white folks”).

117. See *Rachel Jeantel on Trial*, *supra* note 104.

If it is true that Jeantel's stereotypical Blackness took on the role of character evidence against Martin, then the prosecution's case as presented was unwinnable. The prosecution failed to offer any evidence that might humanize Martin in the eyes of the jury. While the prosecution played multiple audio and video recordings of Zimmerman, including his 911 calls and interviews with investigators following the shooting of Martin, they were unable to offer any evidence of Martin's recorded voice.<sup>118</sup> Not only were prosecutors unable to show Martin as a complex human being who may have had a legitimate fear that his life was in danger, but they did little to prevent the jury from inferring that Jeantel's stereotypical Blackness was also probative of Martin's character. If the jury believed that Martin was uneducated, hostile, inarticulate, angry toward Whites, lazy, and a thug (characteristics that are consistent with many traditional stereotypes of African-Americans), then they could quite easily determine that Martin acted in conformity with his stereotypical Blackness on the night in question.

### B. *The Jurors' Reactions to Jeantel*

We need not speculate regarding the impact that Jeantel had on the jurors' perceptions of Martin. An interview with the juror known only as B-37 reveals that Jeantel's failure to present herself in accordance with White-specific norms very likely influenced Juror B-37's assessment of the characters of both Jeantel and Martin.<sup>119</sup>

#### 1. Juror B-37's Background

Before we explore Juror B-37's post-trial interview, it is helpful to review her responses to the attorneys' voir dire questions. Juror B-37 was a White, middle-aged mother of two who resided in Seminole County, Florida, at the time of the trial.<sup>120</sup> During voir dire questioning, Juror B-37 stated that she was aware that riots had occurred following the death of Martin, when, in reality, no riots had occurred.<sup>121</sup> She also stated that, other than the Today show, she does not watch the news and finds the

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118. See Lizette Alvarez, *Trayvon Martin's Father Says Screams on 911 Call Were His Son's*, N.Y. TIMES (July 8, 2013), available at [http://www.nytimes.com/2013/07/09/us/friends-testify-that-zimmerman-is-the-one-screaming-for-help-on-911-call.html?\\_r=0](http://www.nytimes.com/2013/07/09/us/friends-testify-that-zimmerman-is-the-one-screaming-for-help-on-911-call.html?_r=0) (The prosecution's failure to introduce evidence of Martin's voice also hurt their case in another key area. Because the jurors never heard Martin's voice, they could make no assessment as to whether he was the person heard screaming on the 911 calls that were made on the night of his death.).

119. See Dan Zak, *Who is Juror B-37? Our Sole Window – for now - Into the Zimmerman Verdict*, WASH. POST (July 16, 2013), available at [http://www.washingtonpost.com/lifestyle/style/who-is-juror-b37-our-sole-window—for-now—into-the-zimmerman-verdict/2013/07/16/7513eece-ee23-11e2-a1f9-ea873b7e0424\\_story.html](http://www.washingtonpost.com/lifestyle/style/who-is-juror-b37-our-sole-window—for-now—into-the-zimmerman-verdict/2013/07/16/7513eece-ee23-11e2-a1f9-ea873b7e0424_story.html).

120. *Id.*

121. See Hamilton Nolan, *Juror B-37 Hates Media, Calls Martin "Boy of Color"*, GAWKER (July 15, 2013), available at <http://gawker.com/george-zimmerman-juror-b37-hates-media-called-trayvon-787873533>.

media to be worthless.<sup>122</sup> When asked by Zimmerman’s attorneys to describe Martin, she stated that “[h]e was a boy of color” and, when referring to Martin’s death, she called it “an unfortunate incident that happened.”<sup>123</sup>

Juror B-37’s statements support my opinion that she entered the jury box with certain implicit biases against African-Americans. She mistakenly believed that the individuals protesting the Sanford Police Department’s failure to arrest Zimmerman had engaged in riots and likely believed that African-Americans had carried out those riots.<sup>124</sup> Juror B-37 also chose to describe Martin by his sex and color when she could have used many other words to describe him. Martin’s sex and color were his most salient characteristics in the eyes of Juror B-37, but I suspect that she would not have mentioned Zimmerman’s race if asked to describe him.<sup>125</sup> Juror B-37’s description of Martin is a clear example of Flagg’s transparency theory.<sup>126</sup> While Juror B-37’s voir dire responses should have raised some red flags for the prosecution, they did not use one of their peremptory strikes to remove her from the jury.

