Implicit Bias and the Criminal Justice System

Criminal Justice Section

January 16, 2019

New York Hilton Midtown

NYC

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NYSBA 2019 ANNUAL MEETING

Criminal Justice Section

Implicit Bias and the Criminal Justice System

Wednesday, January 16, 2019 | 9:00 a.m. – 12:20 p.m.

New York Hilton Midtown | NYC

3.5 Credits

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This program is transitional and is suitable for all attorneys including those newly admitted.

MCLE Program

9:00 a.m. – 12:20 p.m. | Beekman, Second Floor

Awards Luncheon

12:30 p.m. – 2:00 p.m. | Sutton North, Second Floor

Agenda

9:00 a.m. – 9:05 a.m. **Welcoming Remarks**
Tucker Stanclift, Esq., Section Chair, Stanclift Law PLLC, Queensbury

9:05 a.m. – 10:20 a.m. **Understanding Implicit Bias**

Speaker: **Professor Rachel Godsil**
Director of Research and Co-Founder of the Perception Institute at Rutgers University, Newark, NJ

(1.5 credits in Diversity, Inclusion and Elimination of Bias)

10:20 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:20 a.m. **Implicit Bias – A Law Enforcement Perspective**

A former prosecutor for the New York County Attorney's Office will discuss confronting and addressing issues surrounding implicit bias and law enforcement.

Speaker: **Janine M. Gilbert, Esq.**
@l kco l kqfkd
Coordinator, New York City Police Department, New York, NY

(1.0 credit in Areas of Professional Practice)

11:20 a.m. – 11:30 a.m. **Break**

11:30 a.m. – 12:20 p.m. **Confronting and Addressing Implicit Bias in Litigation**

Our speaker, a noted Criminal Defense attorney who has served as "learned counsel" on approximately 45 federal death penalty cases across the country, will address implicit bias in jury selection and sentencing.

Speaker: **Anthony L. Ricco, Esq.**
Anthony L. Ricco, Attorney at Law, New York, NY

(1.0 credit in Skills)

12:30 p.m. – 2:00 p.m. **Awards Luncheon** *(Additional fees apply)*

Criminal Justice Section Awards to be Presented at Annual Meeting

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Buffalo, NY

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P. David Soares, Esq.
Albany County District Attorney, Albany, NY

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William J. Leahy, Esq.
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Hon. Lawrence K. Marks
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David S. Michaels Memorial Award
Art C. Cody, Esq.
Deputy Director of the Veterans Defense Program, New York State Defenders Association, Albany

Outstanding Contribution in the Field of Criminal Law Education
Hon. Martin Marcus
Acting Justice, Bronx County Supreme Court, Bronx

Outstanding Contribution to the Bar and the Community
Elizabeth Glazer, Esq.
Director, Mayor's Office of Criminal Justice, New York, NY

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THE CRIMINAL JUSTICE SECTION GRATEFULLY ACKNOWLEDGES THE SUPPORT OF

MCLE INFORMATION

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Understanding Implicit Bias

Professor Rachel Godsil, Director of Research
and Co-Founder of the Perception Institute, Rutgers University, Newark, NJ

UCLA LAW REVIEW

Implicit Bias in the Courtroom

Jerry Kang
Judge Mark Bennett
Devon Carbado
Pam Casey
Nilanjana Dasgupta
David Faigman
Rachel Godsil
Anthony G. Greenwald
Justin Levinson
Jennifer Mnookin

ABSTRACT

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* The author team comprises legal academics, scientists, researchers, and even a sitting federal judge who seek to answer this question in accordance with behavioral realism. The Article first provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications that distinguish between explicit, implicit, and structural forms of bias. Next, the Article applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. This application involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed. Finally, the Article examines various concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury.

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59 UCLA L. Rev. 1124 (2012)

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Jennifer Mnookin is Professor of Law at UCLA School of Law.

For their research assistance, we thank Jonathan Feingold and Joshua Neiman.

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INTRODUCTION

The problems of overt discrimination have received enormous attention from lawyers, judges, academics, and policymakers. While explicit sexism, racism, and other forms of bias persist, they have become less prominent and public over the past century. But explicit bias and overt discrimination are only part of the problem. Also important, and likely more pervasive, are questions surrounding implicit bias—attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.

How prevalent and significant are these implicit, unintentional biases? To answer these questions, people have historically relied on their gut instincts and personal experiences, which did not produce much consensus. Over the past two decades, however, social cognitive psychologists have discovered novel ways to measure the existence and impact of implicit biases—without relying on mere common sense. Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects. These fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law's fundamental understandings of discrimination and fairness.

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls? In what circumstances are these risks most acute? Are there practical ways to reduce the effects of implicit biases? To what extent can awareness of these biases mitigate their impact? What other debiasing strategies might work? In other words, in what way—if at all—should the courts respond to a better model of human decisionmaking that the mind sciences are providing?

We are a team of legal academics, scientists, researchers, and a sitting federal judge[1] who seek to answer these difficult questions in accordance with behavioral realism.[2] Our general goal is to educate those in the legal profession who are

1. Judge Mark W. Bennett, a coauthor of this article, is a United States District Court Judge in the Northern District of Iowa.
2. Behavioral realism is a school of thought that asks the law to account for more accurate models of human cognition and behavior. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit*

unfamiliar with implicit bias and its consequences. To do so, we provide a current summary of the underlying science, contextualized to criminal and civil litigation processes that lead up to and crescendo in the courtroom. This involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms. We seek to be useful to legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it. While we aim to provide useful and realistic strategies for those judges already persuaded that implicit bias is a legitimate concern, we also hope to provoke those who know less about it, or are more skeptical of its relevance, to consider these issues thoughtfully.

We are obviously not a random sample of researchers and practitioners; thus, we cannot claim any representative status. That said, the author team represents a broad array of experience, expertise, methodology, and viewpoints. In authoring this paper, the team engaged in careful deliberations across topics of both consensus and dissensus.[3] We did not entirely agree on how to frame questions in this field or how to answer them. That said, we stand collectively behind what we have written. We also believe the final work product reveals the benefits of such cross-disciplinary and cross-professional collaboration.

Part I provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications. Often the science can seem too abstract, especially to nonprofessional scientists. As a corrective, Part II applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. Part III

Bias and the Law, 58 UCLA L. REV. 465, 490 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 997–1008 (2006). Jon Hanson and his coauthors have advanced similar approaches under the names of "critical realism," "situationism," and the "law and mind sciences." *See* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1339 n.28 (2010) (listing papers).

3. This paper arose out of the second symposium of PULSE: Program on Understanding Law, Science, and Evidence at UCLA School of Law, on March 3–4, 2011. We brought together leading scientists (including Anthony Greenwald, the inventor of the Implicit Association Test), federal and state judges, applied researchers, and legal academics to explore the state of the science regarding implicit bias research and to examine the various institutional responses to date. The Symposium also raised possibilities and complications, ranging from the theoretical to practical, from the legal to the scientific. After a day of public presentations, the author team met in a full-day closed session to craft the outlines of this paper. Judge Michael Linfield of the Los Angeles Superior Court and Jeff Rachlinski, Professor of Law at Cornell Law School, participated in the symposium but could not join the author team. Their absence should not be viewed as either agreement or disagreement with the contents of the Article.

examines different intervention strategies to counter the implicit biases of key players in the justice system, such as the judge and jury.

I. IMPLICIT BIASES

A. Empirical Introduction

Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational. We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race. For example, we have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments—even if those anchors are objectively wrong.[4] We exhibit an endowment effect, with irrational attachments to arbitrary initial distributions of property, rights, and grants of other entitlements.[5] We suffer from hindsight bias and believe that what turns out to be the case today should have been easily foreseen yesterday.[6] The list of empirically revealed biases goes on and on. Indeed, many legal academics have become so familiar with such heuristics and biases that they refer to them in their analyses as casually as they refer to economic concepts such as transaction costs.[7]

One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races. An *attitude* is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative.[8] A *stereotype* is an association between a concept (again, in this case a social group) and a trait.[9] Although interconnected, attitudes and stereotypes

4. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 667 (1999) (describing anchoring).
5. *See generally* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).
6. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).
7. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CALIF. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).
8. In both common and expert usage, sometimes the word "prejudice" is used to describe a negative attitude, especially when it is strong in magnitude.
9. If the association is nearly perfect, in that almost every member of the social group has that trait, then we think of the trait less as a stereotype and more as a defining attribute. Typically, when we use the word "stereotype," the correlation between social group and trait is far from perfect. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.

The conventional wisdom has been that these social cognitions—attitudes and stereotypes about social groups—are explicit, in the sense that they are both consciously accessible through introspection *and* endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC),[10] have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

How have mind scientists discovered such findings on matters so latent or implicit? They have done so by innovating new techniques that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported. Some of these measures involve subliminal priming and other treatments that are not consciously detected within an experimental setting. Other instruments use reaction time differences between two types of tasks—one that seems consistent with some bias, the other inconsistent—as in the Implicit Association Test (IAT).[11]

10. Implicit social cognition (ISC) is a field of psychology that examines the mental processes that affect social judgments but operate without conscious awareness or conscious control. *See generally* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007). The term was first used and defined by Anthony Greenwald and Mahzarin Banaji. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

11. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998) (introducing the Implicit Association Test (IAT)). For more information on the IAT, see Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265 (John A. Bargh ed., 2007).

The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit one response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that the same key is used for *both* White and harmless item; a different key is used for *both* African American and weapon. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly.[12] Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people's responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.[13]

Through the IAT, social psychologists from hundreds of laboratories have collected enormous amounts of data[14] on reaction-time measures of "implicit biases," a term we use to denote implicit attitudes and implicit stereotypes. According to these measures, implicit bias is pervasive (widely held),[15] large in magnitude (as compared to standardized measures of explicit bias),[16] dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are

12. *See* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 17 (2007).

13. This D score, which ranges from –2.0 to 2.0, is a standardized score, which is computed by dividing the IAT effect as measured in milliseconds by the standard deviations of the participants' latencies pooled across schema-consistent and -inconsistent conditions. *See, e.g.*, Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003). If an individual's IAT D score is divided by its standard deviation of the population that has taken the test, the result is interpretable as the commonly used effect size measure, Cohen's *d*.

14. The most prominent dataset is collected at PROJECT IMPLICIT, http://projectimplicit.org (last visited Mar. 22, 2012) (providing free online tests of automatic associations). For a broad analysis of this dataset, see Nosek et al., *supra* note 12.

15. Lane, Kang & Banaji, *supra* note 10, at 437.

16. Cohen's d is a standardized unit of the size of a statistical effect. By convention, social scientists mark 0.20, 0.50, and 0.80 as small, medium, and large effect sizes. The IAT effect, as measured in Cohen's d, on various stereotypes and attitudes range from medium to large. *See* Kang & Lane, *supra* note 2, at 474 n.35 (discussing data from Project Implicit). Moreover, the effect sizes of implicit bias against social groups are frequently larger than the effect sizes produced by explicit bias measures. *See id.* at 474–75 tbl.1.

separate mental constructs),[17] and predicts certain kinds of real-world behavior.[18] What policymakers are now keen to understand are the size and scope of these behavioral effects and how to counter them—by altering the implicit biases themselves and by implementing strategies to attenuate their effects.

Useful and current summaries of the scientific evidence can be found in both the legal and psychological literatures. For example, in the last volume of this law review, Jerry Kang and Kristin Lane provided a summary of the evidence demonstrating that we are not perceptually, cognitively, or behaviorally colorblind.[19] Justin Levinson and Danielle Young have summarized studies focusing on jury decisionmaking.[20] In the psychology journals, John Jost and colleagues responded to sharp criticism[21] that the IAT studies lacked real-world consequences by providing a qualitative review of the literature, including ten studies that no manager should ignore.[22] Further, they explained how the findings are entirely consistent with the major tenets of twentieth century social cognitive psychology.[23] In a quantitative review, Anthony Greenwald conducted a meta-analysis of IAT studies—which synthesizes all the relevant scientific findings—and found that implicit attitudes as measured by the IAT predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, substantially better than explicit bias measures.[24]

Instead of duplicating these summaries, we offer research findings that are specific to implicit bias leading up to and in the courtroom. To do so, we chart

17. *See* Anthony G. Greenwald & Brian A. Nosek, *Attitudinal Dissociation: What Does It Mean?*, *in* ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 65 (Richard E. Petty, Russell E. Fazio & Pablo Briñol eds., 2008).
18. *See* Kang & Lane, *supra* note 2, at 481–90 (discussing evidence of biased behavior in perceiving smiles, responding to threats, screening resumes, and body language).
19. *See* Kang & Lane, *supra* note 2, at 473–90; *see also* David L. Faigman, Nilanjana Dasgupta & Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008).
20. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319–26 (2010).
21. *See, e.g.*, Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1108–10 (2006).
22. *See, e.g.*, John T. Jost et al., *The Existence of Implicit Prejudice Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 41 (2009).
23. *See id.*
24. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20 (2009). Implicit attitude scores predicted behavior in this domain at an average correlation of r=0.24, whereas explicit attitude scores had correlations at an average of r=0.12. *See id.* at 24 tbl.3.

out two case trajectories—one criminal, the other civil. That synthesis appears in Part II.

B. Theoretical Clarification

But before we leave our introduction to implicit bias, we seek to make some theoretical clarifications on the relationships between explicit biases, implicit biases, and structural processes that are all involved in producing unfairness in the courtroom. We do so because the legal literature has flagged this as an important issue.[25] In addition, a competent diagnosis of unfairness in the courtroom requires disentangling these various processes. For instance, if the end is to counter discrimination caused by, say, *explicit* bias, it may be ineffective to adopt means that are better tailored to respond to *implicit* bias, and vice versa.

We start by clarifying terms. To repeat, explicit biases are attitudes and stereotypes that are consciously accessible through introspection *and* endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate.

Above, we used the labels "explicit" and "implicit" as adjectives to describe mental constructs—attitudes and stereotypes. Readers should recognize that these adjectives can also apply to research procedures or instruments. An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. No instrument perfectly measures a mental construct. In fact, one can often easily conceal one's explicit bias as measured through an explicit instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not to be candid about the beliefs or attitudes at issue.

By contrast, an implicit instrument does not depend on the respondent's conscious knowledge of the mental constructs that the researcher is inferring from the measure. An example is a reaction-time measure, such as the IAT. This does not necessarily mean that the respondent is unaware that the IAT is measuring bias.

25. *See generally* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1 (2011).

It also does not mean that the respondent is actually unaware that he or she has implicit biases, for example because she has taken an IAT before or is generally aware of the research literature. To repeat, no instrument perfectly measures any mental construct, and this remains true for implicit instruments. One might, for instance, try to conceal implicit bias measured through an implicit instrument, but such faking is often much harder than faking explicit bias measured by an explicit instrument.[26]

Finally, besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called "structural." Other names include "institutional" or "societal." These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.[27] In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Because thinking through biases with respect to human beings evokes so much potential emotional resistance, sometimes it is easier to apply them to something less fraught than gender, race, religion, and the like. So, consider a vegetarian's biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are *explicit* biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of *concealed* bias (explicit bias that is hidden to manage impressions).

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26. *See, e.g.*, Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83, 95–96 (2003).

27. *See, e.g.*, Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1117–22 (2002) (applying lock-in theory to explain the inequalities between Blacks and Whites in education, housing, and employment); john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795–800 (2008) (adopting a systems approach to describe structured racialization); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 743–48 (2000) (describing lock-in theory, drawing on antitrust law and concepts).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an *implicit* bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for $10 or a cheeseburger for $3. Unfortunately, she has only $5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of *structural* bias in favor of meat.

We disentangle these various mechanisms—explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces—because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms—explicit bias, implicit bias, and structural forces—are not mutually exclusive.[28] To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest

28. *See, e.g.*, GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 23–30 (2002) (discussing self-reinforcing stereotypes); john powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, POVERTY & RACE, Sept./Oct. 2011, at 3, 6 (explaining why "implicit bias insights are crucial to addressing the substantive inequalities that result from structural racialization").

that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.[29]

II. TWO TRAJECTORIES

A. The Criminal Path

Consider, for example, some of the crucial milestones in a criminal case flowing to trial. First, on the basis of a crime report, the police investigate particular neighborhoods and persons of interest and ultimately arrest a suspect. Second, the prosecutor decides to charge the suspect with a particular crime. Third, the judge makes decisions about bail and pretrial detention. Fourth, the defendant decides whether to accept a plea bargain after consulting his defense attorney, often a public defender or court-appointed private counsel. Fifth, if the case goes to trial, the judge manages the proceedings while the jury decides whether the defendant is guilty. Finally, if convicted, the defendant must be sentenced. At each of these stages,[30] implicit biases can have an important impact. To maintain a manageable scope of analysis, we focus on the police encounter, charge and plea bargain, trial, and sentencing.

1. Police Encounter

Blackness and criminality. If we implicitly associate certain groups, such as African Americans, with certain attributes, such as criminality, then it should not be surprising that police may behave in a manner consistent with those implicit stereotypes. In other words, biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning.[31] These biases could contribute to the substantial racial disparities that have been widely documented in policing.[32]

29. *See* Jerry Kang, *Implicit Bias and the Pushback From the Left*, 54 ST. LOUIS U. L.J. 1139, 1146–48 (2010) (specifically rejecting complaint that implicit bias analysis must engage in reductionism).
30. The number of stages is somewhat arbitrary. We could have listed more stages in a finer-grained timeline or vice versa.
31. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976–77 (2002).
32. *See, e.g.*, Dianna Hunt, *Ticket to Trouble/Wheels of Injustice/Certain Areas Are Ticket Traps for Minorities*, HOUS. CHRON., May 14, 1995, at A1 (analyzing sixteen million Texas driving records and finding that minority drivers straying into White neighborhoods in Texas's major urban areas were twice as likely as Whites to get traffic violations); Sam Vincent Meddis & Mike Snider, *Drug War 'Focused' on Blacks*, USA TODAY, Dec. 20, 1990, at 1A (reporting findings from a 1989 *USA*

Since the mid–twentieth century, social scientists have uncovered empirical evidence of negative attitudes toward African Americans as well as stereotypes about their being violent and criminal.[33] Those biases persist today, as measured by not only explicit but also implicit instruments.[34]

For example, Jennifer Eberhardt, Philip Goff, Valerie Purdie, and Paul Davies have demonstrated a bidirectional activation between Blackness and criminality.[35] When participants are subliminally primed[36] with a Black male face (as opposed to a White male face, or no prime at all), they are quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static.[37] In other words, by implicitly thinking *Black*, they more quickly saw a weapon.

Interestingly, the phenomenon also happens in reverse. When subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces.[38] Researchers found this result not only in a student population, which is often criticized for being unrepresentative of the real world, but also among police officers.[39] The research suggests both that

Today study that 41 percent of those arrested on drug charges were African American whereas 15 percent of the drug-using population is African American); Billy Porterfield, *Data Raise Question: Is the Drug War Racist?*, AUSTIN AM. STATESMAN, Dec. 4, 1994, at A1 (citing study showing that African Americans were over seven times more likely than Whites to be arrested on drug charges in Travis County in 1993).

33. *See generally* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995).

34. In a seminal paper, Patricia Devine demonstrated that being subliminally primed with stereotypically "Black" words prompted participants to evaluate ambiguous behavior as more hostile. *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). The priming words included "Negroes, lazy, Blacks, blues, rhythm, Africa, stereotype, ghetto, welfare, basketball, unemployed, and plantation." *Id.* at 10. Those who received a heavy dose of priming (80 percent stereotypical words) interpreted a person's actions as more hostile than those who received a milder dose (20 percent). *Id.* at 11–12; *see also* John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996).

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

36. The photograph flashed for only thirty milliseconds. *Id.* at 879.

37. *See id.* at 879–80. There was a 21 percent drop in perceptual threshold between White face primes and Black face primes. This was measured by counting the number of frames (out of a total of 41) that were required before the participant recognized the outlines of the weapon in both conditions. There was a 8.8 frame difference between the two conditions. *Id.* at 881.

38. Visual attendance was measured via a dot-probe paradigm, which requires participants to indicate on which side of the screen a dot flashes. The idea is that if a respondent is already looking at one face (for example, the Black photograph), he or she will see a dot flash near the Black photograph faster. *See id.* at 881 (describing dot-paradigm as the gold standard in visual attention measures).

39. *See id.* at 885–87 (describing methods, procedures, and results of Study 4, which involved sixty-one police officers who were 76 percent White, 86 percent male, and who had an average age of forty-two).

the idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness. How these findings translate into actual police work is, of course, still speculative. At a minimum, however, they suggest the possibility that officers have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention.

Even if this is the case, one might respond that extra visual attention by the police is not too burdensome. But who among us enjoys driving with a police cruiser on his or her tail?[40] Moreover, the increased visual attention did not promote accuracy; instead, it warped the officers' perceptual memories. The subliminal prime of weapons led police officers not only to look more at Black faces but also to remember them in a biased way, as having more stereotypically African American features. Thus, they "were more likely to falsely identify a face that was more stereotypically Black than the target when they were primed with crime than when they were not primed."[41]

We underscore a point that is so obvious that it is easy to miss. The primes in these studies were all flashed *subliminally*. Thus, the behavioral differences in visually attending to Black faces and in remembering them more stereotypically were all triggered implicitly, without the participants' conscious awareness.

Shooter bias. The implicit association between Blackness and weapons has also been found through other instruments, including other priming tasks[42] and the IAT. One of the tests available on Project Implicit specifically examines the implicit stereotype between African Americans (as compared to European Americans) and weapons (as compared to harmless items). That association has been found to be strong, widespread, and dissociated from explicit self-reports.[43]

Skeptics can reasonably ask why we should care about minor differentials between schema-consistent and -inconsistent pairings that are often no more than a half second. But it is worth remembering that a half second may be all

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In this study, the crime primes were not pictures but words: "violent, crime, stop, investigate, arrest, report, shoot, capture, chase, and apprehend." *Id.* at 886.

40. *See* Carbado, *supra* note 31, at 966–67 (describing existential burdens of heightened police surveillance).

41. Eberhardt et al., *supra* note 35, at 887.

42. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). The study deployed a priming paradigm, in which a photograph of a Black or White face was flashed to participants for two hundred milliseconds. Immediately thereafter, participants were shown pictures of guns or tools. *Id.* at 184. When primed by the Black face, participants identified guns faster. *Id.* at 185.

43. For N=85,742 participants, the average IAT D score was 0.37; Cohen's *d*=1.00. By contrast, the self-reported association (that is, the explicit stereotype measure) was Cohen's *d*=0.31. *See* Nosek et al., *supra* note 12, at 11 tbl.2.

the time a police officer has to decide whether to shoot. In the policing context, that half second might mean the difference between life and death.

Joshua Correll developed a shooter paradigm video game in which participants are confronted with photographs of individuals (targets) holding an object, superimposed on various city landscapes.[44] If the object is a weapon, the participant is instructed to press a key to shoot. If the object is harmless (for example, a wallet), the participant must press a different key to holster the weapon. Correll found that participants were quicker to shoot when the target was Black as compared to White.[45] Also, under time pressure, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets, and failed to shoot more armed White targets (misses) than armed Black targets.[46] Interestingly, the shooter bias effect was not correlated with measures of explicit personal stereotypes.[47] Correll also found comparable amounts of shooter bias in African American participants.[48] This suggests that negative attitudes toward African Americans are not what drive the phenomenon.[49]

The shooter bias experiments have also been run on actual police officers, with mixed results. In one study, police officers showed the same bias in favor of shooting unarmed Blacks more often than unarmed Whites that student and civilian populations demonstrated.[50] In another study, however, although police officers showed a similar speed bias, they did not show any racial bias in the

44. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002) (describing the procedure).

45. *Id.* at 1317.

46. *Id.* at 1319. For qualifications about how the researchers discarded outliers, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 n.16 (2005). Subsequent studies have confirmed Correll's general findings. *See, e.g.*, Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (finding similar results).

47. Correll et al., *supra* note 44, at 1323. The scales used were the Modern Racism Scale, the Discrimination and Diversity Scale, the Motivation to Control Prejudiced Responding Scale, and some questions from the Right-Wing Authoritarianism Scale and the Personal Need for Structure Scale for good measure. *Id.* at 1321. These are survey instruments that are commonly used in social psychological research. Shooter bias was, however, correlated with measures of societal stereotypes—the stereotypes that other people supposedly held. *Id.* at 1323.

48. *See id.* at 1324.

49. On explicit attitude instruments, African Americans show on average substantial in-group preference (over Whites). On implicit attitude instruments, such as the IAT, African Americans bell curve around zero, which means that they show no preference on average. *See* Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY RES. & PRACTICE 101, 105–06 (2002).

50. *See* E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181 (2005).

most important criterion of accuracy. In other words, there was no higher error rate of shooting unarmed Blacks as compared to Whites.[51]

Finally, in a study that directly linked implicit stereotypes (with weapons) as measured by the IAT and shooter bias, Jack Glaser and Eric Knowles found that "[i]ndividuals possessing a relatively strong stereotype linking Blacks and weapons [one standard deviation above the mean IAT] clearly show the Shooter Bias."[52] By contrast, recall that Correll found no such correlation with explicit stereotypes. These findings are consistent with the implicit stereotype story. Of course, it may also be true that participants were simply downplaying or concealing their explicit bias, which could help explain why no correlation was found.