## 2. Juror B-37’s Anderson Cooper Interview

Just two days after the announcement of Zimmerman’s acquittal, Juror B-37 sat for an interview with Anderson Cooper.<sup>127</sup> Juror B-37 concealed her identity during the interview to avoid bringing attention to her family.<sup>128</sup> During the interview, Cooper asked Juror B-37 a series of questions about Jeantel:

COOPER: I want to ask you a bunch of the—I want to ask you about some of the different witnesses. Rachel Jeantel, the woman who was on the phone with Trayvon Martin at the start of the incident. What did you make of her testimony?

JUROR: I didn’t think it was very credible, but I felt very sorry for her. She didn’t ask to be in this place. She didn’t ask—she wanted to go. She wanted to leave. She didn’t want to be any part of this jury. I think she felt inadequate toward everyone

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122. *Id.*

123. *Id.*

124. *Id.*

125. It is more likely that Juror B-37 would have identified Zimmerman by his national origin of Hispanic because his national origin differs from Juror B-37’s transparent national origin.

126. *See supra* Section II.B.

127. *See* Anderson Cooper, 360 Degrees, *Excerpts of Interview with Juror B-37 (Part I)*, CNN (July 15, 2013), available at <http://transcripts.cnn.com/TRANSCRIPTS/130715/acd.01.html>.

128. *Id.*

because of her education and her communication skills. I just felt sadness for her.

COOPER: You felt like, what, she was in over her head?

JUROR: Well, not over her head, she just didn't want to be there, and she was embarrassed by being there, because of her education and her communication skills, that she just wasn't a good witness.<sup>129</sup>

Juror B-37's description of Jeantel is extremely telling. First, she stated that Jeantel was not a credible witness but did not immediately explain her reasons for this conclusion. Instead, she discussed Jeantel's "inadequate" education and communication skills and stated, in a paternalistic fashion, that she felt pity for Jeantel.<sup>130</sup> Juror B-37 perceived that Jeantel was embarrassed because her inadequacies were exposed for the world to see.<sup>131</sup> Juror B-37 also concluded that Jeantel's lack of education and poor communication skills made her a bad witness for the prosecution.<sup>132</sup>

Juror B-37's perception of Jeantel was obviously affected by certain widely held racial stereotypes of African-Americans. First, Juror B-37 concluded that Jeantel's education and communication skills were inadequate without considering Jeantel's testimony that she was born in Haiti and had the ability to speak two other languages in addition to English.<sup>133</sup> While Jeantel also revealed her struggle with literacy during her testimony, Juror B-37 did not conclude that those struggles might be due to the fact that English was not the primary language spoken in Jeantel's home.<sup>134</sup> Juror B-37's assumption that Jeantel's speech and reading skills were the result of poor education or a lack of intelligence demonstrate the application of White-specific and American-specific expectations that all people living in the United States must be able to speak and read English, unless they are too unintelligent to do so.

Juror B-37's interview with Cooper also revealed that she had trouble relating to both Jeantel and Martin, providing a clue that her assessment of Jeantel's character also became her assessment of Martin's character:

COOPER: Did you find it hard at times to understand what [Jeantel] was saying?

JUROR: A lot of the times because a lot of the time she was using phrases I have never heard before, and what they meant.

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Brittney Cooper, *Dark-Skinned and Plus-Sized: The Real Rachel Jeantel Story*, SALON (June 28, 2013), available at [http://www.salon.com/2013/06/28/did\\_anyone\\_really\\_hear\\_rachel\\_jeantel/](http://www.salon.com/2013/06/28/did_anyone_really_hear_rachel_jeantel/).

134. *Id.*

COOPER: When she used the phrase, “creepy ass cracker,” what did you think of that?

JUROR: I thought it was probably the truth. I think Trayvon probably said that.

COOPER: And did you see that as a negative statement or a racial statement as the defense suggested?