In sum, we have evidence that suggests that implicit biases could well influence various aspects of policing. A fairly broad set of research findings shows that implicit biases (as measured by implicit instruments) alter and affect numerous behaviors that police regularly engage in—visual surveillance, recall, and even armed response.[53] It should go without saying that explicit biases, which often undergird unspoken policies of racial profiling, also play an enormous role in the differential policing of people of color. It also should go without saying that various structural forces that produce racially segregated, predominantly minority neighborhoods that have higher poverty and crime rates also have a huge impact on racialized policing. Nevertheless, we repeat these points so that readers internalize the idea that implicit, explicit, and structural processes should not be deemed mutually exclusive.

2. Charge and Plea Bargain

Journalistic investigations have uncovered some statistical evidence that racial minorities are treated worse than Whites in prosecutors' charging decisions.[54]

51. *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010–13, 1016–17 (2007) (describing the results from two studies).

52. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 169 (2008).

53. For discussions in the law reviews, with some treatment of implicit biases, see Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 667–73 (2007) (providing a cognitive model based on automatic categorization in accordance with behavioral realism).

54. For example, in San Jose, a newspaper investigation concluded that out of the almost seven hundred thousand criminal cases reported, "at virtually every stage of pre-trial negotiation, whites are more successful than non-whites." Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4. San Francisco Public Defender Jeff Brown commented on racial stereotyping: "It's a feeling, 'You've got a nice

Of course, there might be some legitimate reason for those disparities if, for example, minorities and Whites are not similarly situated on average. One way to examine whether the merits drive the disparate results is to control for everything except some irrelevant attribute, such as race. In several studies, researchers used regression analyses to conclude that race was indeed independently correlated with the severity of the prosecutor's charge.

For example, in a 1985 study of charging decisions by prosecutors in Los Angeles, researchers found prosecutors more likely to press charges against Black than White defendants, and determined that these charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge, or use of a weapon.[55] Two studies also in the late 1980s, one in Florida and the other in Indiana, found charging discrepancies based on the race of the victim.[56] At the federal level, a U.S. Sentencing Commission report found that prosecutors were more apt to offer White defendants generous plea bargains with sentences below the prescribed guidelines than to offer them to Black or Latino defendants.[57]

While these studies are suggestive, other studies find no disparate treatment.[58] Moreover, this kind of statistical evidence does not definitively tell us that biases

person screwing up,' as opposed to feeling that 'this minority is on a track and eventually they're going to end up in state prison.'" Christopher H. Schmitt, *Why Plea Bargains Reflect Bias*, SAN JOSE MERCURY NEWS, Dec. 9, 1991, at 1A; *see also* Christopher Johns, *The Color of Justice: More and More, Research Shows Minorities Aren't Treated the Same as Anglos by the Criminal Justice System*, ARIZ. REPUBLIC, July 4, 1993, at C1 (citing several reports showing disparate treatment of Blacks in the criminal justice system).

55. *See* Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615–19 (1985).

56. *See* Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1493 (2000) (citing Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 441–47 (1979)); Radelet & Pierce, *supra* note 55, at 615–19.

57. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 12 n.41 (2000), *available at* http://www.protectcivilrights.org/pdf/reports/justice.pdf (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995)); *see also* Kevin McNally, *Race and Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004) (compiling studies on the death penalty).

58. *See, e.g.*, Jeremy D. Ball, *Is It a Prosecutor's World? Determinants of Count Bargaining Decisions*, 22 J. CONTEMP. CRIM. JUST. 241 (2006) (finding no correlation between race and the willingness of prosecutors to reduce charges in order to obtain guilty pleas but acknowledging that the study did not include evaluation of the original arrest report); Cyndy Caravelis et al., *Race, Ethnicity, Threat, and the Designation of Career Offenders*, 2011 JUST. Q. 1 (showing that in some counties, Blacks and Latinos are more likely than Whites with similar profiles to be prosecuted as career offenders, but in other counties with different demographics, Blacks and Latinos have a lesser likelihood of such prosecution).

generally or implicit biases specifically produce discriminatory charging decisions or plea offers by prosecutors, or a discriminatory willingness to accept worse plea bargains on the part of defense attorneys. The best way to get evidence on such hypotheses would be to measure the implicit biases of prosecutors and defense attorneys and investigate the extent to which those biases predict different treatment of cases otherwise identical on the merits.

Unfortunately, we have very little data on this front. Indeed, we have no studies, as of yet, that look at prosecutors' and defense attorneys' implicit biases and attempt to correlate them with those individuals' charging practices or plea bargains. Nor do we know as much as we would like about their implicit biases more generally. But on that score, we do know something. Start with defense attorneys. One might think that defense attorneys, repeatedly put into the role of interacting with what is often a disproportionately minority clientele, and often ideologically committed to racial equality,[59] might have materially different implicit biases from the general population. But Ted Eisenberg and Sheri Lynn Johnson found evidence to the contrary: Even capital punishment defense attorneys show negative implicit attitudes toward African Americans.[60] Their implicit attitudes toward Blacks roughly mirrored those of the population at large.

What about prosecutors? To our knowledge, no one has measured specifically the implicit biases held by prosecutors.[61] That said, there is no reason to

59. *See* Gordon B. Moskowitz, Amanda R. Salomon & Constance M. Taylor, *Preconsciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes*, 18 SOC. COGNITION 151, 155–56 (2000) (showing that "chronic egalitarians" who are personally committed to removing bias in themselves do not exhibit implicit attitudinal preference for Whites over Blacks).

60. *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004). The researchers used a paper-pencil IAT that measured attitudes about Blacks and Whites. *Id.* at 1543–45. The defense attorneys displayed biases that were comparable to the rest of the population. *Id.* at 1553. The findings by Moskowitz and colleagues, *supra* note 59, sit in some tension with findings by Eisenberg and Johnson. It is possible that defense attorneys are not chronic egalitarians and/or that the specific practice of criminal defense work exacerbates implicit biases even among chronic egalitarians.

61. In some contexts, prosecutors have resisted revealing information potentially related to their biases. For example, in *United States v. Armstrong*, 517 U.S. 456 (1996), defendants filed a motion to dismiss the indictment for selective prosecution, arguing that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses. *Id.* at 460–61. The claim foundered when the U.S. Attorney's Office resisted the defendants' discovery motion concerning criteria for prosecutorial decisions and the U.S. Supreme Court upheld the U.S. Attorney's Office's refusal to provide discovery. *Id.* at 459–62. The Court held that, prior to being entitled even to discovery, defendants claiming selective prosecution cases based on race must produce credible evidence that "similarly situated individuals of a different race were not prosecuted." *Id.* at 465.

presume attorney exceptionalism in terms of implicit biases.[62] And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune. If this is right, there is plenty of reason to be concerned about how these biases might play out in practice.

As we explain in greater detail below, the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments.[63] They exercise tremendous discretion to decide whether, against whom, and at what level of severity to charge a particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence—all with little judicial oversight. Other psychological theories—such as confirmation bias, social judgeability theory, and shifting standards, which we discuss below[64]—reinforce our hypothesis that prosecutorial decisionmaking indeed risks being influenced by implicit bias.

3. Trial

a. Jury

If the case goes to the jury, what do we know about how implicit biases might influence the factfinder's decisionmaking? There is a long line of research on racial discrimination by jurors, mostly in the criminal context. Notwithstanding some mixed findings, the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race ("racial outgroups"). For example, White jurors will treat Black defendants worse than they treat comparable White defendants. The best and most recent meta-analysis of laboratory juror studies was performed by Tara Mitchell and colleagues, who found that the fact that a juror was of a different race than the defendant influenced

62. Several of the authors have conducted training sessions with attorneys in which we run the IAT in the days leading up to the training. The results of these IATs have shown that attorneys harbor biases that are similar to those harbored by the rest of the population. One recent study of a related population, law students, confirmed that they too harbor implicit gender biases. *See* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 28–31 (2010).

63. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE L. REV. 795 (2012) (undertaking a step-by-step consideration of how prosecutorial discretion may be fraught with implicit bias).

64. *See infra* Part II.B.

both verdicts and sentencing.[65] The magnitude of the effect sizes were measured conservatively[66] and found to be small (Cohen's d=0.092 for verdicts, d=0.185 for sentencing).[67]

But effects deemed "small" by social scientists may nonetheless have huge consequences for the individual, the social category he belongs to, and the entire society. For example, if White juries rendered guilty verdicts in exactly 80 percent of their decisions,[68] then an effect size of Cohen's d=0.095 would mean that the rate of conviction for Black defendants will be 83.8 percent, compared to 76.2 percent for White defendants. Put another way, in one hundred otherwise identical trials, eight more Black than White defendants would be found guilty.[69]

One might assume that juror bias against racial outgroups would be greater when the case is somehow racially charged or inflamed, as opposed to those instances when race does not explicitly figure in the crime. Interestingly, many experiments have demonstrated just the opposite.[70] Sam Sommers and Phoebe Ellsworth explain the counterintuitive phenomenon in this way: When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their

65. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005). The meta-analysis processed thirty-four juror verdict studies (with 7397 participants) and sixteen juror sentencing studies (with 3141 participants). *Id.* at 625. All studies involved experimental manipulation of the defendant's race. Multirace participant samples were separated out in order to maintain the study's definition of racial bias as a juror's differential treatment of a defendant who belonged to a racial outgroup. *See id.*

66. Studies that reported nonsignificant results (p>0.05) for which effect sizes could not be calculated were given effect sizes of 0.00. *Id.*

67. *Id.* at 629.

68. *See* TRACY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 221152, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1, 3 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf ("Seventy-nine percent of trials resulted in a guilty verdict or judgment, including 82% of bench trials and 76% of jury trials."); *see also* THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting the "typical" outcome as three out of four trials resulting in convictions).

69. This translation between effect size *d* values and outcomes was described by Robert Rosenthal & Donald B. Rubin, *A Simple, General Purpose Display of Magnitude of Experimental Effect*, 74 J. EDUC. PSYCHOL. 166 (1982).

70. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).

decisionmaking. These findings are more consistent with an implicit bias than a concealed explicit bias explanation.[71]

So far, we know that race effects have been demonstrated in juror studies (sometimes in counterintuitive ways), but admittedly little is known about "the precise psychological processes through which the influence of race occurs in the legal context."[72] Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors. Leading scholars from the juror bias field have expressly raised the possibility that the psychological mechanisms might be "unintentional and even non-conscious processes."[73]

Some recent juror studies by Justin Levinson and Danielle Young have tried to disentangle the psychological mechanisms of juror bias by using the IAT and other methods. In one mock juror study, Levinson and Young had participants view five photographs of a crime scene, including a surveillance camera photo that featured a masked gunman whose hand and forearm were visible. For half the participants, that arm was dark skinned; for the other half, that arm was lighter skinned.[74] The participants were then provided twenty different pieces of trial evidence. The evidence was designed to produce an ambiguous case regarding whether the defendant was indeed the culprit. Participants were asked to rate how much the presented evidence tended to indicate the defendant's guilt or innocence and to decide whether the defendant was guilty or not, using both a scale of guilty or not guilty and a likelihood scale of zero to one hundred.[75]

The study found that the subtle manipulation of the skin color altered how jurors evaluated the evidence presented and also how they answered the crucial question "How guilty is the defendant?" The guilt mean score was M=66.97 for

71. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 255 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000). That said, one could still hold to an explicit bias story in the following way: The juror has a negative attitude or stereotype that he is consciously aware of and endorses. But he knows it is not socially acceptable so he conceals it. When a case is racially charged, racial bias is more salient, so other jurors will be on the lookout for bias. Accordingly, the juror conceals it even more, all the way up to making sure that his behavior is completely race neutral. This explicit bias story is not mutually exclusive with the implicit bias story we are telling.

72. Samuel R. Sommers, *Race and the Decision-Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 172 (2007).

73. *Id.* at 175.

74. Levinson & Young, *supra* note 20, at 332–33 (describing experimental procedures).

75. *Id.* at 334.

dark skin and M=56.37 for light skin, with 100 being "definitely guilty."[76] Measures of explicit bias, including the Modern Racism Scale and feeling thermometers, showed no statistically significant correlation with the participants' weighing of the evidence or assessment of guilt.[77] More revealing, participants were asked to recall the race of the masked robber (which was a proxy for the light or dark skin), but many could not recall it.[78] Moreover, their recollections did not correlate with their judgments of guilt.[79] Taken together, these findings suggest that implicit bias—not explicit, concealed bias, or even any degree of conscious focus on race—was influencing how jurors assessed the evidence in the case.

In fact, there is even clearer evidence that implicit bias was at work. Levinson, Huajian Cai, and Young also constructed a new IAT, the Guilty–Not Guilty IAT, to test implicit stereotypes of African Americans as guilty (not innocent).[80] They gave the participants this new IAT and the general race attitude IAT. They found that participants showed an implicit negative attitude toward Blacks as well as a small implicit stereotype between Black and guilty.[81] More important than the bias itself is whether it predicts judgment. On the one hand, regression analysis demonstrated that a measure of *evidence evaluation* was a function of both the implicit attitude and the implicit stereotype.[82] On the other hand, the IAT scores did not predict what is arguably more important: guilty verdicts or judgments of guilt on a more granular scale (from zero to one hundred).[83] In sum, a subtle change

76. *See id.* at 337 (confirming that the difference was statistically significant, F=4.40, p=0.034, *d=0.52*).
77. *Id.* at 338.
78. This finding built upon Levinson's previous experimental study of implicit memory bias in legal decisionmaking. *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–406 (2007) (finding that study participants misremembered trial-relevant facts in racially biased ways).
79. Levinson & Young, *supra* note 20, at 338.
80. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Bias: The Guilty–Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010).
81. *Id.* at 204. For the attitude IAT, D=0.21 (p<0.01). *Id.* at 204 n.87. For the Guilty–Not Guilty IAT, D=0.18 (p<0.01). *Id.* at 204 n.83.
82. Participants rated each of the twenty pieces of information (evidence) in terms of its probity regarding guilt or innocence on a 1–7 scale. This produced a total "evidence evaluation" score that could range between 20 (least amount of evidence of guilt) to 140 (greatest). *Id.* at 202 n.70 (citation omitted). The greater the Black = guilty stereotype or the greater the negative attitude toward Blacks, the higher the guilty evidence evaluation. The ultimate regression equation was: Evidence = 88.58 + 5.74 x BW + 6.61 x GI + 9.11 x AI + e (where BW stands for Black or White suspect; GI stands for guilty stereotype IAT score; AI stands for race attitude IAT score; *e* stands for error). *Id.* at 206. In normalized units, the implicit stereotype β=0.25 (p<0.05); the implicit attitude β=0.34 (p<0.01); adjusted R^2=0.24. *See id.* at 206 nn.93–95.
83. *Id.* at 206 n.95.

in skin color changed judgments of evidence and guilt; implicit biases measured by the IAT predicted how respondents evaluated identical pieces of information.

We have a long line of juror research, as synthesized through a meta-analysis, revealing that jurors of one race treat defendants of another race worse with respect to verdict and sentencing. According to some experiments, that difference might take place *more* often in experimental settings when the case is *not* racially charged, which suggests that participants who seek to be fair will endeavor to correct for potential bias when the threat of potential race bias is obvious. Finally, some recent work reveals that certain IATs can predict racial discrimination in the evaluation of evidence by mock jurors. Unfortunately, because of the incredible difficulties in research design, we do not have studies that evaluate implicit bias in real criminal trials. Accordingly, the existing body of research, while strongly suggestive, provides inferential rather than direct support that implicit bias accounts for some of the race effects on conviction and sentencing.

b. Judge

Obviously, the judge plays a crucial role in various aspects of the trial, exercising important discretion in setting bail,[84] deciding motions, conducting and deciding what can be asked during jury selection, ruling on the admissibility of evidence, presiding over the trial, and rendering verdicts in some cases. Again, as with the lawyers, there is no inherent reason to think that judges are immune from implicit biases. The extant empirical evidence supports this assumption.[85] Jeff Rachlinski and his coauthors are the only researchers who have measured the implicit biases of actual trial court judges. They have given the race attitude IAT to judges from three different judicial districts. Consistent with the general population, the White judges showed strong implicit attitudes favoring Whites over Blacks.[86]

84. *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).

85. Judge Bennett, a former civil rights lawyer, shares his unnerving discovery of his own disappointing IAT results in 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, 150 (2010).

86. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009). White judges (*N*=85) showed an IAT effect *M*=216 ms (with a standard deviation of 201 ms). 87.1 percent of them were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. Black judges (*N*=43) showed a small bias *M*=26 ms (with a standard deviation of 208 ms). Only 44.2 percent of Black judges were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. *See id.*

Rachlinski and colleagues investigated whether these biases predicted behavioral differences by giving judges three different vignettes and asking for their views on various questions, ranging from the likelihood of defendant recidivism to the recommended verdict and confidence level. Two of these vignettes revealed nothing about race, although some of the judges were subliminally primed with words designed to trigger the social category African American. The third vignette explicitly identified the defendant (and victim) as White or Black and did not use subliminal primes. After collecting the responses, Rachlinski et al. analyzed whether judges treated White or Black defendants differently and whether the IAT could predict any such difference.

They found mixed results. In the two subliminal priming vignettes, judges did not respond differently on average as a function of the primes. In other words, the primes did not prompt them to be harsher on defendants across the board as prior priming studies with nonjudge populations had found.[87] That said, the researchers found a *marginally* statistically significant interaction with IAT scores: Judges who had a greater degree of implicit bias against Blacks (and relative preference for Whites) were harsher on defendants (who were never racially identified) when they had been primed (with the Black words). By contrast, those judges who had implicit attitudes in favor of Blacks were less harsh on defendants when they received the prime.[88]

In the third vignette, a battery case that explicitly identified the defendant as one race and the victim as the other,[89] the White judges showed equal likelihood of convicting the defendant, whether identified as White or Black. By contrast, Black judges were much more likely to convict the defendant if he was identified as White as compared to Black. When the researchers probed more deeply to see what, if anything, the IAT could predict, they did not find the sort of interaction that they found in the other two vignettes—in other words, judges with strong implicit biases in favor of Whites did not treat the Black defendant more harshly.[90]

Noticing the difference between White and Black judge responses in the third vignette study, the researchers probed still deeper and found a three-way interaction between a judge's race, a judge's IAT score, and a defendant's race. No effect was found for White judges; the core finding concerned, instead, Black

87. *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

88. *See* Rachlinski et al., *supra* note 86, at 1215. An ordered logit regression was performed between the judge's disposition against the priming condition, IAT score, and their interaction. The interaction term was marginally significant at p=0.07. *See id.* at 1214–15 n.94.

89. This third vignette did not use any subliminal primes.

90. *See id.* at 1202 n.41.

judges. Those Black judges with a stronger Black preference on the IAT were less likely to convict the Black defendant (as compared to the White defendant); correlatively, those Black judges with a White preference on the IAT were more likely to convict the Black defendant.[91]

It is hard to make simple sense of such complex findings, which may have been caused in part by the fact that the judges quickly sniffed out the purpose of the study—to detect racial discrimination.[92] Given the high motivation not to perform race discrimination under research scrutiny, one could imagine that White judges might make sure to correct for any potential unfairness. By contrast, Black judges may have felt less need to signal racial fairness, which might explain why Black judges showed different behaviors as a function of implicit bias whereas White judges did not.

Put another way, data show that when the race of the defendant is explicitly identified to judges in the context of a psychology study (that is, the third vignette), judges are strongly motivated to be fair, which prompts a different response from White judges (who may think to themselves "whatever else, make sure not to treat the Black defendants worse") than Black judges (who may think "give the benefit of the doubt to Black defendants"). However, when race is not explicitly identified but implicitly primed (vignettes one and two), perhaps the judges' motivation to be accurate and fair is not on full alert. Notwithstanding all the complexity, this study provides some suggestive evidence that implicit attitudes may be influencing judges' behavior.

4. Sentencing

There is evidence that African Americans are treated worse than similarly situated Whites in sentencing. For example, federal Black defendants were sentenced to 12 percent longer sentences under the Sentencing Reform Act of 1984,[93] and Black defendants are subject disproportionately to the death penalty.[94]

91. *Id.* at 1220 n.114.
92. *See id.* at 1223.
93. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (examining federal judge sentencing under the Sentencing Reform Act of 1984).
94. *See* U.S. GEN. ACCOUNTING OFFICE, GAO GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding killers of White victims receive the death penalty more often than killers of Black victims); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview,*

Of course, it is possible that there is some good reason for that difference, based on the merits. One way to check is to run experimental studies holding everything constant except for race.

Probation officers. In one study, Sandra Graham and Brian Lowery subliminally primed police officers and juvenile probation officers with words related to African Americans, such as "Harlem" or "dreadlocks." This subliminal priming led the officers to recommend harsher sentencing decisions.[95] As we noted above, Rachlinski et al. found no such effect on the judges they tested using a similar but not identical method.[96] But, at least in this study, an effect was found with police and probation officers. Given that this was a subliminal prime, the merits could not have justified the different evaluations.

Afrocentric features. Irene Blair, Charles Judd, and Kristine Chapleau took photographs from a database of criminals convicted in Florida[97] and asked participants to judge how Afrocentric both White and Black inmates looked on a scale of one to nine.[98] The goal was to see if race, facial features, or both correlated with actual sentencing. Using multiple regression analysis, the researchers found that after controlling for the seriousness of the primary and additional offenses, the race of the defendant showed no statistical significance.[99] In other words, White and Black defendants were sentenced without discrimination based on race. According to the

With Recent Findings From Philadelphia, 83 CORNELL L. REV. 1638, 1710–24 (1998) (finding mixed evidence that Black defendants are more likely to receive the death sentence).

95. *See* Graham & Lowery, *supra* note 87.

96. Priming studies are quite sensitive to details. For example, the more subliminal a prime is (in time duration and in frequency), the less the prime tends to stick (the smaller the effects and the faster it dissipates). Rachlinski et al. identified some differences between their experimental procedure and that of Graham and Lowery's. *See* Rachlinski et al., *supra* note 86, at 1213 n.88. Interestingly, in the Rachlinski study, for judges from the eastern conference (seventy judges), a programming error made their subliminal primes last only sixty-four milliseconds. By contrast, for the western conference (forty-five judges), the prime lasted 153 milliseconds, which was close to the duration used by Graham and Lowery (150 milliseconds). *See id.* at 1206 (providing numerical count of judges' prime); *id.* at 1213 n.84 (identifying the programming error). Graham and Lowery wrote that they selected the priming durations through extensive pilot testing "to arrive at a presentation time that would allow the primes to be detectable but not identifiable." Graham & Lowery, *supra* note 87, at 489. It is possible that the truncated priming duration for the eastern conference judges contributed to the different findings between Rachlinski et al. and Graham and Lowery.

97. *See* Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 675 (2004) (selecting a sample of 100 Black inmates and 116 White inmates).

98. *Id.* at 676. Afrocentric meant full lips, broad nose, relatively darker skin color, and curly hair. It is what participants socially understood to look African without any explicit instruction or definition. *See id.* at 674 n.1.

99. *Id.* at 676.

researchers, this is a success story based on various sentencing reforms specifically adopted by Florida mostly to decrease sentencing discretion.[100]

However, when the researchers added Afrocentricity of facial features into their regressions, they found a curious correlation. Within each race, either Black or White, the more Afrocentric the defendant looked, the harsher his punishment.[101] How much so? If you picked a defendant who was one standard deviation above the mean in Afrocentric features and compared him to another defendant of the same race who was one standard deviation below the mean, there would be a sentence difference of seven to eight months between them, holding constant any difference in their actual crime.[102]

Again, if the research provides complex findings, we must grapple with a complex story. On the one hand, we have good news: Black and White defendants were, overall, sentenced comparably. On the other hand, we have bad news: Within each race, the more stereotypically Black the defendant looked, the harsher the punishment. What might make sense of such results? According to the researchers, perhaps implicit bias was responsible.[103] If judges are motivated to avoid racial discrimination, they may be on guard regarding the dangers of treating similarly situated Blacks worse than Whites. On alert to this potential bias, the judges prevent it from causing any discriminatory behavior. By contrast, judges have no conscious awareness that Afrocentric features might be triggering stereotypes of criminality and violence that could influence their judgment. Without such awareness, they could not explicitly control or correct for the potential bias.[104] If this explanation is correct, we have further evidence that discrimination is being driven in part by implicit biases and not solely by explicit-but-concealed biases.

* * *

Where does this whirlwind tour of psychological research findings leave us? In each of the stages of the criminal trial process discussed, the empirical research

100. *Id.* at 677.

101. *Id.* at 676–77. Jennifer Eberhardt and her colleagues reached consistent findings when she used the same Florida photograph dataset to examine how Black defendants were sentenced to death. After performing a median split on how stereotypical the defendant looked, the top half were sentenced to death 57.5 percent of the time compared to the bottom half, which were sentenced to death only 24.4 percent of the time. *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006). Interestingly, this effect was not observed when the victim was Black. *See id.* at 385.

102. *See* Blair et al., *supra* note 97, at 677–78.

103. *See id.* at 678 (hypothesizing that "perhaps an equally pernicious and less controllable process [is] at work").

104. *See id.* at 677.

gives us reason to think that implicit biases—attitudes and beliefs that we are not directly aware of and may not endorse—could influence how defendants are treated and judged. Wherever possible, in our description of the studies, we have tried to provide the magnitude of these effects. But knowing precisely how much work they really do is difficult. If we seek an estimate, reflective of an entire body of research and not any single study, one answer comes from the Greenwald meta-analysis, which found that the IAT (the most widely used, but not the only measure of implicit bias) could predict 5.6 percent of the variation of the behavior in Black–White behavioral domains.[105]

Should that be deemed a lot or a little? In answering this question, we should be mindful of the collective impact of such biases, integrated over time (per person) and over persons (across all defendants).[106] For a single defendant, these biases may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect.

To get a more concrete sense, Anthony Greenwald has produced a simulation that models cumulating racial disparities through five sequential stages of criminal justice—arrest, arraignment, plea bargain, trial, and sentence. It supposes that the probability of arrest having committed the offense is 0.50, that the probability of conviction at trial is 0.75, and that the effect size of implicit bias is r=0.1 at each stage. Under this simulation, for a crime with a mean sentence of 5 years, and with a standard deviation of 2 years, Black criminals can expect a sentence of 2.44 years whereas White criminals can expect just 1.40 years.[107] To appreciate the full social impact, we must next aggregate this sort of disparity a second time over all defendants subject to racial bias, out of an approximate annual

105. *See* Greenwald et al., *supra* note 24, at 24 tbl.3 (showing that correlation between race attitude IAT (Black/White) and behavior in the meta-analysis is 0.236, which when squared equals 0.056, the percentage of variance explained).

106. *See* Rachlinski et al., *supra* note 86, at 1202; Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of 'Affirmative Action*,' 94 CALIF. L. REV. 1063, 1073 (2006).

107. The simulation is available at *Simulation: Cumulating Racial Disparities Through 5 Sequential Stages of Criminal Justice*, http://faculty.washington.edu/agg/UCLA_PULSE.simulation.xlsx (last visited May 15, 2012). If in the simulation the effect size of race discrimination at each step is increased from r=0.1 to r=0.2, which is less than the average effect size of race discrimination effects found in the 2009 meta-analysis, *see supra* note 105, the ratio of expected years of sentence would increase to 3.11 years (Black) to 1.01 years (White).

total of 20.7 million state criminal cases[108] and 70 thousand federal criminal cases.[109] And, as Robert Abelson has demonstrated, even small percentages of variance explained might amount to huge impacts.[110]

B. The Civil Path

Now, we switch from the criminal to the civil path and focus on the trajectory of an individual[111] bringing suit in a federal employment discrimination case—and on how implicit bias might affect this process. First, the plaintiff, who is a member of a protected class, believes that her employer has discriminated against her in some legally cognizable way.[112] Second, after exhausting necessary administrative remedies,[113] the plaintiff sues in federal court. Third, the defendant tries to terminate the case before trial via a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6). Fourth, should that fail, the defendant moves for summary judgment under FRCP 56. Finally, should that motion also fail, the jury renders a verdict after trial. Again, at each of these

108. *See* ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011), *available at* http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf.

109. *See* Rachlinski et al., *supra* note 86, at 1202.

110. *See* Robert P. Abelson, *A Variance Explanation Paradox: When a Little Is a Lot*, 97 PSYCHOL. BULL. 129, 132 (1985) (explaining that the batting average of a 0.320 hitter or a 0.220 hitter predicts only 1.4 percent of the variance explained for a single at-bat producing either a hit or no-hit). Some discussion of this appears in Kang & Lane, *supra* note 2, at 489.

111. We acknowledge that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), made it much more difficult to certify large classes in employment discrimination cases. *See id.* at 2553–54 (holding that statistical evidence of gender disparities combined with a sociologist's analysis that Wal-Mart's corporate culture made it vulnerable to gender bias was inadequate to show that members of the putative class had a common claim for purposes of class certification under FED. R. CIV. P. 23(b)).

112. For example, in a Title VII cause of action for disparate *treatment*, the plaintiff must demonstrate an adverse employment action "because of" the plaintiff's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). By contrast, in a Title VII cause of action for disparate *impact*, the plaintiff challenges facially neutral policies that produce a disparate impact on protected populations. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). We recognize that employment discrimination law is far more complex than presented here, with different elements for different state and federal causes of action.

113. The U.S. Equal Employment Opportunity Commission (EEOC) process is critical in practical terms because the failure to file a claim with the EEOC within the quite short statute of limitations (either 180 or 300 days depending on whether the jurisdiction has a state or local fair employment agency) or to timely file suit after resorting to the EEOC results in an automatic dismissal of the claim. However, neither EEOC inaction nor an adverse determination preclude private suit. *See* 2 CHARLES SULLIVAN & LAUREN WALTER, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 12.03[B], at 672 (4th ed. 2012).

stages,[114] implicit biases could potentially influence the outcome. To maintain a manageable scope of analysis, we focus on employer discrimination, pretrial adjudication, and jury verdict.

1. Employer Discrimination

For many, the most interesting question is whether implicit bias helped cause the employer to discriminate against the plaintiff. There are good reasons to think that some negative employment actions are indeed caused by implicit biases in what tort scholars call a "but-for" sense. This but-for causation may be legally sufficient since Title VII and most state antidiscrimination statutes require only a showing that the plaintiff was treated less favorably "because of" a protected characteristic, such as race or sex.[115] But our objective here is not to engage the doctrinal[116] and philosophical questions[117] of whether existing antidiscrimination laws do or should recognize implicit bias-actuated discrimination. We also do not address what sorts of evidence should be deemed admissible when plaintiffs attempt to make such a case at trial.[118] Although those questions are critically important, our

114. As explained when we introduced the Criminal Path, the number of stages identified is somewhat arbitrary. We could have listed more or fewer stages.

115. Section 703(a) of Title VII of the 1964 Civil Rights Act states that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

116. For discussion of legal implications, see Faigman, Dasgupta & Ridgeway, *supra* note 19; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Krieger & Fiske, *supra* note 2.

117. For a philosophical analysis, see Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010).

118. For example, there is considerable disagreement on whether an expert should be allowed to testify that a particular case is an instance of implicit bias. This issue is part of a much larger debate regarding scientists' ability to make reasonable inferences about an individual case from group data. John Monahan and Laurens Walker first pointed out that scientific evidence often comes to court at two different levels of generality, one general and one specific. *See* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). For instance, in a case involving the accuracy of an eyewitness identification, the general question might concern whether eyewitness identifications that are cross-racial are less reliable than same-race identifications; the specific question in the case would involve whether the cross-racial identification in this case was accurate. Interested in social science evidence, Monahan and Walker referred to this as "social framework" evidence, though their fundamental insight regarding frameworks applies to all scientific evidence. In the context of implicit biases, then, general research amply demonstrates the phenomenon in the population. However, in the courtroom, the issue typically concerns whether a particular decision or action was a product of implicit bias.

As a scientific matter, knowing that a phenomenon exists in a population does not necessarily mean that a scientist can reliably say that it was manifest in a particular case. This has led to a debate as to

task is more limited—to give an empirical account of how implicit bias may potentially influence a civil litigation trajectory.

Our belief that implicit bias causes some employment discrimination is based on the following evidence. First, tester studies in the field—which involve sending identical applicants or applications except for some trait, such as race or gender—have generally uncovered discrimination. According to a summary by Mark Bendick and Ana Nunes, there have been "several dozen testing studies" in the past two decades, in multiple countries, focusing on discrimination against various demographic groups (including women, the elderly, and racial minorities).[119] These studies consistently reveal typical "net rates of discrimination" that range from 20–40 percent.[120] In other words, in 20–40 percent of cases, employers treat subordinated groups (for example, racial minorities) worse than privileged groups (for example, Whites) even though the testers were carefully controlled to be identically qualified.

Second, although tester studies do not distinguish between explicit versus implicit bias, various laboratory experiments have found implicit bias correlations with discriminatory evaluations. For example, Laurie Rudman and Peter Glick demonstrated that in certain job conditions, participants treated a self-promoting and competent woman, whom the researchers termed "agentic," worse than an

whether experts should be limited to testifying only to the general phenomenon or should be allowed to opine on whether a particular case is an instance of the general phenomenon. This is a complicated issue and scholars have weighed in on both sides. For opposition to the use of expert testimony that a specific case is an instance of implicit bias, see Faigman, Dasgupta & Ridgeway, *supra* note 19, at 1394 ("The research . . . does not demonstrate that an expert can validly determine whether implicit bias caused a specific employment decision."); and John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks*," 94 VA. L. REV. 1715, 1719 (2008) ("[Testimony] in which the expert witness explicitly linked general research findings on gender discrimination to specific factual conclusions . . . exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by both the original and revised proposal of what constitutes 'social framework' evidence."). For advancement of allowing expert testimony that a particular case is an instance of some general phenomenon, see Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Proceedings*, 83 TEMPLE L. REV. 867, 876 (2011) ("Qualified social scientists who provide general, relevant knowledge and apply ordinary scientific reasoning may offer informal opinion about the individual case, but probabilistically.").

In the end, lawyers may be able to work around this dispute by using an expert to provide social framework evidence that identifies particular attributes that exacerbate biased decisionmaking, then immediately calling up another witness who is personally familiar with the defendant's work environment and asking that witness whether each of those particular attributes exists.

119. *See* Marc Bendick, Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. SOC. ISSUES (forthcoming 2012), *available at* http://www.bendickegan.com/pdf/Sent_to_JSI_Feb_27_2010.pdf.

120. *Id.* (manuscript at 15).

equally agentic man.[121] When the job description explicitly required the employee to be cooperative and to work well with others, participants rated the agentic female less hirable than the equally agentic male.[122] Probing deeper, the researchers identified that the participants penalized the female candidate for lack of social skills, not incompetence.[123] Explicit bias measures did not correlate with the rankings; however, an implicit gender stereotype (associating women as more communal than agentic)[124] did correlate negatively with the ratings for social skills. In other words, the higher the implicit gender stereotype, the lower the social skills evaluation.[125]

Third, field experiments have provided further confirmation under real-world conditions. The studies by Marianne Bertrand and Sendhil Mullainathan demonstrating discrimination in callbacks because of the names on comparable resumes have received substantial attention in the popular press as well as in law reviews.[126] These studies found that for equally qualified—indeed, otherwise identical candidates, firms called back "Emily" more often than "Lakisha."[127] Less attention has been paid to Dan-Olof Rooth's extensions of this work, which found similar callback discrimination but also found correlations between implicit stereotypes and the discriminatory behavior.[128] Rooth has found these correlations

121. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757 (2001). Agentic qualities were signaled by a life philosophy essay and canned answers to a videotaped interview that emphasized self-promotion and competence. *See id.* at 748. Agentic candidates were contrasted with candidates whom the researchers labeled "androgynous"—they also demonstrated the characteristics of interdependence and cooperation. *Id.*

122. The difference was M=2.84 versus M=3.52 on a 5 point scale ($p<0.05$). *See id.* at 753. No gender bias was shown when the job description was ostensibly masculine and did not call for cooperative behavior. Also, job candidates that were engineered to be androgynous—in other words, to show both agentic and cooperative traits—were treated the same regardless of gender. *See id.*

123. *See id.* at 753–54.

124. The agentic stereotype was captured by word stimuli such as "independent," "autonomous," and "competitive." The communal stereotype was captured by words such as "communal," "cooperative," and "kinship." *See id.* at 750.

125. *See id.* at 756 (r=–0.49, $p<0.001$). For further description of the study in the law reviews, see Kang, *supra* note 46, at 1517–18.

126. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004). A search of the TP-ALL database in Westlaw on December 10, 2011 revealed ninety-six hits.

127. *Id.* at 992.

128. Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECON. 523 (2010) (finding that implicit stereotypes, as measured by the IAT, predicted differential callbacks of Swedish-named versus Arab-Muslim-named resumes). An increase of one standard deviation in implicit stereotype produced almost a 12 percent decrease in the probability that an Arab/Muslim candidate received an interview. *See id.*

with not only implicit stereotypes about ethnic groups (Swedes versus Arab-Muslims) but also implicit stereotypes about the obese.[129]

Because implicit bias in the *courtroom* is our focus, we will not attempt to offer a comprehensive summary of the scientific research as applied to the implicit bias in the *workplace*.[130] We do, however, wish briefly to highlight lines of research—variously called "constructed criteria," "shifting standards," or "casuistry"—that emphasize the *malleability of merit*. We focus on this work because it has received relatively little coverage in the legal literature and may help explain how complex decisionmaking with multiple motivations occurs in the real world.[131] Moreover, this phenomenon may influence not only the defendant (accused of discrimination) but also the jurors who are tasked to judge the merits of the plaintiff's case.

Broadly speaking, this research demonstrates that people frequently engage in motivated reasoning[132] in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like—a decision that may well be influenced by implicit factors—and then justify that choice by molding our merit standards accordingly.

We can make this point more concrete. In one experiment, Eric Luis Uhlmann and Geoffrey Cohen asked participants to evaluate two finalists for police chief—one male, the other female.[133] One candidate's profile signaled *book smart*, the other's profile signaled *streetwise*, and the experimental design varied which profile attached to the woman and which to the man. Regardless of which attributes the male candidate featured, participants favored the male candidate and articulated their hiring criteria accordingly. For example, education (book

129. Jens Agerström & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790 (2011) (finding that hiring managers (N=153) holding more negative IAT-measured automatic stereotypes about the obese were less likely to invite an obese applicant for an interview).

130. Thankfully, many of these studies have already been imported into the legal literature. For a review of the science, see Kang & Lane, *supra* note 2, at 484–85 (discussing evidence of racial bias in how actual managers sort resumes and of correlations between implicit biases, as measured by the IAT, and differential callback rates).

131. One recent exception is Rich, *supra* note 25.

132. For discussion of motivated reasoning in organizational contexts, see Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1029–34 (2005). Motivated reasoning is "the process through which we assimilate information in a self-serving manner." *Id.* at 1029.

133. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005).

smarts) was considered more important when the man had it.[134] Surprisingly, even the attribute of being family oriented and having children was deemed more important when the man had it.[135]

Michael Norton, Joseph Vandello, and John Darley have made similar findings, again in the domain of gender.[136] Participants were put in the role of manager of a construction company who had to hire a high-level employee. One candidate's profile signaled more education; the other's profile signaled more experience. Participants ranked these candidates (and three other filler candidates), and then explained their decisionmaking by writing down "what was most important in determining [their] decision."[137]

In the control condition, the profiles were given with just initials (not full names) and thus the test subjects could not assess their gender. In this condition, participants preferred the higher educated candidate 76 percent of the time.[138] In the two experimental conditions, the profiles were given names that signaled gender, with the man having higher education in one condition and the woman having higher education in the other. When the man had higher education, the participants preferred him 75 percent of the time. In sharp contrast, when the woman had higher education, only 43 percent of the participants preferred her.[139]

The discrimination itself is not as interesting as *how* the discrimination was justified. In the control condition and the man-has-more-education condition, the participants ranked education as more important than experience about half the time (48 percent and 50 percent).[140] By contrast, in the woman-has-more-education condition, only 22 percent ranked education as more important than experience.[141] In other words, what counted as merit was redefined, in real time, to justify hiring the man.

Was this weighting done consciously, as part of a strategy to manipulate merit in order to provide a cover story for decisionmaking caused and motivated by explicit bias? Or, was merit refactored in a more automatic, unconscious, dissonance-reducing rationalization, which would be more consistent with an implicit bias story? Norton and colleagues probed this causation question in another series of

134. *See id.* (M=8.27 with education versus M=7.07 without education, on a 11 point scale; p=0.006; d=1.02).
135. *See id.* (M=6.21 with family traits versus 5.08 without family traits; p=0.05; d=0.86).
136. Michael I. Norton et al., *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004).
137. *Id.* at 820.
138. *Id.* at 821.
139. *Id.*
140. *Id.*
141. *Id.*

experiments, in the context of race and college admissions.[142] In a prior study, they had found that Princeton undergraduate students shifted merit criteria—the relative importance of GPA versus the number of AP classes taken—to select the Black applicant over the White applicant who shared the same cumulative SAT score.[143] To see whether this casuistry was explicit and strategic or implicit and automatic, they ran another experiment in which participants merely rated admissions criteria in the abstract without selecting a candidate for admission.

Participants were simply told that they were participating in a study examining the criteria most important to college admissions decisions. They were given two sample resumes to familiarize themselves with potential criteria. Both resumes had equivalent cumulative SAT scores, but differed on GPA (4.0 versus 3.6) versus number of AP classes taken (9 versus 6). Both resumes also disclosed the applicant's race. In one condition, the White candidate had the higher GPA (and fewer AP classes); in the other condition, the African American candidate had the higher GPA (and fewer AP classes).[144] After reviewing the samples, the participants had to rank order eight criteria in importance, including GPA, number of AP classes, SAT scores, athletic participation, and so forth.

In the condition with the Black candidate having the higher GPA, 77 percent of the participants ranked GPA higher in importance than number of AP classes taken. By contrast, when the White candidate had the higher GPA, only 63 percent of the participants ranked GPA higher than AP classes. This change in the weighting happened even though the participants did not expect that they were going to make an admissions choice or to justify that choice. Thus, these differences could not be readily explained in purely strategic terms, as methods for justifying a subsequent decision. According to the authors,

> [t]hese results suggest not only that it is possible for people to reweight criteria deliberately to justify choices but also that decisions made under such social constraints can impact information processing even prior to making a choice. This suggests that the bias we observed is not simply post hoc and strategic but occurs as an organic part of making decisions when social category information is present.[145]

142. Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 42 (2006).

143. *Id.* at 44.

144. *See id.*

145. *Id.* at 46–47. This does not, however, fully establish that these differences were the result of implicit views rather than explicit ones. Even if test subjects did not expect to have to make admissions determinations, they might consciously select criteria that they believed favored one group over another.

The ways that human decisionmakers may subtly adjust criteria in real time to modify their judgments of merit has significance for thinking about the ways that implicit bias may potentially influence employment decisions. In effect, bias can influence decisions in ways contrary to the standard and seemingly commonsensical model. The conventional legal model describes behavior as a product of discrete and identifiable motives. This research suggests, however, that implicit motivations might influence behavior and that we then rationalize those decisions after the fact. Hence, some employment decisions might be motivated by implicit bias but rationalized post hoc based on nonbiased criteria. This process of reasoning from behavior to motives, as opposed to the folk-psychology assumption that the arrow of direction is from motives to behavior, is, in fact, consistent with a large body of contemporary psychological research.[146]

2. Pretrial Adjudication: 12(b)(6)

As soon as a plaintiff files the complaint, the defendant will try to dismiss as many of the claims in the complaint as possible. Before recent changes in pleading, a motion to dismiss a complaint under FRCP 8 and FRCP 12(b)(6) was decided under the relatively lax standard of *Conley v. Gibson*.[147] Under *Conley*, all factual allegations made in the complaint were assumed to be true. As such, the court's task was simply to ask whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."[148]

Starting with *Bell Atlantic Corp. v. Twombly*,[149] which addressed complex antitrust claims of parallel conduct, and further developed in *Ashcroft v. Iqbal*,[150] which addressed civil rights actions based on racial and religious discrimination post-9/11, the U.S. Supreme Court abandoned the *Conley* standard. First, district courts must now throw out factual allegations made in the complaint if they are merely conclusory.[151] Second, courts must decide on the plausibility of the claim based on the information before them.[152] In *Iqbal*, the Supreme Court held that

146. *See generally* TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).
147. 355 U.S. 41 (1957).
148. *Id.* at 45–46.
149. 550 U.S. 544 (2007).
150. 129 S. Ct. 1937 (2009).
151. *Id.* at 1951.
152. *Id.* at 1950–52.

because of an "obvious alternative explanation"[153] of earnest national security response, purposeful racial or religious "discrimination is not a plausible conclusion."[154]

How are courts supposed to decide what is "Twom-bal"[155] plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information? According to the Court, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[156]

And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.[157]

Moreover, consider what the directive to rely on common sense means in light of social judgeability theory.[158] According to this theory, there are social rules that tell us when it is appropriate to judge someone. For example, suppose your fourth grade child told you that a new kid, Hannah, has enrolled in school and that she receives free lunches. Your child then asks you whether you think she is smart. You will probably decline to answer since you do not feel entitled to make that judgment. Without more probative information, you feel that you would only be crudely stereotyping her abilities based on her socioeconomic status. But what if the next day you volunteered in the classroom and spent twelve minutes observing

153. *Id.* (quoting *Twombly*, 550 U.S. 544) (internal quotation marks omitted).
154. *Id.* at 1952.
155. *See In re* Iowa Ready-Mix Concrete Antitrust Litig., No. C 10-4038-MWB, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (referring to a *Twombly-Iqbal* motion as "Twom-bal").
156. *Iqbal*, 129 S. Ct. at 1940.
157. These schemas also reflect cultural cognitions. *See generally* Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).
158. *See* Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCHOL. 48 (1994).

Hannah interacting with a teacher trying to solve problems? Would you then feel that you had enough individuating information to come to some judgment?

This is precisely what John Darley and Paget Gross tested in a seminal experiment in 1983.[159] When participants only received economic status information, they declined to evaluate Hannah's intelligence as a function of her economic class. However, when they saw a twelve-minute videotape of the child answering a battery of questions, participants felt credentialed to judge the girl, and they did so in a way that was consistent with stereotypes. What they did not realize was that the individuating information in the videotape was purposefully designed to be ambiguous. So participants who were told that Hannah was rich interpreted the video as confirmation that she was smart. By contrast, participants who were told that Hannah was poor interpreted the same video as confirmation that she was not so bright.[160]

Vincent Yzerbyt and colleagues, who call this phenomenon "social judgeability," have produced further evidence of this effect.[161] If researchers told you that a person is either an archivist or a comedian and then asked you twenty questions about this person regarding their degree of extroversion with the options of "True," "False," or "I don't know," how might you answer? What if, in addition, they manufactured an illusion that you were given individuating information—information about the specific individual and not just the category he or she belongs to—even though you actually did not receive any such information?[162] This is precisely what Yzerbyt and colleagues did in the lab.

They found that those operating under the illusion of individuating information were more confident in their answers in that they marked fewer questions with "I don't know."[163] They also found that those operating under the illusion gave more stereotype-consistent answers.[164] In other words, the illusion of being informed made the target judgeable. Because the participants, in fact, had received no such individuating information, they tended to judge the person in accordance with their schemas about archivists and comedians. Interestingly, "in the debriefings,

159. *See* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 22–23 (1983).

160. *See id.* at 24–25, 27–29.

161. *See* Yzerbyt et al., *supra* note 158.

162. This illusion was created by having participants go through a listening exercise, in which they were told to focus only on one speaker (coming through one ear of a headset) and ignore the other (coming through the other). They were later told that the speaker that they were told to ignore had in fact provided relevant individuating information. The truth was, however, that no such information had been given. *See id.* at 50.

163. *See id.* at 51 (M=5.07 versus 10.13; p<0.003).

164. *See id.* (M=9.97 versus 6.30, out of 1 to 20 point range; p<0.006).

subjects reported that they did not judge the target on the basis of a stereotype; they were persuaded that they had described a real person qua person."[165] Again, it is possible that they were concealing their explicitly embraced bias about archivists and comedians from probing researchers, but we think that it is more probable that implicit bias explains these results.

Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas. Just as Yzerbyt's illusion of individuating information entitled participants to judge in the laboratory, the express command of the Supreme Court may entitle judges to judge in the courtroom when they lack any well-developed basis to do so.

There are no field studies to test whether biases, explicit or implicit, influence how actual judges decide motions to dismiss actual cases. It is not clear that researchers could ever collect such information. All that we have are some preliminary data about dismissal rates before and after *Iqbal* that are consistent with our analysis. Again, since *Iqbal* made dismissals easier, we should see an increase in dismissal rates across the board.[166] More relevant to our hypothesis is whether certain types of cases experienced differential changes in dismissal rates. For instance, we would expect *Iqbal* to generate greater increases in dismissal rates for race discrimination claims than, say, contract claims. There are a number of potential reasons for this: One reason is that judges are likely to have stronger biases that plaintiffs in the former type of case have less valid claims than those in the latter. Another reason is that we might expect some kinds of cases

165. *Id.*

166. In the first empirical study of *Iqbal*, Hatamyar sampled 444 cases under *Conley* (from May 2005 to May 2007) and 173 cases under *Iqbal* (from May 2009 to August 2009). *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 597 (2010). She found that the general rate of complaint dismissal rose from 46 percent to 56 percent. *See id.* at 602 tbl.2. However, this finding was not statistically significant under a Pearson chi-squared distribution test examining the different dismissal rates for *Conley*, *Twombly*, and *Iqbal* for three results: grant, mixed, and deny.

to raise more significant concerns about asymmetric information than do others. In contracts disputes, both parties may have good information about most of the relevant facts even prior to discovery. In employment discrimination cases, plaintiffs may have good hunches about how they have been discriminated against, but prior to discovery they may not have access to the broad array of information in the employer's possession that may be necessary to turn the hunch into something a judge finds plausible. Moreover, these two reasons potentially interact: the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge's assessment in the absence of a well-developed evidentiary record.