JUROR: I don’t think it’s really racial. I think it’s just everyday life, the type of life that they live, and how they’re living, in the environment that they’re living in.<sup>135</sup>

Juror B-37 did not find Jeantel to be a credible witness in general, but had no trouble believing her testimony that Martin called Zimmerman a “creepy-ass cracker.”<sup>136</sup> Juror B-37 indicated that she had a hard time understanding Jeantel’s vernacular but concluded that the everyday lives of Martin and Jeantel involved them using pejorative terms to describe Whites. She made judgments and assumptions about the environment in which Martin and Jeantel lived, even though no witnesses offered testimony on this topic. Juror B-37’s statements reveal a divide between the suburban lives of Juror B-37 and Zimmerman on the one hand, and the “ghetto” inner-city lives of Jeantel and Martin on the other. Importantly, Juror B-37’s statements also reveal that she made certain judgments about Martin’s character based on her assessment of his proxy Jeantel.

Compare Juror B-37’s failure to identify with Jeantel and Martin with her glowing and very personal description of Zimmerman. Juror B-37 stated that Zimmerman’s “heart was in the right place” but that his good intentions got displaced because of the crime occurring in his neighborhood.<sup>137</sup> In that regard, the defense offered evidence that African-American men were responsible for a lot of the crime that had occurred in Zimmerman’s neighborhood.<sup>138</sup> In his closing argument, Zimmerman’s defense attorney, Mark O’Mara, argued that Zimmerman had reason to be suspicious of Martin because he fit the description of the individuals who had committed crimes in Zimmerman’s neighborhood in the past.<sup>139</sup> Juror B-37 also stated that, despite some inconsistencies in the statements Zimmerman made to investigators, she believed his account of what happened on the night he shot Martin.<sup>140</sup> Juror B-37 concluded that Martin “got mad and attacked” Zimmerman, and she described Martin as the “aggres-

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135. *Excerpts of Interview with Juror B-37 (Part I)*, *supra* note 127.

136. *Id.*

137. *Id.*

138. See Jelani Cobb, *What the Zimmerman Trial Was About*, *THE NEW YORKER* (July 12, 2013), available at [www.newyorker.com/news/news-desk/what-the-zimmerman-trial-was-about](http://www.newyorker.com/news/news-desk/what-the-zimmerman-trial-was-about).

139. *Id.*

140. *See Excerpts of Interview with Juror B-37 (Part I)*, *supra* note 127.

sor.”<sup>141</sup> She also stated that she believed Martin may have reached for Zimmerman’s gun even though the defense offered no DNA evidence to support this belief.<sup>142</sup> Finally, Juror B-37 stated that she would feel comfortable having Zimmerman patrol her neighborhood and that she believed he would be very responsible with his gun.<sup>143</sup>

Juror B-37 was just one of the six individuals who voted to acquit Zimmerman, and four of the remaining five jurors have disavowed her comments, stating that they do not share the opinions she expressed during her Anderson Cooper interview.<sup>144</sup> Even if the other jurors (four White females and one Puerto Rican female) did not harbor biases similar to those demonstrated by Juror B-37, it is fair to say that, as to Juror B-37, the concepts of implicit bias and transparency theory as well as the application of certain racial stereotypes took on the role of character evidence and provided Juror B-37 with enough information to make assessments about Martin that resulted in her decision to vote for Zimmerman’s acquittal.

I believe that this evidence of stereotypical Blackness is admitted in most criminal cases involving African-American defendants or victims, but it does not receive the same scrutiny that overt, explicit propensity evidence would receive before being presented to the jury. For this reason, judges in criminal trials must make an effort to limit the impact of evidence of stereotypical Blackness.

#### IV. REDUCING OR ELIMINATING THE IMPACT OF EVIDENCE OF STEREOTYPICAL BLACKNESS

This section will explore various options for lessening the impact of evidence of stereotypical Blackness. Because this evidence can find its origins in the concepts of implicit bias and transparency theory, one might believe that it is nearly impossible to reduce or eliminate its impact because it exists on a subconscious level; however, social science research suggests that certain strategies can result in a reduction in implicit bias.<sup>145</sup> When these strategies are considered along with traditional evidentiary tools for limiting the impact of unfairly prejudicial evidence, a set of potential solutions emerges.