Notwithstanding the lack of field studies on these issues, there is some evidentiary support for these differential changes in dismissal rates. For example, Patricia Hatamayr sorted a sample of cases before and after *Iqbal* into six major categories: contracts, torts, civil rights, labor, intellectual property, and all other statutory cases.[167] She found that in contract cases, the rate of dismissal did not change much from *Conley* (32 percent) to *Iqbal* (32 percent).[168] By contrast, for Title VII cases, the rate of dismissal increased from 42 percent to 53 percent.[169] Victor Quintanilla has collected more granular data by counting not Title VII cases generally but federal employment discrimination cases filed specifically by Black plaintiffs both before and after *Iqbal*.[170] He found an even larger jump. Under the *Conley* regime, courts granted only 20.5 percent of the motions to dismiss such cases. By contrast, under the *Iqbal* regime, courts granted 54.6 percent of them.[171] These data lend themselves to multiple interpretations and suffer from various confounds. So at this point, we can make only modest claims. We merely suggest that the dismissal rate data are consistent with our hypothesis that *Iqbal*'s plausibility standard poses a risk of increasing the impact of implicit biases at the 12(b)(6) stage.

If, notwithstanding the plausibility-based pleading requirements, the case gets past the motion to dismiss, then discovery will take place, after which defendants will seek summary judgment under FRCP 56. On the one hand, this procedural posture is less subject to implicit biases than the motion to dismiss because more individuating information will have surfaced through discovery. On the

167. *See id.* at 591–93.
168. *See id.* at 630 tbl.D.
169. *See id.*
170. *See* Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal*'s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011). Quintanilla counted both Title VII and 42 U.S.C. § 1981 cases.
171. *See id.* at 36 tbl.1 ($p<0.000$).

other hand, the judge still has to make a judgment call on whether any "genuine dispute as to any material fact"[172] remains. Similar decisionmaking dynamics are likely to be in play as we saw in the pleading stage, for a significant quantum of discretion remains. Certainly the empirical evidence that demonstrates how poorly employment discrimination claims fare on summary judgment is not inconsistent with this view, though, to be sure, myriad other explanations of these differences are possible (including, for example, doctrinal obstacles to reaching a jury).[173]

3. Jury Verdict

If the case gets to trial, the parties will introduce evidence on the merits of the claim. Sometimes the evidence will be physical objects, such as documents, emails, photographs, voice recordings, evaluation forms, and the like. The rest of it will be witness or expert testimony, teased out and challenged by lawyers on both sides. Is there any reason to think that jurors might interpret the evidence in line with their biases? In the criminal trajectory, we already learned of juror bias via meta-analyses as well as correlations with implicit biases. Unfortunately, we lack comparable studies in the civil context. What we offer are two sets of related arguments and evidence that speak to the issue: motivation to shift standards and performer preference.

a. Motivation to Shift Standards

Above, we discussed the potential malleability of merit determinations when judgments permit discretion and reviewed how employer defendants might shift standards and reweight criteria when evaluating applicants and employees. Here, we want to recognize that a parallel phenomenon may affect juror decisionmaking. Suppose that a particular juror is White and that he identifies strongly with his Whiteness. Suppose further that the defendant is White and is being sued by a racial minority. The accusation of illegal and immoral behavior threatens the

172. FED R. CIV. P. 56(a).

173. *See, e.g.*, Charlotte L. Lanvers, *Different Federal Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & POL'Y 381, 395 (2007); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch. Research Paper No. 08-022, 2008), *available at* http://ssrn.com/abstract=1138373 (finding that civil rights cases, and particularly employment discrimination cases, have a consistently higher summary judgment rate than non–civil rights cases).

status of the juror's racial ingroup. Anca Miron, Nyla Branscombe, and Monica Biernat have demonstrated that this threat to the ingroup can motivate people to shift standards in a direction that shields the ingroup from ethical responsibility.[174]

Miron and colleagues asked White undergraduates at the University of Kansas to state how strongly they identified with America.[175] Then they were asked various questions about America's relationship to slavery and its aftermath. These questions clumped into three categories (or constructs): judgments of harm done to Blacks,[176] standards of injustice,[177] and collective guilt.[178] Having measured these various constructs, the researchers looked for relationships among them. Their hypothesis was that the greater the self-identification with America, the higher the standards would be before being willing to call America racist or otherwise morally blameworthy (that is, the participants would set higher confirmatory standards). They found that White students who strongly identified as American set higher standards for injustice (that is, they wanted more evidence before calling America unjust);[179] they thought less harm was done by slavery;[180] and, as a result, they felt less collective guilt compared to other White students who identified less with America.[181] In other words, their attitudes toward America were correlated with the quantum of evidence they required to reach a judgment that America had been unjust.

In a subsequent study, Miron et al. tried to find evidence of causation, not merely correlation. They did so by experimentally manipulating national identification by asking participants to recount situations in which they felt similar to other Americans (evoking greater identification with fellow Americans) or different from other Americans (evoking less identification with fellow Americans).[182]

174. Anca M. Miron, Nyla R. Branscombe & Monica Biernat, *Motivated Shifting of Justice Standards*, 36 PERSONALITY SOC. PSYCHOL. BULL. 768, 769 (2010).
175. The participants were all American citizens. The question asked was, "I feel strong ties with other Americans." *Id.* at 771.
176. A representative question was, "How much damage did Americans cause to Africans?" on a "very little" (1) to "very much" (7) Likert scale. *Id.* at 770.
177. "Please indicate what percentage of Americans would have had to be involved in causing harm to Africans for you to consider the past United States a racist nation" on a scale of 0–10 percent, 10–25 percent, up to 90–100 percent. *Id.* at 771.
178. "I feel guilty for my nation's harmful past actions toward African Americans" on a "strongly disagree" (1) to "strongly agree" (9) Likert scale. *Id.*
179. *See id.* at 772 tbl.I (r=0.26, p<0.05).
180. *See id.* (r=–0.23, p<0.05).
181. *See id.* (r=–0.21, p<0.05). Using structural equation modeling, the researchers found that standards of injustice fully mediated the relationship between group identification and judgments of harm; also, judgments of harm fully mediated the effect of standards on collective guilt. *See id.* at 772–73.
182. The manipulation was successful. *See id.* at 773 (p<0.05, d=0.54.).

Those who were experimentally made to feel *less* identification with America subsequently reported very different standards of justice and collective guilt compared to others made to feel *more* identification with America. Specifically, participants in the low identification condition set lower standards for calling something unjust, they evaluated slavery's harms as higher, and they felt more collective guilt. By contrast, participants in the high identification condition set higher standards for calling something unjust (that is, they required more evidence), they evaluated slavery's harms as less severe, and they felt less guilt.[183] In other words, by experimentally manipulating how much people identified with their ingroup (in this case, American), researchers could shift the justice standard that participants deployed to judge their own ingroup for harming the outgroup.

Evidentiary standards for jurors are specifically articulated (for example, "preponderance of the evidence") but substantively vague. The question is how a juror operationalizes that standard—just how much evidence does she require for believing that this standard has been met? These studies show how our assessments of evidence—of how much is enough—are themselves potentially malleable. One potential source of malleability is, according to this research, a desire (most likely implicit) to protect one's ingroup status. If a juror strongly identifies with the defendant employer as part of the same ingroup—racially or otherwise—the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff. In other words, jurors who implicitly perceive an ingroup threat may require more evidence to be convinced of the defendant's harmful behavior than they would in an otherwise identical case that did not relate to their own ingroup. Ingroup threat is simply an example of this phenomenon; the point is that implicit biases may influence jurors by affecting how they implement ambiguous decision criteria regarding both the quantum of proof and how they make inferences from ambiguous pieces of information.

b. Performer Preference

Jurors will often receive evidence and interpretive cues from performers at trial, by which we mean the cast of characters in the courtroom who jurors see, such as the judge, lawyers, parties, and witnesses. These various performers are playing roles of one sort or another. And, it turns out that people tend to have stereotypes about the ideal employee or worker that vary depending on the segment of the labor

183. In standards for injustice, M=2.60 versus 3.39; on judgments of harm, M=5.82 versus 5.42; on collective guilt, M=6.33 versus 4.60. All differences were statistically significant at p=0.05 or less. *See id.*

market. For example, in high-level professional jobs and leadership roles, the supposedly ideal employee is often a White man.[184] When the actual performer does not fit the ideal type, people may evaluate the performance more negatively.

One study by Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran, and Gary Blasi found just such performer preference with respect to lawyers, as a function of race.[185] Kang and colleagues measured the explicit and implicit beliefs about the ideal lawyer held by jury-eligible participants from Los Angeles. The researchers were especially curious whether participants had implicit stereotypes linking the ideal litigator with particular racial groups (White versus Asian American). In addition to measuring their biases, the researchers had participants evaluate two depositions, which they heard via headphones and simultaneously read on screen. At the beginning of each deposition, participants were shown for five seconds a picture of the litigator conducting the deposition on a computer screen accompanied by his name. The race of the litigator was varied by name and photograph. Also, the deposition transcript identified who was speaking, which meant that participants repeatedly saw the attorneys' last names.[186]

The study discovered the existence of a moderately strong implicit stereotype associating litigators with Whiteness (IAT D=0.45);[187] this stereotype correlated with more favorable evaluations of the White lawyer (ingroup favoritism since 91% of the participants were White) in terms of his competence ($r=0.32$, $p<0.01$), likeability ($r=0.31$, $p<0.01$), and hireability ($r=0.26$, $p<0.05$).[188] These results were confirmed through hierarchical regressions. To appreciate the magnitude of the effect sizes, imagine a juror who has no explicit stereotype but a large implicit stereotype (IAT D=1) that the ideal litigator is White. On a 7-point scale, this juror would favor a White lawyer over an identical Asian American

184. *See, e.g.*, Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573 (2002); Alice H. Eagly, Steven J. Karau & Mona G. Makhijani, *Gender and the Effectiveness of Leaders: A Meta-Analysis*, 117 PSYCHOL. BULL. 125 (1995); *see also* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 213–17 (2000) (discussing how conceptions of merit are designed around masculine norms); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007).

185. *See* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

186. *See id.* at 892–99 (describing method and procedure, and identifying attorney names as "William Cole" or "Sung Chang").

187. *See id.* at 900. They also found strong negative implicit attitudes against Asian Americans (IAT D=0.62). *See id.*

188. *Id.* at 901 tbl.3.

lawyer 6.01 to 5.65 in terms of competence, 5.57 to 5.27 in terms of likability, and 5.65 to 4.92 in terms of hireability.[189]

This study provides some evidence that potential jurors' implicit stereotypes cause racial discrimination in judging attorney performance of basic depositions. What does this have to do with how juries might decide employment discrimination cases? Of course, minority defendants do not necessarily hire minority attorneys. That said, it is possible that minorities do hire minority attorneys at somewhat higher rates than nonminorities. But even more important, we hypothesize that similar processes might take place with how jurors evaluate not only attorneys but also both parties and witnesses, as they perform their various roles at trial. To be sure, this study does not speak directly to credibility assessments, likely to be of special import at trial, but it does at least suggest that implicit stereotypes may affect judgment of performances in the courtroom.

We concede that our claims about implicit bias influencing jury decisionmaking in civil cases are somewhat speculative and not well quantified. Moreover, in the real world, certain institutional processes may make both explicit and implicit biases less likely to translate into behavior. For example, jurors must deliberate with other jurors, and sometimes the jury features significant demographic diversity, which seems to deepen certain types of deliberation.[190] Jurors also feel accountable[191] to the judge, who reminds them to adhere to the law and the merits. That said, for reasons already discussed, it seems implausible to think that current practices within the courtroom somehow magically burn away all jury biases, especially implicit biases of which jurors and judges are unaware. That is why we seek improvements based on the best understanding of how people actually behave.

Thus far, we have canvassed much of the available evidence describing how implicit bias may influence decisionmaking processes in both criminal and civil cases. On the one hand, the research findings are substantial and robust. On the other hand, they provide only imperfect knowledge, especially about what is actually happening in the real world. Notwithstanding this provisional and limited knowledge, we strongly believe that these studies, in aggregate, suggest that implicit bias in the trial process is a problem worth worrying about. What, then, can be done? Based on what we know, how might we intervene to improve the trial process and potentially vaccinate decisionmakers against, or at least reduce, the influence of implicit bias?

189. These figures were calculated using the regression equations in *id.* at 902 n.25, 904 n.27.

190. *See infra* text accompanying notes 241–245.

191. *See, e.g.*, Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 267–70 (1999).

III. INTERVENTIONS

Before we turn explicitly to interventions, we reiterate that there are many causes of unfairness in the courtroom, and our focus on implicit bias is not meant to deny other causes. In Part II, we laid out the empirical case for why we believe that implicit biases influence both criminal and civil case trajectories. We now identify interventions that build on an overlapping scientific and political consensus. If there are cost-effective interventions that are likely to decrease the impact of implicit bias in the courtroom, we believe they should be adopted at least as forms of experimentation.

We are mindful of potential costs, including implementation and even overcorrection costs. But we are hopeful that these costs can be safely minimized. Moreover, the potential benefits of these improvements are both substantive and expressive. Substantively, the improvements may increase actual fairness by decreasing the impact of implicit biases; expressively, they may increase the appearance of fairness by signaling the judiciary's thoughtful attempts to go beyond cosmetic compliance.[192] Effort is not always sufficient, but it ought to count for something.

A. Decrease the Implicit Bias

If implicit bias causes unfairness, one intervention strategy is to decrease the implicit bias itself. It would be delightful if explicit refutation would suffice. But abstract, global self-commands to "Be fair!" do not much change implicit social cognitions. How then might we alter implicit attitudes or stereotypes about various social groups?[193] One potentially effective strategy is to expose ourselves to countertypical associations. In rough terms, if we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.

192. In a 1999 survey by the National Center for State Courts, 47 percent of the American people doubted that African Americans and Latinos receive equal treatment in state courts; 55 percent doubted that non–English speaking people receive equal treatment. The appearance of fairness is a serious problem. *See* NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 37 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf. The term "cosmetic compliance" comes from Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

193. For analysis of the nature versus nurture debate regarding implicit biases, see Jerry Kang, *Bits of Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 132 (Justin D. Levinson & Robert J. Smith eds., 2012).

These exposures can come through direct contact with countertypical people. For example, Nilanjana Dasgupta and Shaki Asgari tracked the implicit gender stereotypes held by female subjects both before and after a year of attending college.[194] One group of women attended a year of coed college; the other group attended a single-sex college. At the start of their college careers, the two groups had comparable amounts of implicit stereotypes against women. However, one year later, those who attended the women's college on average expressed no gender bias, whereas the average bias of those who attended the coed school increased.[195] By carefully examining differences in the two universities' environments, the researchers learned that it was exposure to countertypical women in the role of professors and university administrators that altered the implicit gender stereotypes of female college students.[196]

Nilanjana Dasgupta and Luis Rivera also found correlations between participants' self-reported numbers of gay friends and their negative implicit attitudes toward gays.[197] Such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom (staff and law clerks), our residential neighborhoods, and friendship circles. That said, any serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political. Moreover, these interventions might produce only modest results. For instance, Rachlinski et al. found that judges from an eastern district that featured approximately half White judges and half Black judges had "only slightly smaller" implicit biases than the judges of a western jurisdiction, which contained only two Black judges (out of forty-five total district court judges, thirty-six of them being White).[198] In addition, debiasing exposures would have to compete against the other daily real-life exposures in the courtroom that rebias. For instance, Joshua Correll found that police officers who worked in areas with high minority demographics and violent crime showed more shooter bias.[199]

If increasing direct contact with a diverse but countertypical population is not readily feasible, what about vicarious contact, which is mediated by images,

194. *See* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649–54 (2004).

195. *See id.* at 651.

196. *See id.* at 651–53.

197. *See* Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 270 (2006).

198. *See* Rachlinski et al., *supra* note 86, at 1227.

199. *See* Correll et al., *supra* note 51, at 1014 ("We tentatively suggest that these environments may reinforce cultural stereotypes, linking Black people to the concept of violence.").

videos, simulations, or even imagination and which does not require direct face-to-face contact?[200] Actually, the earliest studies on the malleability of implicit bias pursued just these strategies. For instance, Nilanjana Dasgupta and Anthony Greenwald showed that participants who were exposed vicariously to countertypical exemplars in a history questionnaire (for example, Black figures to whom we tend to have positive attitudes, such as Martin Luther King Jr., and White figures to whom we tend to have negative attitudes, such as Charles Manson) showed a substantial decrease in negative implicit attitudes toward African Americans.[201] These findings are consistent with work done by Irene Blair, who has demonstrated that brief mental visualization exercises can also change scores on the IAT.[202]

In addition to exposing people to famous countertypical exemplars, implicit biases may be decreased by juxtaposing ordinary people with countertypical settings. For instance, Bernard Wittenbrink, Charles Judd, and Bernadette Park examined the effects of watching videos of African Americans situated either at a convivial outdoor barbecue or at a gang-related incident.[203] Situating African Americans in a positive setting produced lower implicit bias scores.[204]

There are, to be sure, questions about whether this evidence directly translates into possible improvements for the courtroom.[205] But even granting numerous caveats, might it not be valuable to engage in some experimentation? In chambers and the courtroom buildings, photographs, posters, screen savers, pamphlets, and decorations ought to be used that bring to mind countertypical exemplars or associations for participants in the trial process. Since judges and jurors are differently situated, we can expect both different effects and implementation strategies. For example, judges would be exposed to such vicarious displays regularly as a feature of their workplace environment. By contrast, jurors would be exposed only

200. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1166–67 (2000) (comparing vicarious with direct experiences).

201. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001). The IAT effect changed nearly 50 percent as compared to the control (IAT effect M=78ms versus 174ms, p=0.01) and remained for over twenty-four hours.

202. Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001). *See generally* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (literature review).

203. *See* Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815, 818–19 (2001).

204. *Id.* at 819.

205. How long does the intervention last? How immediate does it have to be? How much were the studies able to ensure focus on the positive countertypical stimulus as opposed to in a courtroom where these positives would be amidst the myriad distractions of trial?

during their typically brief visit to the court.[206] Especially for jurors, then, the goal is not anything as ambitious as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.[207]

To repeat, we recognize the limitations of our recommendation. Recent research has found much smaller debiasing effects from vicarious exposure than originally estimated.[208] Moreover, such exposures must compete against the flood of typical, schema-consistent exposures we are bombarded with from mass media. That said, we see little costs to these strategies even if they appear cosmetic. There is no evidence, for example, that these exposures will be so powerful that they will overcorrect and produce net bias against Whites.

B. Break the Link Between Bias and Behavior

Even if we cannot remove the bias, perhaps we can alter decisionmaking processes so that these biases are less likely to translate into behavior. In order to keep this Article's scope manageable, we focus on the two key players in the courtroom: judges and jurors.[209]

1. Judges

a. Doubt One's Objectivity

Most judges view themselves as objective and especially talented at fair decisionmaking. For instance, Rachlinski et al. found in one survey that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in "avoid[ing] racial prejudice in decisionmaking"[210] relative to other judges attending the same conference. That is, obviously, mathematically impossible.

206. *See* Kang, *supra* note 46, at 1537 (raising the possibility of "debiasing booths" in lobbies for waiting jurors).
207. Rajees Sritharan & Bertram Gawronski, *Changing Implicit and Explicit Prejudice: Insights From the Associative-Propositional Evaluation Model*, 41 SOC. PSYCHOL. 113, 118 (2010).
208. *See* Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 141 (2010) (finding an effect size that was approximately 70 percent smaller than the original Dasgupta and Greenwald findings, *see supra* note 201).
209. Other important players obviously include staff, lawyers, and police. For a discussion of the training literature on the police and shooter bias, see Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 46–48 (2010).
210. *See* Rachlinski et al., *supra* note 86, at 1225.

(One is reminded of Lake Wobegon, where all of the children are above average.) In another survey, 97.2 percent of those administrative agency judges surveyed put themselves in the top half in terms of avoiding bias, again impossible.[211] Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases. In one study, they had participants choose either the candidate profile labeled "Gary" or the candidate profile labeled "Lisa" for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organization skills but weak interpersonal skills.[212] Half the participants were primed to view themselves as objective.[213] The other half were left alone as control.

Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations.[214] But those who were manipulated to think of themselves as objective evaluated the male candidate higher (M=5.06 versus 3.75, p=0.039, d=0.76).[215] Interestingly, this was not due to a malleability of merit effect, in which the participants reweighted the importance of either organizational skills or interpersonal skills in order to favor the man. Instead, the discrimination was caused by straight-out disparate evaluation, in which the Gary profile was rated as more interpersonally skilled than the Lisa profile by those primed to think themselves objective (M=3.12 versus 1.94, p=0.023, d=0.86).[216] In short, thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe.

But is such a suggestion based on wishful thinking? Is there any evidence that education and reminders can actually help? There is some suggestive evidence from Emily Pronin, who has carefully studied the bias blindspot—the belief

211. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

212. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007).

213. This was done simply by asking participants to rate their own objectivity. Over 88 percent of the participants rated themselves as above average on objectivity. *See id.* at 209. The participants were drawn from a lay sample (not just college students).

214. *See id.* at 210–11 (M=3.24 for male candidate versus 4.05 for female candidate, p=0.21).

215. *See id.* at 211.

216. *See id.* Interestingly, the gender of the participants mattered. Female participants did not show the objectivity priming effect. *See id.*

that others are biased but we ourselves are not.[217] In one study, Emily Pronin and Matthew Kugler had a control group of Princeton students read an article from *Nature* about environmental pollution. By contrast, the treatment group read an article allegedly published in *Science* that described various nonconscious influences on attitudes and behaviors.[218] After reading an article, the participants were asked about their own objectivity as compared to their university peers. Those in the control group revealed the predictable bias blindspot and thought that they suffered from less bias than their peers.[219] By contrast, those in the treatment group did not believe that they were more objective than their peers; moreover, their more modest self-assessments differed from those of the more confident control group.[220] These results suggest that learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.

b. Increase Motivation

Tightly connected to doubting one's objectivity is the strategy of increasing one's motivation to be fair.[221] Social psychologists generally agree that motivation is an important determinant of checking biased behavior.[222] Specific to implicit bias, Nilanjana Dasgupta and Luis Rivera found that participants who were consciously motivated to be egalitarian did not allow their antigay implicit attitudes to translate into biased behavior toward a gay person. By contrast, for those lacking such motivation, strong antigay implicit attitudes predicted more biased behavior.[223]

A powerful way to increase judicial motivation is for judges to gain actual scientific knowledge about implicit social cognitions. In other words, judges should be internally persuaded that a genuine problem exists. This education and

217. *See generally* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007).

218. *See* Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 574 (2007). The intervention article was 1643 words long, excluding references. *See id.* at 575.

219. *See id.* at 575 (M=5.29 where 6 represented the same amount of bias as peers).

220. *See id.* For the treatment group, their self-evaluation of objectivity was M=5.88, not statistically significantly different from the score of 6, which, as noted previously, meant having the same amount of bias as peers. Also, the self-reported objectivity of the treatment group (M=5.88) differed from the control group (M=5.29) in a statistically significant way, p=0.01. *See id.*

221. For a review, see Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009).

222. *See* Russell H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude–Behavior Processes*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 97 (Shelly Chaiken & Yaacov Trope eds., 1999).

223. *See* Dasgupta & Rivera, *supra* note 197, at 275.

awareness can be done through self-study as well as more official judicial education. Such education is already taking place, although mostly in an ad hoc fashion.[224] The most organized intervention has come through the National Center for State Courts (NCSC). The NCSC organized a three-state pilot project in California, Minnesota, and North Dakota to teach judges and court staff about implicit bias.[225] It used a combination of written materials, videos, resource websites, Implicit Association Tests, and online lectures from subject-matter experts to provide the knowledge. Questionnaires completed before and after each educational intervention provided an indication of program effectiveness.

Although increased knowledge of the underlying science is a basic objective of an implicit bias program, the goal is not to send judges back to college for a crash course in Implicit Psychology 101. Rather, it is to persuade judges, on the merits, to recognize implicit bias as a potential problem, which in turn should increase motivation to adopt sensible countermeasures. Did the NCSC projects increase recognition of the problem and encourage the right sorts of behavioral changes? The only evidence we have is limited: voluntary self-reports subject to obvious selection biases.

For example, in California, judicial training emphasized a documentary on the neuroscience of bias.[226] Before and after watching the documentary, participants were asked to what extent they thought "a judge's decisions and court staff's interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups."[227] Before viewing the documentary, approximately 16 percent chose "rarely-never," 55 percent chose "occasionally," and 30 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 20 percent chose "occasionally," and 79 percent chose "most-all."[228]

Relatedly, participants were asked whether they thought implicit bias could have an impact on behavior even if a person lacked explicit bias. Before viewing the documentary, approximately 9 percent chose "rarely-never," 45 percent chose "occasionally," and 45 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 14 percent chose "occasionally," and 84 percent

224. Several of the authors of this Article have spoken to judges on the topic of implicit bias.

225. *See* PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), *available at* http://www.ncsc.org/IBReport.

226. The program was broadcast on the Judicial Branch's cable TV station and made available streaming on the Internet. *See The Neuroscience and Psychology of Decisionmaking*, ADMIN. OFF. COURTS EDUC. DIV. (Mar. 29, 2011), http://www2.courtinfo.ca.gov/cjer/aoctv/dialogue/neuro/index.htm.

227. *See* CASEY ET AL., *supra* note 225, at 12 fig.2.

228. *See id.*

chose "most-all."[229] These statistics provide some evidence that the California documentary increased awareness of the problem of implicit bias. The qualitative data, in the form of write-in comments[230] support this interpretation.

What about the adoption of behavioral countermeasures? Because no specific reforms were recommended at the time of training, there was no attempt to measure behavioral changes. All that we have are self-reports that speak to the issue. For instance, participants were asked to agree or disagree with the statement, "I will apply the course content to my work." In California, 90 percent (N=60) reported that they agreed or strongly agreed.[231] In North Dakota (N=32), 97 percent reported that they agreed or strongly agreed.[232] Three months later, there was a follow-up survey given to the North Dakota participants, but only fourteen participants replied. In that survey, 77 percent of those who responded stated that they had made efforts to reduce the potential impact of implicit bias.[233] In sum, the findings across all three pilot programs suggest that education programs can increase motivation and encourage judges to engage in some behavioral modifications. Given the limitations of the data (for example, pilot projects with small numbers of participants, self-reports, self-selection, and limited follow-up results), additional research is needed to confirm these promising but preliminary results.

From our collective experience, we also recommend the following tactics. First, training should commence early, starting with new-judge orientation when individuals are likely to be most receptive. Second, training should not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias. Instead, trainers can start the conversation with other types of decisionmaking errors and cognitive biases, such as anchoring, or less-threatening biases, such as the widespread preference for the youth over the elderly that IATs reveal. Third, judges should be encouraged to take the IAT or other measures of implicit

229. *Id.* at 12 fig.3.

230. Comments included: "raising my awareness of prevalence of implicit bias," "enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same," and "greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested." *See* CASEY ET AL., *supra* note 225, at 11.

231. *See id.* at 10.

232. *See id.* at 18. Minnesota answered a slightly different question: 81 percent gave the program's applicability a medium high to high rating.

233. *See id.* at 20. The strategies that were identified included: "concerted effort to be aware of bias," "I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination," "Simply trying to think things through more thoroughly," "Reading and learning more about other cultures," and "I have made mental notes to myself on the bench to be more aware of the implicit bias and I've re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part."

bias. Numerous personal accounts have reported how the discomfiting act of taking the IAT alone motivates action. And researchers are currently studying the specific behavioral and social cognitive changes that take place through such self-discovery. That said, we do not recommend that such tests be mandatory because the feeling of resentment and coercion is likely to counter the benefits of increased self-knowledge. Moreover, judges should never be expected to disclose their personal results.

c. Improve Conditions of Decisionmaking

Implicit biases function automatically. One way to counter them is to engage in effortful, deliberative processing.[234] But when decisionmakers are short on time or under cognitive load, they lack the resources necessary to engage in such deliberation. Accordingly, we encourage judges to take special care when they must respond quickly and to try to avoid making snap judgments whenever possible. We recognize that judges are under enormous pressures to clear ever-growing dockets. That said, it is precisely under such work conditions that judges need to be especially on guard against their biases.

There is also evidence that certain elevated emotional states, either positive or negative, can prompt more biased decisionmaking. For example, a state of happiness seems to increase stereotypic thinking,[235] which can be countered when individuals are held accountable for their judgments. Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases.[236]

234. There are also ways to deploy more automatic countermeasures. In other words, one can teach one's mind to respond not reflectively but reflexively, by automatically triggering goal-directed behavior through internalization of certain if-then responses. These countermeasures function implicitly and even under conditions of cognitive load. *See generally* Saaid A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 514–15, 520 (2010); Monteith et al., *supra* note 221, at 218–21 (discussing bottom-up correction versus top-down).

235. *See* Galen V. Bodenhausen et al., *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 621 (1994).

236. *See* Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009). The researchers found that implicit bias against gays and lesbians could be increased more by making participants feel disgust than by making participants feel anger. *See id.* at 588. Conversely, they found that implicit bias against Arabs could be increased more by making participants feel angry rather than disgusted. *See id.* at 589; *see also* David DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOL. SCI. 319 (2004).

In sum, judges should try to achieve the conditions of decisionmaking that allow them to be mindful and deliberative and thus avoid huge emotional swings.

d. Count

Finally, we encourage judges and judicial institutions to count. Increasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias. But, how can the behavior of trial court judges be held accountable if biased decisionmaking is itself difficult to detect? If judges do not seek out the information that could help them see their own potential biases, those biases become more difficult to correct. Just as trying to lose or gain weight without a scale is challenging, judges should engage in more quantified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions. Judges need to count.

The comparison we want to draw is with professional umpires and referees. Statistical analyses by behavioral economists have discovered various biases, including ingroup racial biases, in the decisionmaking of professional sports judges. Joseph Price and Justin Wolfers found racial ingroup biases in National Basketball Association (NBA) referees' foul calling;[237] Christopher Parsons and colleagues found ingroup racial bias in Major League Baseball (MLB) umpires' strike calling.[238] These discoveries were only possible because professional sports leagues count performance, including referee performance, in a remarkably granular and comprehensive manner.

Although NBA referees and MLB umpires make more instantaneous calls than judges, judges do regularly make quick judgments on motions, objections, and the like. In these contexts, judges often cannot slow down. So, it makes sense

237. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. ECON. 1859, 1885 (2010) ("We find that players have up to 4% fewer fouls called against them and score up to 2½% more points on nights in which their race matches that of the refereeing crew. Player statistics that one might think are unaffected by referee behavior [for example, free throw shooting] are uncorrelated with referee race. The bias in foul-calling is large enough so that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew assigned to the game.").

238. Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1433 (2011) ("Pitches are slightly more likely to be called strikes when the umpire shares the race/ethnicity of the starting pitcher, an effect that is observable only when umpires' behavior is not well monitored. The evidence also suggests that this bias has substantial effects on pitchers' measured performance and games' outcomes. The link between the small and large effects arises, at least in part, because pitchers alter their behavior in potentially discriminatory situations in ways that ordinarily would disadvantage themselves (such as throwing pitches directly over the plate).").

to count their performances in domains such as bail, probable cause, and preliminary hearings.

We recognize that such counting may be difficult for individual judges who lack both the quantitative training and the resources to track their own performance statistics. That said, even amateur, basic counting, with data collection methods never intended to make it into a peer-reviewed journal, might reveal surprising outcomes. Of course, the most useful information will require an institutional commitment to counting across multiple judges and will make use of appropriately sophisticated methodologies. The basic objective is to create a negative feedback loop in which individual judges and the judiciary writ large are given the corrective information necessary to know how they are doing and to be motivated to make changes if they find evidence of biased performances. It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.

2. Jurors

a. Jury Selection and Composition

Individual screen. One obvious way to break the link between bias and unfair decisions is to keep biased persons off the jury. Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand. This is, of course, precisely one of the purposes of voir dire, although the interrogation process was designed to ferret out concealed explicit bias, not implicit bias.

One might reasonably ask whether potential jurors should be individually screened for implicit bias via some instrument such as the IAT. But the leading scientists in implicit social cognition recommend against using the test as an individually diagnostic measure. One reason is that although the IAT has enough test-retest reliability to provide useful research information about human beings generally, its reliability is sometimes below what we would like for individual assessments.[239] Moreover, real-word diagnosticity for individuals raises many more issues than just test-retest reliability. Finally, those with implicit biases need not

239. The test-retest reliability between a person's IAT scores at two different times has been found to be 0.50. For further discussion, see Kang & Lane, *supra* note 2, at 477–78. Readers should understand that "the IAT's properties approximately resemble those of sphygmomanometer blood pressure (BP) measures that are used to assess hypertension." *See* Anthony G. Greenwald & N. Sriram, *No Measure Is Perfect, but Some Measures Can Be Quite Useful: Response to Two Comments on the Brief Implicit Association Test*, 57 EXPERIMENTAL PSYCHOL. 238, 240 (2010).

be regarded as incapable of breaking the causal chain from implicit bias to judgment. Accordingly, we maintain this scientifically conservative approach and recommend against using the IAT for individual juror selection.[240]

Jury diversity. Consider what a White juror wrote to Judge Janet Bond Arterton about jury deliberations during a civil rights complaint filed by Black plaintiffs:

> During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about "those people" rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). *Had just one African-American been sitting in that room, the content of discussion would have been quite different.* And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.
>
> I pass these thoughts onto you in the hope that the jury system can some day be improved.[241]

This anecdote suggests that a second-best strategy to striking potential jurors with high implicit bias is to increase the demographic diversity of juries[242] to get a broader distribution of biases, some of which might cancel each other out. This is akin to a diversification strategy for an investment portfolio. Moreover, in a more diverse jury, people's willingness to express explicit biases might be muted, and the very existence of diversity might even affect the operation of implicit biases as well.

In support of this approach, Sam Sommers has confirmed that racial diversity in the jury alters deliberations. In a mock jury experiment, he compared the deliberation content of all-White juries with that of racially diverse juries.[243] Racially diverse juries processed information in a way that most judges and lawyers would consider desirable: They had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer

240. For legal commentary in agreement, see, for example, Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 856–57 (2012). Roberts suggests using the IAT during orientation as an educational tool for jurors instead. *Id.* at 863–66.

241. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting letter from anonymous juror) (emphasis added).

242. For a structural analysis of why juries lack racial diversity, see Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 68–71 (2008).

243. The juries labeled "diverse" featured four White and two Black jurors.

uncorrected statements, and greater discussion of race-related topics.[244] In addition to these information-based benefits, Sommers found interesting predeliberation effects: Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.[245]

Given these benefits,[246] we are skeptical about peremptory challenges, which private parties deploy to decrease racial diversity in precisely those cases in which diversity is likely to matter most.[247] Accordingly, we agree with the recommendation by various commentators, including Judge Mark Bennett, to curtail substantially the use of peremptory challenges.[248] In addition, we encourage consideration of restoring a 12-member jury size as "the most effective approach" to maintain juror representativeness.[249]

b. Jury Education About Implicit Bias

In our discussion of judge bias, we recommended that judges become skeptical of their own objectivity and learn about implicit social cognition to become motivated to check against implicit bias. The same principle applies to jurors, who must be educated and instructed to do the same in the course of their jury service. This education should take place early and often. For example, Judge

244. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

245. *See* Sommers, *supra* note 242, at 87.

246. Other benefits include promoting public confidence in the judicial system. *See id.* at 82–88 (summarizing theoretical and empirical literature).

247. *See* Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAV. DECISION MAKING 467 (2007); Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527 (2008) (reviewing literature); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007) (finding that race influences the exercise of peremptory challenges in participant populations that include college students, law students, and practicing attorneys and that participants effectively justified their use of challenges in race-neutral terms).

248. *See, e.g.*, Bennett, *supra* note 85, at 168–69 (recommending the tandem solution of increased lawyer participation in voir dire and the banning of peremptory challenges); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

249. Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 427 (2009).

Bennett spends approximately twenty-five minutes discussing implicit bias during jury selection.[250]

At the conclusion of jury selection, Judge Bennett asks each potential juror to take a pledge, which covers various matters including a pledge against bias:

> I pledge ***:
>
> I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.[251]

He also gives a specific jury instruction on implicit biases before opening statements:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common

250. Judge Bennett starts with a clip from *What Would You Do?*, an ABC show that uses hidden cameras to capture bystanders' reactions to a variety of staged situations. This episode—a brilliant demonstration of bias—opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear. *What Would You Do?* (ABC television broadcast May 7, 2010), *available at* http://www.youtube.com/watch?v=ge7i60GuNRg.

251. Mark W. Bennett, Jury Pledge Against Implicit Bias (2012) (unpublished manuscript) (on file with authors). In addition, Judge Bennett has a framed poster prominently displayed in the jury room that repeats the language in the pledge.

> sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.[252]

Juror research suggests that jurors respond differently to instructions depending on the persuasiveness of each instruction's rationale. For example, jurors seem to comply more with an instruction to ignore inadmissible evidence when the *reason* for inadmissibility is potential unreliability, not procedural irregularity.[253] Accordingly, the implicit bias instructions to jurors should be couched in accurate, evidence-based, and scientific terms. As with the judges, the juror's education and instruction should not put them on the defensive, which might make them less receptive. Notice how Judge Bennett's instruction emphasizes the near universality of implicit biases, including in the judge himself, which decreases the likelihood of insult, resentment, or backlash from the jurors.

To date, no empirical investigation has tested a system like Judge Bennett's—although we believe there are good reasons to hypothesize about its benefits. For instance, Regina Schuller, Veronica Kazoleas, and Kerry Kawakami demonstrated that a particular type of reflective voir dire, which required individuals to answer an open-ended question about the possibility of racial bias,

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252. *Id.* In all criminal cases, Judge Bennett also instructs on explicit biases using an instruction that is borrowed from a statutory requirement in federal death penalty cases:

> You must follow certain rules while conducting your deliberations and returning your verdict:
>
> * * *
>
> Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read that statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

The certification statement, contained in a final section labeled "Certification" on the Verdict Form, states the following:

> By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of the race, color, religious beliefs, national origin, or sex of the defendant.

This certification is also shown to all potential jurors in jury selection, and each is asked if they will be able to sign it.

253. *See, e.g.*, Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997) (finding evidence that mock jurors responded differently to wiretap evidence that was ruled inadmissible either because it was illegally obtained or unreliable).

appeared successful at removing juror racial bias in assessments of guilt.[254] That said, no experiment has yet been done on whether jury instructions specifically targeted at implicit bias are effective in real-world settings. Research on this specific question is in development.

We also recognize the possibility that such instructions could lead to juror complacency or moral credentialing, in which jurors believe themselves to be properly immunized or educated about bias and thus think themselves to be more objective than they really are. And, as we have learned, believing oneself to be objective is a prime threat to objectivity. Despite these limitations, we believe that implicit bias education and instruction of the jury is likely to do more good than harm, though we look forward to further research that can help us assess this hypothesis.

c. Encourage Category-Conscious Strategies

Foreground social categories. Many jurors reasonably believe that in order to be fair, they should be as colorblind (or gender-blind, and so forth.) as possible. In other words, they should try to avoid seeing race, thinking about race, or talking about race whenever possible. But the juror research by Sam Sommers demonstrated that White jurors showed race bias in adjudicating the merits of a battery case (between White and Black people) unless they perceived the case to be somehow racially charged. In other words, until and unless White jurors felt there was a specific threat to racial fairness, they showed racial bias.[255]

What this seems to suggest is that whenever a social category bias might be at issue, judges should recommend that jurors feel free to expressly raise and foreground any such biases in their discussions. Instead of thinking it appropriate to repress race, gender, or sexual orientation as irrelevant to understanding the case, judges should make jurors comfortable with the legitimacy of raising such issues. This may produce greater confrontation among the jurors within deliberation, and evidence suggests that it is precisely this greater degree of discussion, and even confrontation, that can potentially decrease the amount of biased decisionmaking.[256]

This recommendation—to be conscious of race, gender, and other social categories—may seem to contradict some of the jury instructions that we noted

254. Regina A. Schuller, Veronica Kazoleas & Kerry Kawakami, *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009).

255. *See supra* notes 70–71.

256. *See* Alexander M. Czopp, Margo J. Monteith & Aimee Y. Mark, *Standing Up for a Change: Reducing Bias Through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCHOL. 784, 791 (2006).

above approvingly.[257] But a command that the race (and other social categories) of the defendant should not influence the juror's verdict is entirely consistent with instructions to recognize explicitly that race can have just this impact—unless countermeasures are taken. In other words, in order to make jurors behave in a colorblind manner, we can explicitly foreground the possibility of racial bias.[258]

Engage in perspective shifting. Another strategy is to recommend that jurors try shifting perspectives into the position of the outgroup party, either plaintiff or defendant.[259] Andrew Todd, Galen Bohenhausen, Jennifer Richardson, and Adam Galinsky have recently demonstrated that actively contemplating others' psychological experiences weakens the automatic expression of racial biases.[260] In a series of experiments, the researchers used various interventions to make participants engage in more perspective shifting. For instance, in one experiment, before seeing a five-minute video of a Black man being treated worse than an identically situated White man, participants were asked to imagine "what they might be thinking, feeling, and experiencing if they were Glen [the Black man], looking at the world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary."[261] By contrast, the control group was told to remain objective and emotionally detached. In other variations, perspective taking was triggered by requiring participants to write an essay imagining a day in the life of a young Black male.

These perspective-taking interventions substantially decreased implicit bias in the form of negative attitudes, as measured by both a variant of the standard IAT (the personalized IAT) and the standard race attitude IAT.[262] More important, these changes in implicit bias, as measured by reaction time instruments,

257. *See* Bennett, *supra* note 252 ("[Y]ou must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.").

258. Although said in a different context, Justice Blackmun's insight seems appropriate here: "In order to get beyond racism we must first take account of race." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

259. For a thoughtful discussion of jury instructions on "gender-, race-, and/or sexual orientation-switching," see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 252–55 (2003); *see also id.* at 257–58 (quoting actual race-switching instruction given in a criminal trial based on Prof. Lee's work).

260. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011).

261. *See id.* at 1030.

262. Experiment one involved the five-minute video. Those in the perspective-shifting condition showed a bias of M=0.43, whereas those in the control showed a bias of M=0.80. Experiment two involved the essay, in which participants in the perspective-taking condition showed M=0.01 versus M=0.49. *See id.* at 1031. Experiment three used the standard IAT. *See id.* at 1033.

also correlated with behavioral changes. For example, the researchers found that those in the perspective-taking condition chose to sit closer to a Black interviewer,[263] and physical closeness has long been understood as positive body language, which is reciprocated. Moreover, Black experimenters rated their interaction with White participants who were put in the perspective-taking condition more positively.[264]

CONCLUSION

Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

Confronted with a robust research basis suggesting the widespread effects of bias on decisionmaking, we are therefore forced to choose. Should we seek to be behaviorally realistic, recognize our all-too-human frailties, and design procedures and systems to decrease the impact of bias in the courtroom? Or should we ignore inconvenient facts, stick our heads in the sand, and hope they somehow go away? Even with imperfect information and tentative understandings, we choose the first option. We recognize that our suggestions are starting points, that they may not all work, and that, even as a whole, they may not be sufficient. But we do think they are worth a try. We hope that judges and other stakeholders in the justice system agree.

263. *See id.* at 1035.
264. *See id.* at 1037.

Prosecuting Fairly: *Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat*

by Rachel D. Godsil and HaoYang (Carl) Jiang

"All of us prosecutors want to do justice—we hold ourselves to a higher standard, so why aren't we trusted?"

— *William Stetzer*

The question posed by Bill Stetzer[1] is shared by many prosecutors. Yet too often, those in communities of color have a hard time believing that these values are genuine based upon their personal experiences. This article shares insights from social psychology research and neuroscience that can unlock this conundrum and provide tools to align behaviors with values.

How is this research important? It shows that people can genuinely want to be fair, but their decisions, reactions, and behaviors can be determined by their unconscious processes. These cognitive functions are shaped by the racial stereotypes that continue to be prevalent in popular media and culture. To begin to achieve racially equitable outcomes within the criminal justice system, prosecutors need to understand the risks of these unconscious, stereotypical associations and related phenomena linked to racial and ethnic differences. The next step is to use cutting-edge brain and

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social science to foster environments that promote equal treatment and guard against the impact of biases.

We are not suggesting that all issues of racial disparity within the criminal justice system are the result of individual decisions—many are systemic and beyond the scope of this article. However, individual decisions and interactions matter enormously to those affected by them. We are in a moment when leaders within criminal justice have access to methods to meaningfully shift dynamics, reduce disparities, and enhance the legitimacy of the criminal justice system. Prosecutors across the country are beginning to make use of these methods and working to engender the trust often missing in communities they impact.

Our purpose is to move the discussion forward by showing how the roles of three intersecting phenomena may play at various decision points or important interactions in the prosecutorial process:

- **Implicit Bias**—"the automatic association of stereotypes and attitudes toward particular groups";[2]
- **Racial Anxiety**—"involves the stress response people experience before or during interracial interactions ";[3] and
- **Stereotype Threat**—"involves inhibition in cognitive functioning when a negative stereotype about [one's] identity group is activated."[4]

We then describe the interventions that can begin to prevent these phenomena from undermining fairness.

What Is Implicit Bias and Why Does It Happen?

Explicit bias is consciously held hostilities or stereotypes about groups of people that differs dramatically from the automatic processes involved in implicit bias. Implicit biases are not a consequence of an individual's chosen values; they are automatic associations that follow from stereotypes common in our culture. The fact that biases are implicit does not mean they necessarily dictate our actions, but to prevent them from doing so, we need to be aware that they are operating.

In the context of criminal justice, the distorted stereotypes associating black and Latino men with violence, criminality, and poverty that have been and continue to be common in the media are most dangerous.[5] Recent studies have found that people judge identically sized black and white men differently; with black

men seen as larger, stronger, and more apt to cause harm in an altercation.[6]

In addition, when people are primed with black faces, they are faster to see crime-related objects; when primed with white faces, they are faster to see neutral objects.[7] In a 2016 study of college students, the association of black faces with crime-related objects occurred even when the face was of a five-year-old boy.[8] Also salient to the criminal justice context is a study finding that after hearing about an encounter, people were more apt to remember hostile details about a person named "Tyronne" than "William," and even wrongly recalled hostile details when the story was about "Tyronne."[9]

Researchers have assessed the presence of implicit bias using a variety of methods. The most commonly known is the Implicit Association Test (IAT), which can be easily accessed on the website Project Implicit.[10] The IAT is a computer task that measures how quickly participants can link particular groups with positive or negative words (race attitude) or different racial groups with weapons (weapons association) by pressing a particular key on the computer's keyboard. The IAT is not akin to a DNA test; it is not a precise and entirely stable measure of bias in any single individual. Rather, it reveals patterns and tendencies among large groups of people.[11] Scientists are also beginning to use physiological tools to measure implicit responses to race, including functional Magnetic Resonance Imaging (fMRI), patterns of cardiovascular responses, facial electromyography (EMG), and cortisol responses.

What Is Racial Anxiety and Why Does It Happen?

In navigating social interactions across lines of difference, implicit bias is but one obstacle. Others include "racial anxiety," a phenomenon centered on discomfort about the potential consequences of interracial interactions. Research indicates many people of color experience racial anxiety.[12] For a person of color, this anxiety materializes through an expectation they will receive discrimination, hostility, or distant treatment. White people may experience a "mirror anxiety" that they will be assumed to be racist by people of color and face corresponding feelings of hostility.[13]

Racial anxiety has been measured based upon self-reports, but it is also observed behaviorally when someone exhibits behaviors associated with anxiety, such as sweating, increased heart rate, facial

twitches, fidgeting, and avoiding eye contact.[14] Racial anxiety has been shown to have cognitive effects as well, diminishing people's executive functions.[15] As with implicit bias, researchers have developed physiological tools to measure racial anxiety by assessing release levels of norepinephrine from the locus coeruleus to the anterior cingulate cortex.[16]

What Is Stereotype Threat and Why Does It Happen?

Stereotype threat is the frequently unconscious fear that one's actions may confirm stereotypes about their identity groups.[17] Stereotypes differ across groups so this anxiety can play out differently for particular identity groups and in different situations.[18] It has been well documented by its effect on the academic performance of students of color who fear confirming the negative stereotypes of intellectual inferiority.[19]

Stereotype threat can cause individuals to attempt to discern whether they are confirming negative racial stereotypes or whether they are being judged based on those stereotypes.[20] The constant monitoring and increased vigilance expends cognitive resources.[21] Stereotype threat is particularly likely to be triggered in high-pressure situations or when the task outcome is of high value.[22]

This threat occurs when three conflicting beliefs are activated:

1. the group stereotype of inferior ability (e.g., women cannot read maps);
2. the recognition that you are a member of the group (e.g., I am a woman); and
3. the knowledge of one's own ability (e.g., I am good at map reading).

The physical manifestation of this conflict occurs through the diversion of cognitive resources (our brain power) that would be otherwise spent on the task at hand. These effects are detectable in both the body and brain, most often through an increased heart rate and rising blood pressure, as well as in the brain regions that regulate emotion.[23] The resulting stress, combined with a motivation to self-monitor and suppress self-doubt, creates a failure to perform to potential.

It has also been shown to be a risk in the context of patients of color being concerned about the stereotypes held about them by health care providers.[24,25] In this context, stereotype threat can

undermine communication, lead to discounting of feedback, poor adherence to health plans, and disidentification—viewing health promotion behaviors as "white."[26]

Presence of Bias in Prosecutor's Offices

In a recent study of the Manhattan District Attorney's Office, the Vera Institute found that in the exercise of discretion at every level from case screening, bail recommendations, charging, and sentences in pleas, black defendants were subject to more severe outcomes compared to similarly situated whites.[27] Prosecutors recommended denying bail to black defendants more often, a significant factor, and eventual plea deals included longer incarceration times.[28]

The Vera study does not address the precise mechanisms explaining the disparate outcomes; however, research in social psychology suggests how bias may operate. For example, if black men are misjudged due to their physical size, leading to higher rates of perceived criminality and aggression, this has ramifications for witness or police officer actions, accounts, and trial testimony, but may also cause prosecutors to perceive such aggressiveness accordingly in charging and sentencing decisions.[29]

Bias may further manifest in the detailed accounts of crimes provided to police and prosecutors. As noted earlier, a study asked participants to read a short description of a crime committed by "William" and an identical description of a crime committed by "Tyronne."[30] They were then distracted for 15 minutes and asked to recall details of the incident. The participants who read William's actions recalled fewer aggressive details about the incident. The participants who read Tyronne's actions not only correctly remembered more aggressive details about the incident, but also incorrectly attributed additional aggressive details to Tyronne.[31]

One can imagine how such selective memory may play out in the courtroom, where prosecutors must routinely determine if defendants are exaggerating or being purposefully deceptive in their description of events. If passersby and witnesses provide a disingenuous version of the facts, one can expect that bias will color the subsequent results.