##### A. Jury Selection

During the jury selection process, it is common for the attorneys or the court to ask jurors if they believe they can be fair and unbiased in their

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141. *Id.*

142. *Id.*

143. *Id.*

144. See Carolyn Pesce, *4 Zimmerman Jurors: B-37 Doesn't Speak for Us*, USA TODAY (July 17, 2013), available at <http://www.usatoday.com/story/news/nation/2013/07/17/zimmerman-jurors-issue-statement/2523893/>.

145. See discussion *infra* Section IV.A-B.



assessment of the evidence. This inquiry is completely ineffective in determining whether a given juror can set aside his or her implicit biases since the jurors are likely not even aware that they harbor certain implicit biases.<sup>146</sup> Similarly, White jurors are not likely to acknowledge the tendency of Whites to apply White-specific norms to people of color because those norms usually appear to be race-neutral. The point here is that the normal voir dire examination process is not sufficient to ferret out jurors who are likely to make decisions based on evidence of stereotypical Blackness.

On the other hand, research shows that racial diversity can significantly reduce the likelihood that implicit bias will affect jury verdicts.<sup>147</sup> Professors Jolls and Sunstein have summarized several social science studies which “support[ ] the conclusion that the presence of population diversity in an environment tends to reduce the level of implicit bias.”<sup>148</sup> They note one study wherein White IAT test-takers who were paired with African-American partners exhibited less implicit bias than White test-takers paired with White partners.<sup>149</sup>

While racial diversity among jurors may reduce bias, the racial make-up of the voter rolls in counties like Seminole County, Florida, may not allow for racially diverse juries. Thus, judges must employ other strategies to eliminate the effect of stereotype evidence.

#### B. *Instruction from the Court*

One method for reducing the effect of implicit bias, transparency theory, and racial stereotypes may be to simply talk about these concepts with the jury and encourage them to resist the urge to allow these phenomena to affect their assessment of the evidence. Rather than ignoring the 10,000-pound pink elephant in the courtroom that is race in the American criminal justice system, it may be quite effective to educate jurors on the existence of implicit bias and transparency theory and caution them against allowing racial stereotypes to influence their decisions in any way. Judge Bennett argues that courts should instruct jurors that most people hold certain biases and urge jurors to control their biases while serving on the jury.<sup>150</sup> To support this view, Bennett cites to research studies of police officers showing a statistically significant decrease in implicit bias

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146. See *White Juror Bias*, *supra* note 50, at 222 (“Due to racial norms in contemporary America, modern racism is often expressed in subtle ways and prejudicial thoughts often linger outside Whites’ conscious awareness. As a result, when asked about their ability to remain race-neutral, few White Americans admit to harboring anti-Black sentiment. Some potential jurors may intentionally lie in order to avoid appearing prejudiced. Others may truly believe they are impartial.”).

147. See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 981 (2006).

148. *Id.*

149. *Id.* (summarizing studies).

150. See Bennett, *supra* note 33, at 169.

following training.<sup>151</sup> Judge Bennett is an innovator in the area of juror education on the topic of bias. In both civil and criminal trials, he instructs jurors on implicit bias just prior to opening statements. He also requires jurors in his criminal cases to sign a certificate of nondiscrimination.<sup>152</sup> Because the premise of this paper is that stereotypical Blackness takes on the role of propensity evidence in criminal cases involving African-Americans, it would also be appropriate and necessary for the court to provide a limiting instruction to the jurors cautioning them to avoid using such evidence to make inferences about the character traits of the defendant or alleged victim.<sup>153</sup>

In the Zimmerman case, the court limited the discussion of race during the trial;<sup>154</sup> however, according to Sommers and Ellsworth, the court would have reduced juror bias by allowing some discussion of race during the trial.<sup>155</sup> They argue that allowing the discussion of race at trial will remind White jurors of their egalitarian ideals and desire to appear non-prejudiced, thereby ensuring a non-biased verdict.<sup>156</sup> One might argue that race was salient at the Zimmerman trial because the national media coverage focused on the trial as a microcosm of race relations in America, but I believe the jury failed to consider or openly discuss race during jury deliberations because the court and attorneys made clear that the case was not about race. Because the trial was whitewashed in this way, jurors likely believed they would be breaking the rules if they had engaged an open discussion about race.

### C. Rebuttal Evidence

The most effective way to combat traditional character evidence, short of excluding it altogether, is to rebut the evidence. If Jeantel's testimony in the Zimmerman case resulted in a portrayal of Trayvon Martin as an uneducated, hostile, inarticulate, lazy thug who disliked Whites,<sup>157</sup> then the prosecution should have been able to rebut this evidence.

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151. *Id.* at 156, 169; *see also Seeing Through Colorblindness*, *supra* note 39, at 500 (“[B]eing aware of potential biases, being motivated to check those biases, and being accountable to a superior (as a jury feels toward a judge) should have some effect on the translation of bias to behavior.”).

152. *See* Bennett, *supra* note 33, at 169.

153. Federal Rule of Evidence 105 would allow for such an instruction. *See* FED. R. EVID. 105.

154. *See supra* Section III.

155. *See supra* note 50 and accompanying text.

156. *See White Juror Bias*, *supra* note 50, at 222-23. Indeed, Sommers and Ellsworth advise the attorneys of Black defendants to “play the race card” in an effort to remind jurors of the discriminatory treatment that exists at every level of the criminal justice system. *Id.*

157. *See supra* Section III.A.

Florida's rule of the admissibility of character evidence is very similar to Federal Rule of Evidence 404.<sup>158</sup> It provides that a criminal defendant may offer evidence of a pertinent character trait of the alleged victim and that the prosecution may rebut such evidence.<sup>159</sup> In the Zimmerman trial, the defense did not offer explicit evidence of Martin's character for violence. Doing so would have been quite risky for Zimmerman, who had been arrested and charged with felony battery and resisting arrest and who was accused of domestic violence in 2005.<sup>160</sup> Had Zimmerman introduced explicit evidence of Martin's character for violence, he likely would have opened the door for the prosecution to offer reputation testimony regarding Zimmerman's character for violence.<sup>161</sup> Rather than offering explicit character evidence, Zimmerman's defense team was able to bring out evidence of Jeantel's character traits, many of which were not pertinent to Jeantel's credibility, and link those traits to Martin. This approach insulated Zimmerman from the risk that his reputation for violence might be admitted in rebuttal.

The more appropriate rule would be to allow rebuttal evidence where the jury hears evidence of an individual's stereotypical Blackness. In the Zimmerman trial, that rebuttal evidence would not have focused on attacking Zimmerman's character but instead on humanizing Martin. Under the current version of Florida's Rule 404, the prosecution could have offered evidence of Martin's character for peacefulness, but it made a strategic decision not to do so to avoid opening the door to evidence suggesting that Martin had engaged in violence in the past.<sup>162</sup> Thus, rather than focusing on Martin's propensity for violence, the evidence rebutting the stereotype evidence would focus on Martin's general demeanor, lifestyle, and attitude toward Whites. For example, had the prosecution been able to introduce video evidence of Martin speaking or interacting with his family or friends, then he would have been on equal footing with Zimmerman, who spoke to the jury through several video and audio recordings. Also, to combat the notion that Martin did not like Whites and exhibited hostility toward them, the prosecution would offer evidence that Martin was friendly with people of all races and may have had very close

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158. See FLA. STAT. ANN. § 90.404(1)(b) (West 2014).

159. *Id.*

160. See MSNBC.com Staff, *Zimmerman Accused of Domestic Violence, Fighting with a Police Officer*, NBC NEWS (Mar. 27, 2012), available at [http://usnews.nbcnews.com/\\_news/2012/03/27/10894561-zimmerman-accused-of-domestic-violence-fighting-with-a-police-officer](http://usnews.nbcnews.com/_news/2012/03/27/10894561-zimmerman-accused-of-domestic-violence-fighting-with-a-police-officer).

161. See FLA. STAT. ANN. § 90.405 (stating that, where character evidence is admissible, it must be offered through reputation testimony on direct examination while specific instances may only be brought out on cross-examination).