Research establishes that lawyers are not immune to implicit biases. In one study, 60 law firm partners were given an identical memorandum written by "Thomas Meyer," identified as a third-year associate who went to NYU Law School. The memo contained

seven spelling or grammar errors. Half of the partners were led to believe that Meyer was white and the other half that Meyer was black. Though the memos were identical, partners found an average of 2.9 of the seven errors when Thomas Meyer was depicted as white, and an average of 5.8 of the seven errors when Thomas Meyer was depicted as black.[32]

Possible Decision Points Influenced by Bias

In grappling with the myriad ways bias may be present in a prosecutor's office, it is helpful to clearly examine the decision points and interaction moments in which prosecutors exercise their discretion. Possible decision points include: charging decisions, pre-trial strategy, and trial strategy.[33]

Charging Decisions

Charging decisions for a prosecutor involve the decision of whether to charge a defendant with a crime and the decision of what crime to charge. Research has indicated that prosecutors are routinely less likely to charge white suspects than black suspects. Even while controlling for the type of crime and existence of a previous criminal record, the data indicates disproportionate charging trends based on race.[34]

Such findings are magnified by studies around priming, or subliminal exposure via words and images, related to prosecutorial decision-making. For example, the use of an African American name, specific genre of music associated with African Americans, or "black" neighborhood, can cause racial stereotypes to "be immediately and automatically activated in the mind of a prosecutor, without the prosecutor's awareness."[35] As previously noted, the priming of a black face caused participants in one study to more quickly detect "degraded images" of an object commonly associated with crime (e.g., knife, gun).[36] Again, the impact of this phenomenon may cause prosecutors to charge a defendant of color with more severity or more speed than a white defendant.

The effects of implicit bias do not merely affect adult defendants. Black juvenile suspects were more likely to be charged as adults when compared to their white counterparts, even while controlling for severity of crime and previous record.[37] One possible explanation for this disparity may result from the inability of white people to correctly gauge a black child's age. In one study, white

undergraduate students were primed with the face of a black or white child and then asked to identify the next image of a gun or toy as fast as possible. Participants identified the second image as a gun more quickly after primed with black faces than white, and identified the second image as a toy more quickly after primed with white faces than black.

Pre-Trial Strategy

In considering whether to oppose bail or consider a plea bargain, there are many points in which implicit bias can impact a prosecutor's pre-trial decision-making process. For example, research indicates that defendants of color receive worse pre-trial detention decisions than their white counterparts in certain jurisdictions.[38] In evaluating bail procedures, implicit bias may also operate through "the implicit devaluation of the defendant."[39] Evidence of this devaluation was demonstrated by a comparison of computerized facial images of a white male and a black male.[40] Researchers showed participants a series of images transitioning from "angry" to "neutral" to "happy," and asked them to determine when a face appeared happy. The results of these findings pointed to a lack of empathy recognition among white participants with black faces. In essence, the black male appeared to be angrier, more hostile, and more serious than the white counterpart.[41] As a result, prosecutors may be unable to gauge their defendants' honesty or intent based on body language alone.

Trial Strategy

Whether through striking black jurors or making closing arguments tinged with racial animus, prosecutors have wide leeway in justifying their trial decisions on non-racial lines even when influenced by racial bias. For example, while prohibitions against race-based strikes of jurors have clear precedent and are well defined, the implementation of the prohibition is often difficult. According to one analysis, courts will "routinely uphold peremptory challenges based on largely unverifiable race-neutral claims, for example, those based on avoiding eye contact, possessing an apparent lack of intelligence, or showing signs of nervousness."[42] While prosecutors may not routinely refer to explicit biases for striking a juror, it is often difficult to ascertain a prosecutor's true intentions or categorize the influences that sway their decision.

For example, according to the same analysis, "prosecutors might associate black citizens with lack of respect for law enforcement and opposition to the prosecution of drug crimes or use of the death penalty as a punishment."[43] As a result, black jurors are unfairly stereotyped and castigated based on the implicit biases that affect black defendants.

Possible Interventions for Bias

Fortunately, while the breadth of decision points and interaction moments between prosecutors and defendants seem intractable, researchers have identified several interventions to address them. These interventions fall into two categories: *bias reduction* and *bias override*. While bias reduction is the fundamental goal for prosecutors, since the biased mindset is itself transformed, it seems unlikely that an amelioration of our biases will occur in the near future. Therefore, pursuing bias override simultaneously is crucial.

One avenue to decrease bias is the constant and consistent exposure of prosecutors to positive images and associations with non-stereotypical out-group individuals. Depictions that counter negative stereotypes create new implicit associations between those positive attributes and the out-group as a whole.[44] According to experts, the most effective bias reduction strategies require a series of steps to "break the prejudice habit."[45] This may require prosecutors to engage in more community building activities and outreach, including know-your-rights trainings and community prosecution workshops. Prosecutors must expand the set of positive pro-social interactions with the out-group in order to succeed in long-term bias reduction.

Since the reduction of bias will take a significant amount of time and energy, it will be critically important for institutions and stakeholders to put long-term practices into place that will minimize the effects of such bias.[46] These formal and objective decision-making tools may include the creation of a prosecutor override card, similar to a judge's bench card, which outlines the necessary questions prosecutors should ask before engaging in a charging/sentencing decision. In combating implicit bias, the National Center for State Courts (NCSC) has identified a number of risk factors that increase the severity of bias on the part of prosecutors and judges. These factors include: intensified emotional states, ambiguity of information, salient social categories, low-effort cognitive

processing, distracted or pressured decision-making circumstances, and a lack of clear feedback loops.[47] As a result, the use of an objective checklist to assist prosecutors in curbing bias is essential to reduce these factors.

As Professor Kristen Henning writes: "Well-intentioned actors can overcome automatic or implicit biases ... when they are made aware of stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so."[48] Studies show this self-correction is successful when efforts are made to actively engage in thoughtful reflection, scrutiny, and reasoning efforts regarding the rationale for decision-making. According to the NCSC, this process should be routine, systematized, and intentional.[49] An effective checklist, like the judicial bench cards used in jurisdictions such as Los Angeles County; Omaha, Neb.; Portland, Ore.; and Mecklenburg County, N.C., have been empirically shown to curb biases in judges when considering the appropriateness of foster care for youth of color.[50]

According to an analysis conducted by the Brennan Center for Justice, a number of best practices exist to ensure the effectiveness of judicial bench cards in the reduction of implicit bias.[51] For example, the inclusion of implicit bias questions (e.g., "imagine how one would evaluate the defendant if he or she belonged to a different, non-stigmatized group")[52] both prompts the decision maker to the possibility of bias and ensures an objective check in the reasoning process. Other practices include listing alternatives to placement, reminders on the general process for specific hearings, and listing instances where defendants should have public defenders present.[53]

In addition to an objective decision-making tool, short-term remedies also exist. For example, prosecution offices should begin to collect and store information on racial demographics at each point of the charging and sentencing process. Such an information collecting measure should be shared with stakeholders and consistently reviewed for trends and patterns for prosecutorial success.[54] Additional trainings focused on the systematization of bias override in new attorney training manuals would go a long way toward providing "explicit reminders" for attorneys to monitor themselves and their peers.[55]

Presence of Racial Anxiety in the Prosecutor's Office and Possible Interventions

Racial anxiety also has the potential to undermine effective prosecution. As Bill Stetzer, a white prosecutor, has observed:

> I would be questioning a black prospective juror and what I would be thinking is: Does this juror think I'm a racist? Am I going to offend this juror? If this juror is bad for me, will I get challenged under *Batson*?
>
> All the while, the prospective juror is wondering: Is this guy going to treat me differently because I'm black? Is he trying to find a way to get rid of me?
>
> What this means is that both the juror and I are scared, and we never talk about it. Why does it matter? Because both the juror and I are likely to stiffen up our body language, we'll avoid, eye contact. We will each be sending the other the message that "I don't trust you." As a prosecutor, when a juror doesn't trust me, I lose cases.[56]

In addition to the interactions between prosecutors and jurors, the behavioral effects of racial anxiety have the risk of undermining effective witness interviewing, as well as potentially leading victims or families of victims to distrust the prosecutor. When a victim or family member is feeling vulnerable, the lack of eye contact or the avoidant body language can be read as linked to their race.

It is equally important to consider the many interactions prosecutors of color have with their peers, employees, and managers. From hiring, to discipline, to termination, prosecutors of color often face a different set of expectations and obstacles than their white counterparts. This racial anxiety about interracial interactions has implications for white and minority staff.

For example, one study contrasted the experiences black and Latino college students face in interracial interactions. While racial minorities were more likely to request respect, professionalism, and competence, white students expressed a desire to be well liked and develop rapport with their peers.[57] One can imagine a scenario in which a prosecutor of color who is interviewing for a prospective position may feel slighted by a white interviewer due to a difference in social interaction goals.

In instances where racial anxiety is present in the workplace, studies indicate a correlative negative response in employee workflow and performance. This is a result of the cognitive impact of perceived prejudice as black subjects are much more likely to face impairment when they saw ambiguous evidence of discrimination, whereas white subjects felt such impairment when blatant evidence of prejudice was experienced.[58] The evidence indicates that people of color are more sensitive to the presence of racial slights and feel them more acutely than whites.

Prosecutor offices can begin to address such imbalances in ways similar to addressing implicit bias: reduction and override. Not only should new attorney trainings include methods to communicate across lines of difference, more attention should be paid to diversity hiring overall. A more diverse pool of prosecutors may curb implicit bias, racial anxiety, and stereotype threat due to the increased exposure to different viewpoints and perspectives. As research has indicated in the jury context, "diverse group decision-making is better than homogenous group decision-making."[59]

The Presence of Stereotype Threat in the Prosecutor's Office and Possible Interventions

The research on stereotype threat in health care is salient to its potential effects in the criminal justice system. If people of color are concerned that they will be viewed through stereotypical lenses, they may be less apt to interact effectively with prosecutors, which has implications for reporting crimes, acting as witnesses, and a host of other instances in which trust and communication are critical.

In addition, stereotype threat has significant salience for the experience of prosecutors of color. Research and anecdotal evidence suggest that they may face added burdens due to the concern about confirming a negative stereotype about their in-group during the course of performing their professional functions. When a negative stereotype is triggered about someone's group, making one's identity salient, it can undermine performance because they worry about confirming the stereotype.

A prosecutor of color, for example, can often feel twice the burden/challenge of their white counterpart on the job.[60] Unfortunately, the reverse can also be true for white managers. For example, the provision of overly positive feedback on writing tasks for a minority employee to compensate for feelings of racism

is a real phenomenon. Research has shown stereotype threat has motivated recommendations for job changes despite the lack of necessary skills.[61]

Possible interventions and solutions for decreasing stereotype threat include removing the triggers for stereotype threat, promoting a growth mindset, and providing motivational feedback. A potential tool that prosecutors can adopt for providing feedback is *wise feedback*.[62] Originally designed to restore minority students' trust in critical feedback, three double-blind, randomized experiments provided a series of interventions that have shown success in the academic context. These steps include:

- working with the client/colleagues to understand their highest goals and aspirations;
- using an *asset frame* to identify and convey the reasons you are confident they can meet those goals and aspirations; and
- candidly sharing any constructive feedback on the steps they need to take going forward to meet their goals and aspirations.[63]

Through a combination of these tools, it is possible to reduce the feelings of stereotype threat prosecutors of color may feel in the workplace and provide higher rates of retention and better performance from staff of color.

Conclusion

Although bias reduction and override work can be extraordinarily difficult without the dedication and fidelity to objective measures needed to succeed, there are short and long-term steps prosecutors can take to begin their journey toward a productive and safe workspace. It is important to recognize that along with the interventions we have outlined, success is also dependent upon the buy-in of managerial and administrative staff. Without a clear "train-the-trainer" regimen, it can be easy for staff to dismiss such solutions as mere lip service to the issues we have outlined. Through combating implicit bias, racial anxiety, and stereotype threat, we hope to shed light on the various ways these intersecting and interconnecting phenomena can impact the performance of prosecutors and their efficacy in serving their communities. ■

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Implicit Bias —
A Law Enforcement Perspective

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Implicit Bias: A Law Enforcement Perspective

By Heather B. Perkins and Janine M. Gilbert, Esq.

The following is not the opinion or official policy of the NYPD with respect to implicit bias in policing. Several studies have been conducted on this topic, and abundant research material is available based on empirical data. This paper approaches the subject from the perspective of a career police sergeant and a police executive (a former prosecutor) who have worked for years on developing an implicit bias training for police officers. The hope is that this paper may provide useful information that will help to explain *one* law enforcement perspective on implicit bias in policing, proposed implicit bias training, and the challenges faced by police officers and law enforcement executives, as opposed to an academic or clinical review of the subject.

Implicit Bias Training has emerged as the new panacea for discrimination, whether experienced by coffee house customers, college kids, tech executives, or members of the community who interact with the police. Though there is not a consensus on the efficacy of training on the topic, or even on what effective training would look like, there has been a general surge in the direction of disseminating it in response to critical incidents occurring in institutions and corporations, especially when race is involved. As a result, there are two simultaneous lines of inquiry regarding implicit bias, one is the original question of, “What it is and how it effects our behavior?”, and the other is, “What is to be done about it.”

Some law enforcement executives are starting to accept the idea that implicit bias has played a part in some of the decision-making and behavior of officers, and that training is required to begin to address the issue. Police officers, like every other segment of the population, are susceptible to the influence of the information and input they receive on a daily basis, particularly from news media, movies, television, the experiences of their friends and peers, and family lore. Some may say officers are even more susceptible because they risk their lives everyday just by showing up at work. The NYPD has embarked on the journey of educating each of the nearly 37,000 uniformed members of service in the department about implicit bias and its impact on policing. The goal of the NYPD is observable and measurable behavioral change in its officers. However, there are many obstacles to transforming the intention of making all members of service aware of implicit bias into achieving that goal.

This discussion is intended to identify the challenges faced by law enforcement in addressing implicit bias, review approaches to addressing it in our enforcement ranks and beyond, and on establishing a framework for evaluating success in this arena. There has been an abundance of scholarship on the topic of implicit bias and policing, its effects on our behavior, and the best way to combat it.[1]

[1] Fridell, Lorie A., Producing Bias-Free Policing: A Science-Based Approach, Springer (2017); Spencer, K. B., Charbonneau, A. K., & Glaser, J. (2016), "Implicit Bias and Policing," *Social and Personality Psychology Compass*, *10*(1), 50-63. doi:10.1111/spc3.12210; Weir, K., "Policing in Black & White, Police Departments are Eager for Ways to Reduce Disparities and Psychological Research is Beginning to Find Answers," *Monitor on Psychology*, *47*(11), 36 (December 2016); Goff, P.A., & Kahn, K.B., "Racial Bias in Policing: Why We Know Less Than We Should," *Social Issues and Policy Review*, (March 2012).

This is the first challenge that confronts law enforcement, the divergent camps and their varying beliefs on how much impact implicit bias has on our behavior, and the validity of any form of training that may be based on it. Researchers such as Joshua Correll and Tracie Keesee find racial bias in the shoot/don't shoot decision of officers,[2] while other research claims to find no statistical discriminatory result in the same set of decisions.[3]

Law enforcement tends to be full of cynics, and for those people, a lack of consensus in an idea is a red flag. Therefore, a notion that suggests they may not be aware of what drives their decision-making or behavior is extremely hard to accept. Law enforcement training hones tangible skills, such as those intended to uncover truths, reveal lies, not take things at face value, find a theory that is supported by evidence, and follow the trail of motive and intent to identify the bad actors in society and to solve crime. "The inherent stress and frustration found in the law enforcement profession" causes cynicism in many officers.[4] "Cynicism can be defined as a means to display an attitude of contemptuous distrust of human nature and motives."[5] It should be noted that it is generally understood that the type of personality found in law enforcement is one that tends toward absolutes and sees the world in a binary fashion – right and wrong; lawful or unlawful; dangerous

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[2] Correll, J., *et al.* (2007). Across the Thin Blue Line: Police Officers and Racial Bias in the Decision. *Journal of Personality and Social Psychology*, *92*(6), 1006–1023.

[3] Roland G. Fryer J. An Empirical Analysis of Racial Differences in Police Use of Force. Journal of Political Economy. Forthcoming.

[4] Behrend, Kenneth R. "Police Cynicism: A Cancer in Law Enforcement?" *FBI Law Enforcement Bulletin*, August 1980, Vol. 49, No. 8, at 1. http://www.ncjrs.gov/App/publications/abstract.aspx?ID=76356

[5] http://www.ncjrs.gov/App/publications/abstract.aspx?ID=76356

or safe, etc. Whether this tendency is a result of their training or is what drew them to the profession to begin with, is another question that we are not addressing; but law enforcement is well populated with proof-seeking, polarized thinking, cynics. As such, a concept in social science (sometimes referred to in police circles as "soft science") that still seems unsettled, is challenged to find support in the law enforcement community. This is not to say that all law enforcement officers are cynics, solely that the type of personality commonly found in police ranks has to be factored into the equation in order to develop an effective and long lasting training that will impact officer decision-making and behavior.

The next challenge is the "*Us vs. Them*"[6] mentality that pervades law enforcement communities. Though most communities or populations have their own version of "us vs. them," it is particularly strong in law enforcement circles. In law enforcement, "the 'us' are his fellow police officers, and 'them' becomes the remainder of society."[7] This can be attributed to the type of work officers are asked to do. Officers are repeatedly exposed to the worst sides of humanity, causing them to question the motives and actions of the people they encounter. Officers are constantly aware that there is a real danger that intentional harm may be inflicted by others at any time. Finally, the rigid paramilitary structure of law enforcement organizations requires officers to follow orders, defer to the rank and command structure, and depend upon their group for safety. As a result, mistrust and doubt

[6] Behrend, Kenneth R. "Police Cynicism: A Cancer in Law Enforcement?" *FBI Law Enforcement Bulletin*, August 1980, Vol. 49, No. 8, at 2. http://www.ncjrs.gov/App/publications/abstract.aspx?ID=76356
[7] Id.

are inherent in most police encounters, pushing the “them” further away, resulting in an overreliance on “us.”

This divide is compounded by the lack of understanding by the greater community of the realities faced by police. There are myths about all professions, usually helped along by Hollywood and other popular entertainment, but the result of the disconnect between what the public thinks they know about policing and the realities of the job have an even more polarizing effect. These assumptions about policing lead people to believe that they know what an officer should have done, and the officer’s motivation for the action taken. Given that these situations can be fraught with personal danger and are rarely reported accurately to begin with, officers expect that non-law enforcement personnel will not understand the facts of the incident and may even be actively hostile to police and law enforcement generally.

The challenge this presents with implicit bias training is two-fold. First, it makes any information coming from a non-police source de facto less credible. Second, it magnifies the resistance to the information because as long as other in-group members (officers, units, or departments) don’t buy into a concept such as implicit bias, the concept’s credibility is weakened. This creates a C*atch 22* for the introduction of ideas from outside law enforcement circles, and highlights the importance of finding partners within law enforcement to be able to develop a training that can reach officers.

The third challenge is that culture change take time. Even innovative attitudes that originate from inside an organization or culture need time, faith, repetition, and

buy-in (especially from the leadership) to be adopted and passed down to subsequent generations. The larger the population and the deeper entrenched opposing ideas are, the longer and more difficult the change process becomes.

This is not to suggest that law enforcement should be allowed to abdicate responsibility for recognizing and addressing obstacles to providing fair, legitimate, and impartial service to all communities equitably. This is simply a factor that must be considered when developing training and evaluating its efficacy. In order to address these challenges, we have developed some ideas about the best approach to addressing implicit bias in law enforcement.

Not only must it be exemplary, the training also has to have as its goals: (1) developing informational awareness, (2) addressing actual changes in behavior, (3) changing attitudes about the community itself, specifically historically marginalized communities, and law enforcement's relationship with the community (transforming "us vs. them" to "we are them"), and do so in a manner that law enforcement personnel will be open to accepting it (which may not necessarily always look the way the community or social scientists think it should.) However, the first and, arguably, most important aspect is the development of awareness of implicit bias.

Chief of Police Kenneth Behrend noted the following about cynicism, a similar and related problem:

> The first and perhaps best line of defense against allowing police cynicism to infect you or your agency is simply acknowledging that it does exist. It is real, and as such, can be prevented or corrected. Being aware of what it is in layman's terms is an asset in identifying the symptoms and taking corrective action or instituting procedures which will minimize its occurrence…. By educating our personnel that cynicism is a reaction to conditions that can strike anyone and expose

> the phenomenon so that it can be understood, we have taken the first step toward preventing its occurrence.[8]

Similarly, the awareness component of any implicit bias training curriculum is key. Awareness of how our brains work and how we make decisions gives us a chance to recognize where bias may impact that process, therefore, allowing us the opportunity to control against its effects on our behavior. Though the positive effect of awareness on policing behavior is difficult to measure, if not impossible, it should still be the essential component. The first step to solving any problem, is recognizing that there is a problem.

The aspects of the training that address behavioral change should build upon the structure of preexisting police training. The institution of new, stand-alone, behavioral expectations would be difficult and prone to failure. Instead, the curriculum should identify existing police tactics that provide officers the opportunity to allow their newly developed awareness of implicit bias to help inform their decision-making and behavior. "Don't rush" is a good example. In critical situations officers must work quickly, but it is considered "Best Practice" not to rush in without evaluating a situation first. Rushing can result in decision-making with insufficient information and often leads to mistakes.

For example, when responding to a domestic violence call, officers are taught to gather as much information as possible from databases, 911 operators, complaints/witnesses, and prior incident reports, as well as develop a plan of action

[8] Behrend, Kenneth R. "Police Cynicism: A Cancer in Law Enforcement?" *FBI Law Enforcement Bulletin*, August 1980, Vol. 49, No. 8, at 3. http://www.ncjrs.gov/App/publications/abstract.aspx?ID=76356

with their partner before arriving on the scene. If, however, in the rush to respond to such a call for service, officers do not utilize these resources in the time available prior to arriving on the scene, they will be forced to be overly dependent on assumptions and observations they make upon arrival. This situation creates the opportunity for bias to inform decision-making, putting all parties at greater risk. One of the assumptions in a domestic violence situation is likely to be that the parties involved are a heterosexual couple and that the male is the aggressor. In fact, there are documented instances where officers have been attacked by a female aggressor because they entered a situation focusing on the male participant as the perpetrator. If training emphasizes the link between good police tactics and overcoming a reliance on assumptions informed by implicit bias, then it offers the best opportunity to be accepted by officers and influence their behavior and decision-making.

Additionally, any discussion around implicit bias has to address the matter of race head on. Officers are predisposed to believe that implicit bias training is about race and racism. In fact, many will think the purpose of the training is to expose them as racist. This training, however, is not intended to uncover racists or those with explicit biases, but it is intended to address those implicit biases that inform decision-making and behavior. Failure to talk about race directly, and specifically how implicit biases around race impact police decision-making, will compromise the credibility of both the training and the trainers. Reluctance or outright refusal to address race communicates an unwillingness to reckon with such controversial

topics and can be interpreted as resistance to the overall culture change this training seeks to effect.

Additionally, the curriculum must tackle cynicism and the “us vs. them” mentality and how to combat it. In order to truly have a positive outcome, one of the primary goals must be overall culture change. Moreover, there is an element of community buy-in and public commitment by community leaders and elected officials to the training and to allowing the change process to occur. This culture change will take time, as true change comes slowly, and there may be setbacks. Community leaders have to be prepared to work with law enforcement in the aftermath of any incidents, and trust in the Agency’s commitment to change. While the lion’s share of responsibility in this space falls on the paid professionals that have sworn an oath of service to the community, real and lasting change can only be achieved if the community participates and is invested as well. In order for officers to see themselves as part of the communities they serve, communities have to accept the legitimacy of law enforcement and its place in society.

The training itself has to be presented in small groups such that participant’s individual skepticism and cynicism can be directly addressed by the facilitators. Additionally, the facilitators must be extremely knowledgeable about the material and possess excellent classroom management skills. Without these two elements, the training will be unsuccessful, and threatens to further officer’s distrust. Officers who have attended an ineffective training are harder to convince of the importance of implicit bias awareness. This means there must be buy-in from the top executive staff, before the attitudes of the rank-and-file are addressed. The executive corps

of any department deciding to implement this kind of training, has to accept it as more than a public relations maneuver. They have to understand the mechanisms of bias and the ways that they pose risks to their officers and to the communities they serve.

Furthermore, every stakeholder has to be clear on the goals: changing outcomes of police interactions with communities, specifically those that have been historically marginalized. If this is the goal, then the public and academics, alike, have to trust that experienced and knowledgeable police trainers know the best way to achieve this. The community may wish for the training to have a greater focus on the impact of officers' mistakes on public. Academics often want the language of the training to more science-based and technically specific. However, this training will be most successful if it is created with an understanding of the culture of each specific organization and tailored to how the members of service think and their motivations.