162. See FLA. STAT. ANN. § 90.404(1)(b)(2); see also Tracy Connor, *Jury's Look into Trayvon Martin's Past Has its Limits*, NBC NEWS (June 7, 2013), available at [http://usnews.nbcnews.com/\\_news/2013/06/07/18832092-jurys-look-into-trayvon-martins-past-has-its-limits?lite](http://usnews.nbcnews.com/_news/2013/06/07/18832092-jurys-look-into-trayvon-martins-past-has-its-limits?lite) (noting that the trial judge excluded evidence of Martin's past fights and text messages referencing guns).

friends who were White. Evidence of Martin's plan to attend college or efforts to find employment would combat the notion that he was a thug. Finally, evidence of Martin's good performance in school would combat the stereotype that he was unintelligent and lazy.

Each of these suggestions assumes that Martin exhibited these traits. If Martin displayed at least some of these characteristics during his short lifetime, it is unfortunate that the jury never had an opportunity to get to know him. Although many different factors resulted in the acquittal of George Zimmerman, I believe that this rebuttal evidence would have given the jury a more well-rounded picture of the voiceless Trayvon Martin.

Empirical research supports this approach to attacking stereotype evidence.<sup>163</sup> Melinda Jones has found that providing information to the jury that contradicts racial stereotypes is very effective in preventing the application of the stereotype.<sup>164</sup> Jones found that "counterstereotypical information that was highly relevant to the judgment (for example, describing a Hispanic defendant accused of an aggressive crime as nonaggressive via character testimony) was effective in eliminating stereotypic biases."<sup>165</sup> Thus, in the Zimmerman case, prosecutors could have reduced the possibility that jurors would rely upon stereotyped biases of Martin by offering counterstereotypical character evidence to the extent they could do so within the confines of the Florida Rules of Evidence.

## V. CONCLUSION

The Zimmerman trial is just one example of a phenomenon that likely happens quite frequently, often without the benefit of a public trial. We will never know the extent to which evidence of stereotypical Blackness affected the grand juries investigating the deaths of Michael Brown,<sup>166</sup> Eric Garner,<sup>167</sup> and John Crawford.<sup>168</sup> What we do know is that following George Zimmerman's acquittal, he has been involved in several incidents

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163. See Melinda Jones, *Preventing the Application of Stereotypic Biases in the Courtroom: The Role of Detailed Testimony*, 20 J. OF APP. SOC. PSY. 1767 (1997) (analyzing methods for preventing the application of stereotypic biases in jury decision-making).

164. *Id.* at 1768-69.

165. *Id.* at 1769.

166. See Monica Davey & Julie Bosman, *Grand Jury Declines to Indict Police Officer in Ferguson Shooting*, N.Y. TIMES, NOV. 25, 2014, at A1.

167. See Larry Celona, Kirstan Conley & Bruce Golding, *Cop Cleared in Chokehold Death of Eric Garner*, N.Y. POST (Dec. 3, 2014), available at <http://nypost.com/2014/12/03/cop-cleared-in-eric-garner-chokehold-death/>.

168. See Mark Berman, *No Indictment after Police Shoot and Kill Man at Ohio Wal-Mart; Justice Dep't launches investigation*, WASH. POST (Sept. 24, 2014), available at <http://www.washingtonpost.com/news/post-nation/wp/2014/09/24/no-indictments-after-police-shoot-and-kill-man-at-an-ohio-wal-mart-justice-dept-launches-investigation/>.

that call into question Juror B-37's assessment of him as a peaceful, responsible gun owner whose "heart was in the right place."<sup>169</sup>

African-Americans must frequently confront biases and stereotypes. These biases and prejudices certainly exist outside the context of criminal cases, but evidence of stereotypical Blackness takes on greater significance when an African-American is either a silent victim or a defendant exercising his or her constitutional right to remain silent. The strategies outlined above, which include empaneling more diverse juries, educating and instructing jurors on the risk of bias, and offering explicit evidence to rebut unspoken but pervasive racial stereotypes, may move us toward verdicts that are a better reflection of the evidence presented rather than a product of our implicit prejudices and misconceptions about people who are different from us. It is the writer's hope that these practices will move us toward a more perfect criminal justice system that will treat all Americans equally regardless of their skin color.

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169. See Greg Botelho & Carma Hassan, *George Zimmerman Arrested on Suspected Domestic Violence*, CNN (Jan. 13, 2015), available at <http://www.cnn.com/2015/01/10/us/george-zimmerman-arrested/> (noting that Zimmerman has had two arrests for domestic violence and had been accused of making criminal threats since his acquittal in 2013).