Finally, there is the question of what success looks like and how we measure it. Social scientists are not in agreement about what constitutes an effective training or how to evaluate success. Some research suggests that there is little positive impact on the behavior of attendees of implicit bias training, or that its effect is short lived. [9] We contend that the fact that the training shows a change of behavior, even if short-lived, is sign of its efficacy. This demonstrates that the training effects

[9] Forscher, Patrick & Lai, Calvin & R. Axt, Jordan & R. Ebersole, Charles & Herman, Michelle & Devine, Patricia & Nosek, Brian. (2016), "A Meta-Analysis of Change in Implicit Bias;" James, T. (2017, December 23) "Can Cops Unlearn Their Unconscious Biases?" *The Atlantic*. Online.

behavior and suggests that continued reinforcement and exposure to the concept would have a lasting effect. Weaving the ideas into other trainings and procedures, and actively working towards buy-in will promote change in the agency culture in general, and specifically around issues of bias and the behavior of officers.

A successful training would result in officer awareness of implicit bias and taking measures to minimizes its effects; officer and executive buy-in into the concept of implicit bias and its impact on policing; culture change; and a transformation of the relationship between law enforcement and the community, eliminating the “us vs. them” mentality. These can be measured by internal climate surveys which are designed to evaluate members of service familiarity with the concept of implicit bias and their buy-in; an examination of the frequency the idea occurs in the overall training curriculum, policies, and procedures; and an improved community sentiment gauged by satisfaction surveys.

Implicit Bias:
The Law Enforcement Perspective

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NYPD Office of Equity and Inclusion

Heather B. Perkins Sergeant,
NYPD Office of Equity and Inclusion

1

Disclaimer

- The following presentation is not the opinion or official policy of the NYPD with respect to implicit bias in policing

2

Outline:

- Why Are We Talking about Implicit Bias?
- Challenges Faced by Law Enforcement
- Approaches to Addressing Implicit Bias
- Success and How to Measure It

3

Why Implicit Bias?

- Cognitive bias that unintentionally effects behavior
- Observable decline over time in explicit bias (racism/sexism/homophobia/anti-Semitism)
- No associated decline in discriminatory outcomes
- Implicit Bias may explain the gap

4

Why Implicit Bias Training?

- Bring awareness
- Bridge the gap
- Move toward change
- Address the issues head on

5

Challenges:

- "Personality" of police officers
- Skepticism of Law Enforcement
- Us vs. Them mentality
- Effective training takes time and resources
- Culture change takes time

6

Approach to Addressing Implicit Bias:

- Clear Goals
- Strong Training
- Universal Experience
- Risk Based Focus
- Multidimensional Considerations

7

Goals of Implicit Bias Training

- Awareness
- Behavior Change
- Replace "*Us vs. Them*" Mentality with "*We are Them*"
- Address the Issue of Bias Openly

8

Training Structure

- Small Class Size
- Full Training Day or Days
- Excellent Facilitators
- Curriculum Tailored to Audience

9

Universal Experience

- Explain how cognitive bias effects all people
- Identify where it can be seen in daily life
- Draw connections between everyone's experience and policing experience

10

Risk-Based Focus

- Training needs to focus on what is at risk
- Officer safety
- Public safety

11

Multidimensional Approach

- Talk about history of law enforcement and community
- Reflect on current tensions/problems
- Self-diagnose causes
- Obstacles to solutions
- Reaffirm mission and ideals

12

The following is an example of what a small part of the risk-based curriculum might look like…

13

Implicit Bias – Defined:

- Attitudes about people, that influence decision-making, unrelated to the nature of one's character.

14

Implicit Bias

- Universal to the human condition
- Not a condemnation of character
- Not the result of conscious racism
  - Implicit bias is not code for racist
- Presents performance risks for personnel
- Awareness can help avoid falling into traps

15

15

Training Need

- Human brains have evolved to act in certain ways.
- Brains make decisions without our conscious input.
  - Some responses are helpful:

(Stove= Hot = Do Not Touch)

  - Some responses can put us at risk:

(Female = Not Threatening= Diminished Awareness)

16

Subconscious Conclusions

- Think Branding
- Can you name these Brands →
- Were you born knowing them?
- How did you learn them?

17

What does this have to do with policing?

- The same forces that influence our brains to know brands, also influence our brains in other ways.
- Our brains *usually* get it right.
- Sometimes our brains don't and we fall into a trap.
- Those traps put us at risk.

18

Risks

- Personal safety
- Legitimacy
- Reputation
- Tension
- Fairness
- Failure of Mission
- Public Safety
- Loss of trust
- Discipline
- Litigation

19

Training Need

20

This type of training is about…

Creating awareness of the factors, including implicit bias, that go into human decision-making, and learning how we can avoid falling into traps -- or defuse them.

21

Awareness

- **Not** about condemning character
- **Not** about reprimanding you

- ***Is*** about identifying potential problems
- ***Is*** about developing mental tactics
- ***Is*** about avoiding traps

22

Observation Skills Test

- Pilot
- Nurse
- Teacher
- CEO
- Flight Attendant
- Doctor
- Librarian
- Lawyer

23

24


Pilot
Nurse
CEO
Teacher
Flight Attendant
Doctor
Librarian
Lawyer

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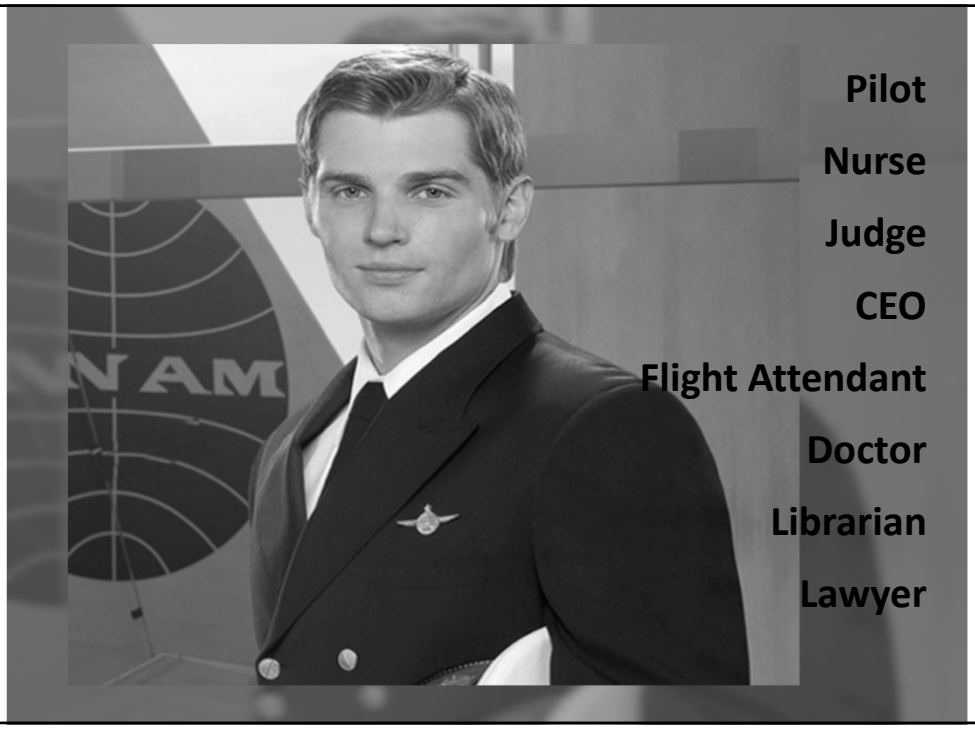
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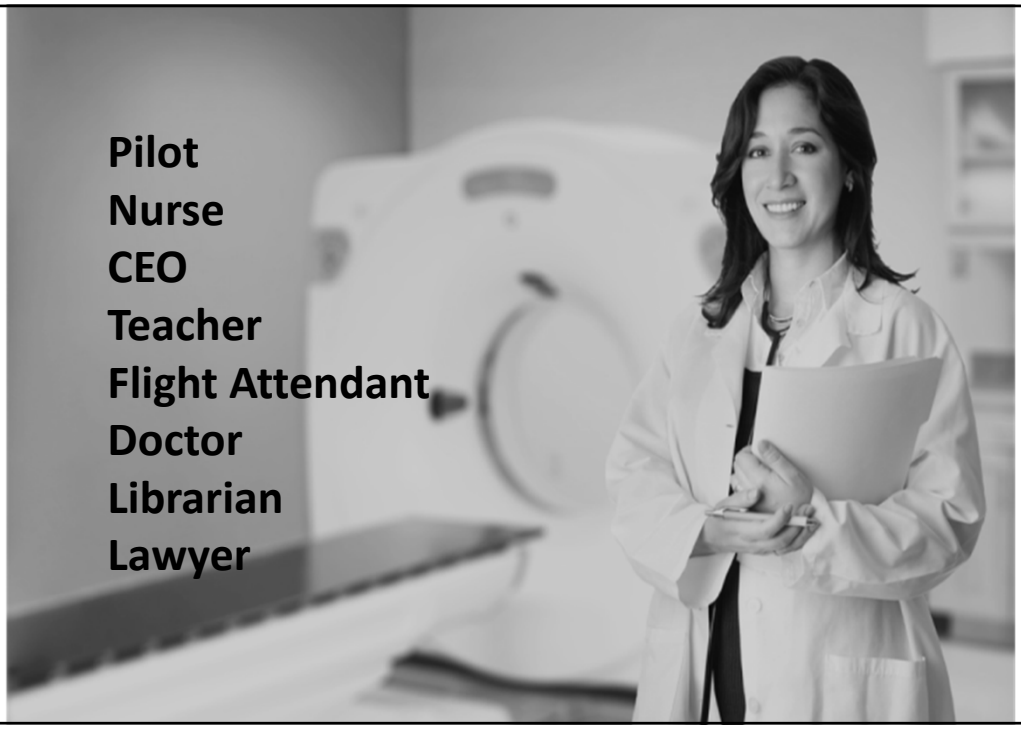
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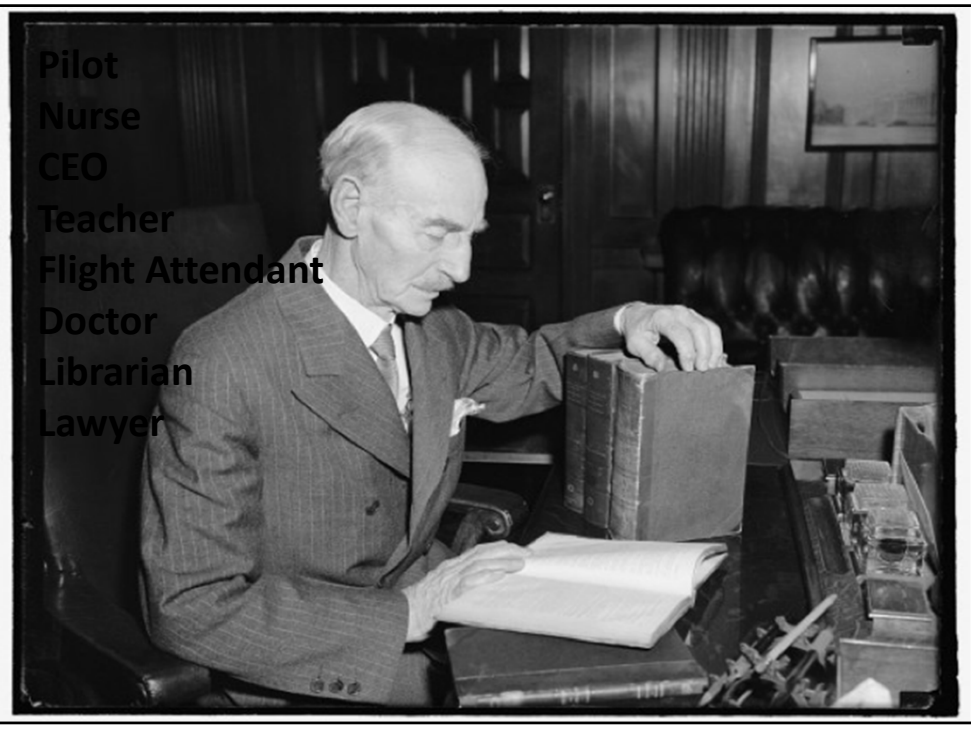
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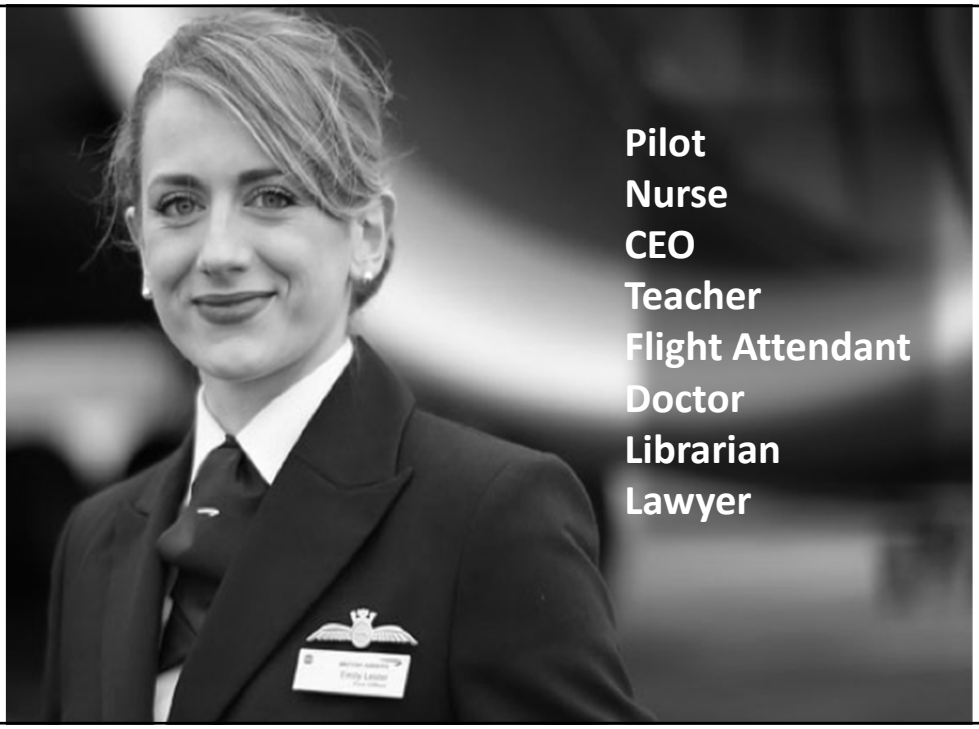

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Evaluation

32

Where does it come from?

33

AP Associated Press AP - Tue Aug 30,11:31 AM ET

A young man walks through chest deep flood water after looting a grocery store in New Orleans on Tuesday, Aug. 30, 2005. Flood waters continue to rise in New Orleans after Hurricane Katrina did extensive damage when it

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AFP

AFP/Getty Images - Tue Aug 30, 3:47 AM ET

Two residents wade through chest-deep water after finding bread and soda from a local grocery store after Hurricane Katrina came through the area in New Orleans, Louisiana.(AFP/Getty Images/Chris Graythen)

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34

Aligning Behavior to Values

- Is behavior always consistent with values?
- Situations can affect behavior more than character.
- Situations can make us behave in ways that are inconsistent with who we think we are.
- When we do, we get trapped.

35

Situations that make us vulnerable

- Feeling threatened
- Complacency
- Making quick decisions
- Being mentally taxed
- Being in a bad mood
- Multitasking

36

Implementation:

- Full Training Day or Days
- Integration of the idea into trainings
- Consistent Follow-up and reinforcement

37

What does success look like?

- Awareness
- Buy-in
- Culture change
- Improved community sentiment

38

How To Measure Success?

- Familiarity with the concept of Implicit Bias
- Prevalence of idea in training curriculum
- Buy-in gauged by internal climate surveys
- Community satisfaction surveys

39

Thank You

Implicit Bias:

The Law Enforcement Perspective

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Confronting and Addressing Implicit Bias in Litigation

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Implicit Bias and the Criminal Justice System

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ANDREWS v. SHULSEN, 485 U.S. 919 (1988)

U.S. Supreme Court

ANDREWS v. SHULSEN , 485 U.S. 919 (1988)

485 U.S. 919

William ANDREWS
v.
Kenneth SHULSEN, Warden, et al.
No. 87-5449

Supreme Court of the United States

February 29, 1988

Rehearing Denied April 18, 1988.

See 485 U.S. 1015.

On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

The petition for a writ of certiorari is denied.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see Gregg v. Georgia, 428 U.S. 153, 231-241, 2973-2977 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence. Even if I did not hold this view, I would grant the petition because petitioner William Andrews was convicted of murder and sentenced to death under circumstances raising grave concerns

Page 485 U.S. 919 , 920

of impermissible racial bias. These circumstances include a midtrial incident in which a juror handed the bailiff a napkin with a drawing of a man on a gallows above the inscription, "Hang the Niggers." The District Court in this case refused even to undertake an evidentiary hearing to investigate petitioner's substantial allegations of racial prejudice. The Constitution cannot countenance such indifference and summary treatment when a person's life is at stake.

I

Petitioner was convicted for his role in a multiple murder during the robbery of a hi-fi shop in Ogden, Utah. The ringleader of the crimes, Dale Pierre, was executed last year. Evidence at trial indicated that petitioner had a substantially less active role in the murders than Pierre . The two men entered the shop together and forced five people into the store's basement. There the victims were forced to drink liquid drain cleaner, which induced violent vomiting. One of the two victims who survived the robbery testified that petitioner said, "I can't do it, I'm scared," and that petitioner left the scene shortly thereafter. Only after petitioner left did Pierre carry out, in particularly gruesome fashion, the multiple murders for which petitioner has been sentenced to die. Pet. for Cert. 3.

The murders understandably attracted substantial attention in the local press and the community from which the jury venire was drawn. The incident also may have generated racist sentiments, inasmuch as the defendants were black people and the victims were white members of the local community. The single black member of the venire was excluded, and an all-white jury was empaneled.

An ugly racial incident involving the jury occurred during the trial. The jury was eating lunch in a separate dining room when a juror presented the bailiff with a drawing that had been made on a napkin. The drawing represented a stick figure hanging on a gallows. Underneath the figure were the words, "Hang the Niggers." The bailiff was unable to say who had made the drawing or how many other jurors had seen it, although he did inform the court that "some of the jurors" had asked him "what the court may do about this." The only action the trial court took in response was to issue a general instruction to the jury to "ignore communications from foolish people." Id., at 9-10, and n. 4.

Page 485 U.S. 919 , 921

After petitioner and Pierre were convicted, the court ordered a 5-day recess. The jury was not sequestered. During this time, media coverage of the conviction was widespread and, petitioner alleges, racially inflammatory. Petitioner alleges, for example, that one newspaper ran a false report that petitioner had directed a "Black Power" closed-fist gesture at one of the surviving victims after the verdict was read. Id., at 10. The jury returned for the separate sentencing hearing and voted unanimously to sentence petitioner to death.

In his petition for a writ of habeas corpus, petitioner alleged that adverse publicity and hostile community sentiment had injected racial animus into his trial and undermined his right to a fair trial. The District Court refused to convene an evidentiary hearing to consider this claim. 600 F.Supp. 408, 415-416 (Utah 1984). The Court of Appeals for the Tenth Circuit upheld this refusal with little discussion, stating: " Having reviewed the briefs and the appellate record, we conclude that no hearing is required under the principles of Townsend v.

Sain, 372 U.S. 293 [ ] (1963), and that the constitutional standard for a fair trial has been met." 802 F.2d 1256, 1260 (1986) (citations omitted).

II

"This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 215, 945 (1982). Such a hearing is, of course, especially vital when the defendant has been condemned to die. In Turner v. Murray, 476 U.S. 28 (1986), the Court vacated a death sentence entered in a case in which the trial court had refused the defendant's request to question the prospective jurors on racial prejudice . The plurality recognized that "in light of the complete finality of the death sentence," the Constitution requires district courts to be especially solicitous of allegations of racial prejudice in capital cases. Id., at 35, 106 S.Ct. at 1688. The plurality therefore vacated the sentence, even though no specific allegations of racial prejudice had been made other than the fact that the case involved a black defendant and a white victim. The Court concluded that "the risk that racial prejudice may have infected petitioner's capital sentencing [was] unacceptable in light of the ease with which that risk could have been minimized." Id., at 36.

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This case involves far more serious and specific allegations of racial animus than did Turner, including a vulgar incident of lynch-mob racism reminiscent of Reconstruction days. Moreover, petitioner is not asking this Court to decide whether there is sufficient evidence of racial prejudice to impeach the conviction and sentence. He seeks only to have the District Court undertake an evidentiary hearing to consider his charges. I would think it clear that the Constitution, not to mention common decency, requires no less than this modest procedure. See Tanner v. United States, 483 U.S. 107, 142, 2759 (1987) (MARSHALL, J., concurring in part and dissenting in part).

III

Was it one (or more) of petitioner's jurors who drew a black man hanging on a gallows and attached the inscription, "Hang the Niggers"? How many other jurors saw the incendiary drawing before it was turned over to the bailiff? Might it have had any effect on the deliberations? Was the jury's decision to sentence petitioner to die influenced by racially- charged media coverage of the trial between the guilt and penalty phases? These are among the questions that petitioner deserves to have at least considered before he is put to death for a series of murders in which he played only a secondary role. It is conscience shocking that all three levels of the federal judiciary are willing to send petitioner to his death without so much as investigating these serious allegations at an evidentiary hearing. Not only is this less process than due; it is no process at all. I dissent.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FOSTER *v.* CHATMAN, WARDEN

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 14–8349. Argued November 2, 2015—Decided May 23, 2016

Petitioner Timothy Foster was convicted of capital murder and sentenced to death in a Georgia court. During jury selection at his trial, the State used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury. Foster argued that the State's use of those strikes was racially motivated, in violation of *Batson* v. *Kentucky*, 476 U. S. 79. The trial court rejected that claim, and the Georgia Supreme Court affirmed. Foster then renewed his *Batson* claim in a state habeas proceeding. While that proceeding was pending, Foster, through the Georgia Open Records Act, obtained from the State copies of the file used by the prosecution during his trial. Among other documents, the file contained (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in bright green, with a legend indicating that the highlighting "represents Blacks"; (2) a draft affidavit from an investigator comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) notes identifying black prospective jurors as "B#1," "B#2," and "B#3"; (4) notes with "N" (for "no") appearing next to the names of all black prospective jurors; (5) a list titled "[D]efinite NO's" containing six names, including the names of all of the qualified black prospective jurors; (6) a document with notes on the Church of Christ that was annotated "NO. No Black Church"; and (7) the questionnaires filled out by five prospective black jurors, on which each juror's response indicating his or her race had been circled.

The state habeas court denied relief. It noted that Foster's *Batson* claim had been adjudicated on direct appeal. Because Foster's renewed *Batson* claim "fail[ed] to demonstrate purposeful discrimination," the court concluded that he had failed to show "any change in the facts sufficient to overcome" the state law doctrine of res judicata.

Syllabus

The Georgia Supreme Court denied Foster the Certificate of Probable Cause necessary to file an appeal.

Held:

1. This Court has jurisdiction to review the judgment of the Georgia Supreme Court denying Foster a Certificate of Probable Cause on his *Batson* claim. Although this Court cannot ascertain the grounds for that unelaborated judgment, there is no indication that it rested on a state law ground that is both "independent of the merits" of Foster's *Batson* claim and an "adequate basis" for that decision, so as to preclude jurisdiction. *Harris* v. *Reed*, 489 U. S. 255, 260. The state habeas court held that the state law doctrine of res judicata barred Foster's claim only by examining the entire record and determining that Foster had not alleged a change in facts sufficient to overcome the bar. Based on this lengthy "*Batson* analysis," the state habeas court concluded that Foster's renewed *Batson* claim was "without merit." Because the state court's application of res judicata thus "depend[ed] on a federal constitutional ruling, [that] prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded." *Ake* v. *Oklahoma*, 470 U. S. 68, 75; see also *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152. Pp. 6–9.

2. The decision that Foster failed to show purposeful discrimination was clearly erroneous. Pp. 9–25.

(a) *Batson* provides a three-step process for adjudicating claims such as Foster's. "First, a defendant must make a prima facie showing that a preemptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder* v. *Louisiana*, 552 U. S. 472, 477 (internal quotation marks and brackets omitted). Only *Batson*'s third step is at issue here. That step turns on factual findings made by the lower courts, and this Court will defer to those findings unless they are clearly erroneous. See *ibid.* Pp. 9–10.

(b) Foster established purposeful discrimination in the State's strikes of two black prospective jurors: Marilyn Garrett and Eddie Hood. Though the trial court accepted the prosecution's justifications for both strikes, the record belies much of the prosecution's reasoning. Pp. 10–22.

(i) The prosecution explained to the trial court that it made a last-minute decision to strike Garrett only after another juror, Shirley Powell, was excused for cause on the morning that the strikes were exercised. That explanation is flatly contradicted by evidence

showing that Garrett's name appeared on the prosecution's list of "[D]efinite NO's"—the six prospective jurors whom the prosecution was intent on striking from the outset. The record also refutes several of the reasons the prosecution gave for striking Garrett instead of Arlene Blackmon, a white prospective juror. For example, while the State told the trial court that it struck Garrett because the defense did not ask her for her thoughts about such pertinent trial issues as insanity, alcohol, or pre-trial publicity, the record reveals that the defense asked Garrett multiple questions on each topic. And though the State gave other facially reasonable justifications for striking Garrett, those are difficult to credit because of the State's willingness to accept white jurors with the same characteristics. For example, the prosecution claims that it struck Garrett because she was divorced and, at age 34, too young, but three out of four divorced white prospective jurors and eight white prospective jurors under age 36 were allowed to serve. Pp. 11–17.

(ii) With regard to prospective juror Hood, the record similarly undermines the justifications proffered by the State to the trial court for the strike. For example, the prosecution alleged in response to Foster's pretrial *Batson* challenge that its only concern with Hood was the fact that his son was the same age as the defendant. But then, at a subsequent hearing, the State told the court that its chief concern was with Hood's membership in the Church of Christ. In the end, neither of those reasons for striking Hood withstands scrutiny. As to the age of Hood's son, the prosecution allowed white prospective jurors with sons of similar age to serve, including one who, in contrast to Hood, equivocated when asked whether Foster's age would be a factor at sentencing. And as to Hood's religion, the prosecution erroneously claimed that three white Church of Christ members were excused for cause because of their opposition to the death penalty, when in fact the record shows that those jurors were excused for reasons unrelated to their views on the death penalty. Moreover, a document acquired from the State's file contains a handwritten note stating, "NO. NO Black Church," while asserting that the Church of Christ does not take a stand on the death penalty. Other justifications for striking Hood fail to withstand scrutiny because no concerns were expressed with regard to similar white prospective jurors. Pp. 17–23.

(c) Evidence that a prosecutor's reasons for striking a black prospective juror apply equally to an otherwise similar nonblack prospective juror who is allowed to serve tends to suggest purposeful discrimination. *Miller-El* v. *Dretke*, 545 U. S. 231, 241. Such evidence is compelling with respect to Garrett and Hood and, along with the prosecution's shifting explanations, misrepresentations of the record,

Syllabus

and persistent focus on race, leads to the conclusion that the striking of those prospective jurors was "motivated in substantial part by discriminatory intent." *Snyder*, 552 U. S., at 485. P. 23.

(d) Because *Batson* was decided only months before Foster's trial, the State asserts that the focus on black prospective jurors in the prosecution's file was an effort to develop and maintain a detailed account should the prosecution need a defense against any suggestion that its reasons were pretextual. That argument, having never before been raised in the 30 years since Foster's trial, "reeks of afterthought." *Miller-El*, 545 U. S., at 246. And the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury. Pp. 23–25.

Reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 14–8349

TIMOTHY TYRONE FOSTER, PETITIONER *v.* BRUCE CHATMAN, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

[May 23, 2016]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Petitioner Timothy Foster was convicted of capital murder and sentenced to death in a Georgia court. During jury selection at his trial, the State exercised peremptory strikes against all four black prospective jurors qualified to serve. Foster argued that the State's use of those strikes was racially motivated, in violation of our decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986). The trial court and the Georgia Supreme Court rejected Foster's *Batson* claim.

Foster then sought a writ of habeas corpus from the Superior Court of Butts County, Georgia, renewing his *Batson* objection. That court denied relief, and the Georgia Supreme Court declined to issue the Certificate of Probable Cause necessary under Georgia law for Foster to pursue an appeal. We granted certiorari and now reverse.

I

On the morning of August 28, 1986, police found Queen Madge White dead on the floor of her home in Rome, Georgia. White, a 79-year-old widow, had been beaten,

sexually assaulted, and strangled to death. Her home had been burglarized. Timothy Foster subsequently confessed to killing White, and White's possessions were recovered from Foster's home and from Foster's two sisters. The State indicted Foster on charges of malice murder and burglary. He faced the death penalty. *Foster* v. *State*, 258 Ga. 736, 374 S. E. 2d 188 (1988).

District Attorney Stephen Lanier and Assistant District Attorney Douglas Pullen represented the State at trial. Jury selection proceeded in two phases: removals for cause and peremptory strikes. In the first phase, each prospective juror completed a detailed questionnaire, which the prosecution and defense reviewed. The trial court then conducted a juror-by-juror *voir dire* of approximately 90 prospective jurors. Throughout this process, both parties had the opportunity to question the prospective jurors and lodge challenges for cause. This first phase whittled the list down to 42 "qualified" prospective jurors. Five were black.

In the second phase, known as the "striking of the jury," both parties had the opportunity to exercise peremptory strikes against the array of qualified jurors. Pursuant to state law, the prosecution had ten such strikes; Foster twenty. See Ga. Code Ann. §15–12–165 (1985). The process worked as follows: The clerk of the court called the qualified prospective jurors one by one, and the State had the option to exercise one of its peremptory strikes. If the State declined to strike a particular prospective juror, Foster then had the opportunity to do so. If neither party exercised a peremptory strike, the prospective juror was selected for service. This second phase continued until 12 jurors had been accepted.

The morning the second phase began, Shirley Powell, one of the five qualified black prospective jurors, notified the court that she had just learned that one of her close friends was related to Foster. The court removed Powell

for cause. That left four black prospective jurors: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett.

The striking of the jury then commenced. The State exercised nine of its ten allotted peremptory strikes, removing all four of the remaining black prospective jurors. Foster immediately lodged a *Batson* challenge. The trial court rejected the objection and empaneled the jury. The jury convicted Foster and sentenced him to death.

Following sentencing, Foster renewed his *Batson* claim in a motion for a new trial. After an evidentiary hearing, the trial court denied the motion. The Georgia Supreme Court affirmed, 258 Ga., at 747, 374 S. E. 2d, at 197, and we denied certiorari, *Foster* v. *Georgia*, 490 U. S. 1085 (1989).

Foster subsequently sought a writ of habeas corpus from the Superior Court of Butts County, Georgia, again pressing his *Batson* claim. While the state habeas proceeding was pending, Foster filed a series of requests under the Georgia Open Records Act, see Ga. Code Ann. §§50–18–70 to 50–18–77 (2002), seeking access to the State's file from his 1987 trial. In response, the State disclosed documents related to the jury selection at that trial. Over the State's objections, the state habeas court admitted those documents into evidence. They included the following:

(1) Four copies of the jury venire list. On each copy, the names of the black prospective jurors were highlighted in bright green. A legend in the upper right corner of the lists indicated that the green highlighting "represents Blacks." See, *e.g.*, App. 253. The letter "B" also appeared next to each black prospective juror's name. See, *e.g., ibid.* According to the testimony of Clayton Lundy, an investigator who assisted the prosecution during jury selection, these highlighted venire lists were circulated in the district attorney's office during jury selection. That allowed "everybody in the office"—approximately "10 to 12 people," including "[s]ecretaries, investigators, [and] district attor-

neys"—to look at them, share information, and contribute thoughts on whether the prosecution should strike a particular juror. Pl. Exh. 1, 2 Record 190, 219 (Lundy deposition) (hereinafter Tr.). The documents, Lundy testified, were returned to Lanier before jury selection. *Id.,* at 220.

(2) A draft of an affidavit that had been prepared by Lundy "at Lanier's request" for submission to the state trial court in response to Foster's motion for a new trial. *Id.,* at 203. The typed draft detailed Lundy's views on ten black prospective jurors, stating "[m]y evaluation of the jurors are a[s] follows." App. 343. Under the name of one of those jurors, Lundy had written:

> "If it comes down to having to pick one of the black jurors, [this one] might be okay. This is solely my opinion. . . . Upon picking of the jury after listening to all of the jurors we had to pick, if we had to pick a black juror I recommend that [this juror] be one of the jurors." *Id*., at 345 (paragraph break omitted).

That text had been crossed out by hand; the version of the affidavit filed with the trial court did not contain the crossed-out language. See *id*., at 127–129. Lundy testified that he "guess[ed]" the redactions had been done by Lanier. Tr. 203.

(3) Three handwritten notes on black prospective jurors Eddie Hood, Louise Wilson, and Corrie Hinds. Annotations denoted those individuals as "B#1," "B#2," and "B#3," respectively. App. 295–297. Lundy testified that these were examples of the type of "notes that the team—the State would take down during voir dire to help select the jury in Mr. Foster's case." Tr. 208–210.

(4) A typed list of the qualified jurors remaining after *voir dire*. App. 287–290. It included "Ns" next to ten jurors' names, which Lundy told the state habeas court "signif[ied] the ten jurors that the State had strikes for during jury selection." Tr. 211. Such an "N" appeared

alongside the names of all five qualified black prospective jurors. See App. 287–290. The file also included a handwritten version of the same list, with the same markings. *Id.*, at 299–300; see Tr. 212. Lundy testified that he was unsure who had prepared or marked the two lists.

(5) A handwritten document titled "definite NO's," listing six names. The first five were those of the five qualified black prospective jurors. App. 301. The State concedes that either Lanier or Pullen compiled the list, which Lundy testified was "used for preparation in jury selection." Tr. 215; Tr. of Oral Arg. 45.

(6) A handwritten document titled "Church of Christ." A notation on the document read: "NO. No Black Church." App. 302.

(7) The questionnaires that had been completed by several of the black prospective jurors. On each one, the juror's response indicating his or her race had been circled. *Id.,* at 311, 317, 323, 329, 334.

In response to the admission of this evidence, the State introduced short affidavits from Lanier and Pullen. Lanier's affidavit stated:

> "I did not make any of the highlighted marks on the jury venire list. It was common practice in the office to highlight in yellow those jurors who had prior case experience. I did not instruct anyone to make the green highlighted marks. I reaffirm my testimony made during the motion for new trial hearing as to how I used my peremptory jury strikes and the basis and reasons for those strikes." *Id.*, at 169 (paragraph numeral omitted).

Pullen's affidavit averred:

> "I did not make any of the highlighted marks on the jury venire list, and I did not instruct anyone else to make the highlighted marks. I did not rely on the highlighted jury venire list in making my decision on

> how to use my peremptory strikes." *Id.*, at 170–171 (paragraph numeral omitted).

Neither affidavit provided further explanation of the documents, and neither Lanier nor Pullen testified in the habeas proceeding.

After considering the evidence, the state habeas court denied relief. The court first stated that, "[a]s a preliminary matter," Foster's *Batson* claim was "not reviewable based on the doctrine of res judicata" because it had been "raised and litigated adversely to [Foster] on his direct appeal to the Georgia Supreme Court." App. 175. The court nonetheless announced that it would "mak[e] findings of fact and conclusions of law" on that claim. *Id.,* at 191. Based on what it referred to as a "*Batson* . . . analysis," the court concluded that Foster's "renewed *Batson* claim is without merit," because he had "fail[ed] to demonstrate purposeful discrimination." *Id.,* at 192, 195, 196.

The Georgia Supreme Court denied Foster the "Certificate of Probable Cause" necessary under state law for him to pursue an appeal, determining that his claim had no "arguable merit." *Id.*, at 246; see Ga. Code Ann. §9–14–52 (2014); Ga. Sup. Ct. Rule 36 (2014). We granted certiorari. 575 U. S. ___ (2015).

II

Before turning to the merits of Foster's *Batson* claim, we address a threshold issue. Neither party contests our jurisdiction to review Foster's claims, but we "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006).

This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment "if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the

court's decision." *Harris* v. *Reed*, 489 U. S. 255, 260 (1989).

The state habeas court noted that Foster's *Batson* claim was "not reviewable based on the doctrine of res judicata" under Georgia law. App. 175. The Georgia Supreme Court's unelaborated order on review provides no reasoning for its decision.[1] That raises the question whether the Georgia Supreme Court's order—the judgment from which Foster sought certiorari[2]—rests on an adequate and independent state law ground so as to preclude our jurisdiction over Foster's federal claim.

We conclude that it does not. When application of a state law bar "depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985); see also *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984).

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[1] The order stated, in its entirety: "Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur, except Benham, J., who dissents." App. 246.

[2] We construe Foster's petition for writ of certiorari as seeking review of the Georgia Supreme Court's order denying him a "Certificate of Probable Cause." App. 246. The Georgia Supreme Court Rules provide that such a certificate "*will* be issued where there is arguable merit." Rule 36 (emphasis added); see also *Hittson* v. *GDCP Warden*, 759 F. 3d 1210, 1231–1232 (CA11 2014). A decision by the Georgia Supreme Court that Foster's appeal had no "arguable merit" would seem to be a decision on the merits of his claim. In such circumstances the Georgia Supreme Court's order is subject to review in this Court pursuant to a writ of certiorari under 28 U. S. C. §1257(a). *R. J. Reynolds Tobacco Co.* v. *Durham County*, 479 U. S. 130, 138–139 (1986); see *Sears* v. *Upton*, 561 U. S. 945 (2010) (*per curiam*) (exercising jurisdiction over order from Georgia Supreme Court denying a Certificate of Probable Cause). We reach the conclusion that such an order is a decision on the merits "in the absence of positive assurance to the contrary" from the Georgia Supreme Court. *R. J. Reynolds*, 479 U. S., at 138.

In this case, the Georgia habeas court's analysis in the section of its opinion labeled "*Batson* claim" proceeded as follows:

> "The [State] argues that this claim is not reviewable due to the doctrine of res judicata. However, because [Foster] claims that additional evidence allegedly supporting this ground was discovered subsequent to the Georgia Supreme Court's ruling [on direct appeal], this court will review the *Batson* claim as to whether [Foster] has shown any change in the facts sufficient to overcome the res judicata bar." App. 192.

To determine whether Foster had alleged a sufficient "change in the facts," the habeas court engaged in four pages of what it termed a "*Batson* . . . analysis," in which it evaluated the original trial record and habeas record, including the newly uncovered prosecution file. *Id.,* at 192–196. Ultimately, that court concluded that Foster's "renewed *Batson* claim is *without merit*." *Id.,* at 196 (emphasis added).

In light of the foregoing, it is apparent that the state habeas court's application of res judicata to Foster's *Batson* claim was not independent of the merits of his federal constitutional challenge.[3] That court's invocation of res

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[3] Contrary to the dissent's assertion, see *post*, at 6–8, it is perfectly consistent with this Court's past practices to review a lower court decision—in this case, that of the Georgia habeas court—in order to ascertain whether a federal question may be implicated in an unreasoned summary order from a higher court. See, *e.g.*, *R. J. Reynolds*, 479 U. S., at 136–139 (exercising §1257 jurisdiction over unreasoned judgment by the North Carolina Supreme Court after examining grounds of decision posited by North Carolina Court of Appeal); see also Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett, Dan Himmelfarb, Supreme Court Practice 211 (10th ed. 2013) ("[W]here the state court opinion fails to yield precise answers as to the grounds of decision, the Court may be forced to turn to other parts of the record, such as pleadings, motions, and trial court rulings, to determine if a federal claim is so central to the controversy as to

judicata therefore poses no impediment to our review of Foster's *Batson* claim. See *Ake*, 470 U. S., at 75.[4]

III

A

The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder* v. *Louisiana*, 552 U. S. 472, 478 (2008) (internal quotation marks omitted). Our decision in *Batson* v. *Kentucky*, 476 U. S. 79, provides a three-step process for determining when a strike is discriminatory:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder*, 552 U. S., at 476–477 (internal quotation marks and brackets omitted).

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preclude resting the judgment on independent and adequate state grounds."). And even the dissent does not follow its own rule. It too goes beyond the unreasoned order of the Georgia Supreme Court in determining that the "likely explanation for the court's denial of habeas relief is that Foster's claim is procedurally barred." *Post*, at 2. There would be no way to know this, of course, from the face of the Georgia Supreme Court's summary order.

[4]The concurrence notes that the "res judicata rule applied by the Superior Court in this case is quite different" from the state procedural bar at issue in *Ake*, which was "entirely dependent on federal law." *Post*, at 8. But whether a state law determination is characterized as "entirely dependent on," *ibid.*, "resting primarily on," *Stewart* v. *Smith*, 536 U. S. 856, 860 (2002) (*per curiam*), or "influenced by" a question of federal law, *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984), the result is the same: the state law determination is not independent of federal law and thus poses no bar to our jurisdiction.

Both parties agree that Foster has demonstrated a prima facie case, and that the prosecutors have offered race-neutral reasons for their strikes. We therefore address only *Batson*'s third step. That step turns on factual determinations, and, "in the absence of exceptional circumstances," we defer to state court factual findings unless we conclude that they are clearly erroneous. *Synder*, 552 U. S., at 477.

Before reviewing the factual record in this case, a brief word is in order regarding the contents of the prosecution's file that Foster obtained through his Georgia Open Records Act requests. Pursuant to those requests, Foster received a "certif[ied] . . . true and correct copy of 103 pages of the State's case file" from his 1987 trial. App. 247. The State argues that "because [Foster] did not call either of the prosecutors to the stand" to testify in his state habeas proceedings, "he can only speculate as to the meaning of various markings and writings" on those pages, "the author of many of them, and whether the two prosecutors at trial (District Attorney Lanier and Assistant District Attorney Pullen) even saw many of them." Brief for Respondent 20. For these reasons, the State argues, "none of the specific pieces of new evidence [found in the file] shows an intent to discriminate." *Ibid.* (capitalization omitted). For his part, Foster argues that "[t]here is no question that the prosecutors used the lists and notes, which came from the prosecution's file and were certified as such," and therefore the "source of the lists and notes, their timing, and their purpose is hardly 'unknown' or based on 'conjecture.'" Reply Brief 4–5 (quoting Brief for Respondent 27–28).

The State concedes that the prosecutors themselves authored some documents, see, *e.g.*, Tr. of Oral Arg. 45 (admitting that one of the two prosecutors must have written the list titled "definite NO's"), and Lundy's testimony strongly suggests that the prosecutors viewed oth-

ers, see, *e.g.*, Tr. 220 (noting that the highlighted jury venire lists were returned to Lanier prior to jury selection). There are, however, genuine questions that remain about the provenance of other documents. Nothing in the record, for example, identifies the author of the notes that listed three black prospective jurors as "B#1," "B#2," and "B#3." Such notes, then, are not necessarily attributable directly to the prosecutors themselves. The state habeas court was cognizant of those limitations, but nevertheless admitted the file into evidence, reserving "a determination as to what weight the Court is going to put on any of [them]" in light of the objections urged by the State. 1 Record 20.

We agree with that approach. Despite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. We have "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder,* 552 U. S., at 478. As we have said in a related context, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). At a minimum, we are comfortable that all documents in the file were authored by *someone* in the district attorney's office. Any uncertainties concerning the documents are pertinent only as potential limits on their probative value.

B

Foster centers his *Batson* claim on the strikes of two black prospective jurors, Marilyn Garrett and Eddie Hood. We turn first to Marilyn Garrett. According to Lanier, on the morning that the State was to use its strikes he had

not yet made up his mind to remove Garrett. Rather, he decided to strike her only after learning that he would not need to use a strike on another black prospective juror, Shirley Powell, who was excused for cause that morning.

Ultimately, Lanier did strike Garrett. In justifying that strike to the trial court, he articulated a laundry list of reasons. Specifically, Lanier objected to Garrett because she: (1) worked with disadvantaged youth in her job as a teacher's aide; (2) kept looking at the ground during *voir dire*; (3) gave short and curt answers during *voir dire*; (4) appeared nervous; (5) was too young; (6) misrepresented her familiarity with the location of the crime; (7) failed to disclose that her cousin had been arrested on a drug charge; (8) was divorced; (9) had two children and two jobs; (10) was asked few questions by the defense; and (11) did not ask to be excused from jury service. See App. 55–57 (pretrial hearing); *id.*, at 93–98, 105, 108, 110–112 (new trial hearing); Record in No. 45609 (Ga. 1988), pp. 439–440 (hereinafter Trial Record) (brief in opposition to new trial).

The trial court accepted Lanier's justifications, concluding that "[i]n the totality of circumstances," there was "no discriminatory intent, and that there existed reasonably clear, specific, and legitimate reasons" for the strike. App. 143. On their face, Lanier's justifications for the strike seem reasonable enough. Our independent examination of the record, however, reveals that much of the reasoning provided by Lanier has no grounding in fact.

Lanier's misrepresentations to the trial court began with an elaborate explanation of how he ultimately came to strike Garrett:

> "[T]he prosecution considered this juror [to have] the most potential to choose from out of the four remaining blacks in the 42 [member] panel venire. However, a system of events took place on the morning of jury

> selection that caused the excusal of this juror. The [S]tate had, in his jury notes, *listed this juror as questionable*. The four negative challenges were allocated for Hardge, Hood, Turner and Powell. . . . But on the morning of jury selection, Juror Powell was excused for cause with no objections by [d]efense counsel. She was replaced by Juror Cadle [who] was acceptable to the State. This left the State with an additional strike it had not anticipated or allocated. Consequently, the State had to choose between [white] Juror Blackmon or Juror Garrett, the only two *questionable* jurors the State had left on the list." Trial Record 438–440 (brief in opposition to new trial) (emphasis added and citations omitted).

Lanier then offered an extensive list of reasons for striking Garrett and explained that "[t]hese factors, with no reference to race, were considered by the prosecutor in this particular case to result in a juror less desirable from the prosecutor's viewpoint than Juror Blackmon." *Id.,* at 441 (emphasis deleted).

Lanier then compared Blackmon to Garrett. In contrast to Garrett, Juror Blackmon

> "was 46 years old, married 13 years to her husband who works at GE, buying her own home and [was recommended by a third party to] this prosecutor. She was no longer employed at Northwest Georgia Regional Hospital and she attended Catholic church on an irregular basis. She did not hesitate when answering the questions concerning the death penalty, had good eye contact with the prosecutor and gave good answers on the insanity issue. She was perceived by the prosecutor as having a stable home environment, of the right age and no association with any disadvantaged youth organizations." *Ibid.*

Lanier concluded that "the chances of [Blackmon] return-

ing a death sentence were greater when all these factors were considered than Juror Garrett. Consequently, Juror Garrett was excused." *Ibid.*

The trial court accepted this explanation in denying Foster's motion for a new trial. See App. 142–143. But the predicate for the State's account—that Garrett was "listed" by the prosecution as "questionable," making that strike a last-minute race-neutral decision—was false.

During jury selection, the State went first. As a consequence, the defense could accept any prospective juror not struck by the State without any further opportunity for the State to use a strike against that prospective juror. Accordingly, the State had to "pretty well select the ten specific people [it] intend[ed] to strike" in advance. *Id.*, at 83 (pretrial hearing); accord, *ibid.* ("[T]he ten people that we felt very uncomfortable with, we have to know up front." (Lanier testimony)). The record evidence shows that Garrett was one of those "ten specific people."

That much is evident from the "definite NO's" list in the prosecution's file. Garrett's name appeared on that list, which the State concedes was written by one of the prosecutors. Tr. of Oral Arg. 45. That list belies Lanier's assertion that the State considered allowing Garrett to serve. The title of the list meant what it said: Garrett was a "*definite* NO." App. 301 (emphasis added). The State from the outset was intent on ensuring that *none* of the jurors on that list would serve.

The first five names on the "definite NO's" list were Eddie Hood, Evelyn Hardge, Shirley Powell, Marilyn Garrett, and Mary Turner. All were black. The State struck each one except Powell (who, as discussed, was excused for cause at the last minute—though the prosecution informed the trial court that the "State was not, under any circumstances, going to take [Powell]," Trial Record 439 (brief in opposition to new trial)). Only in the number six position did a white prospective juror appear,

and she had informed the court during *voir dire* that she could not "say positively" that she could impose the death penalty even if the evidence warranted it. 6 Tr. in No. 86–2218–2 (Super. Ct. Floyd Cty., Ga., 1987), p. 1152 (hereinafter Trial Transcript); see also *id.,* at 1153–1158. In short, contrary to the prosecution's submissions, the State's resolve to strike Garrett was never in doubt. See also App. 290 ("N" appears next to Garrett's name on juror list); *id.,* at 300 (same).

The State attempts to explain away the contradiction between the "definite NO's" list and Lanier's statements to the trial court as an example of a prosecutor merely "misspeak[ing]." Brief for Respondent 51. But this was not some off-the-cuff remark; it was an intricate story expounded by the prosecution in writing, laid out over three single-spaced pages in a brief filed with the trial court.

Moreover, several of Lanier's reasons for *why* he chose Garrett over Blackmon are similarly contradicted by the record. Lanier told the court, for example, that he struck Garrett because "the defense did not ask her questions about" pertinent trial issues such as her thoughts on "insanity" or "alcohol," or "much questions on publicity." App. 56 (pretrial hearing). But the trial transcripts reveal that the defense asked her several questions on all three topics. See 5 Trial Transcript 955–956 (two questions on insanity and one on mental illness); *ibid.* (four questions on alcohol); *id.,* at 956–957 (five questions on publicity).

Still other explanations given by the prosecution, while not explicitly contradicted by the record, are difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror. Lanier told the trial court that he struck Garrett because she was divorced. App. 56 (pretrial hearing). But he declined to strike three out of the four prospective white jurors who were also divorced. See Juror Questionnaire in No. 86–2218–2 (Super. Ct. Floyd

Cty., Ga., 1987) (hereinafter Juror Questionnaire), for Juror No. 23, p. 2 (juror Coultas, divorced); *id.*, No. 33, p. 2 (juror Cochran, divorced); *id.*, No. 107, p. 2 (juror Hatch, divorced); App. 23–24, 31 (State accepting jurors Coultas, Cochran, and Hatch). Additionally, Lanier claimed that he struck Garrett because she was too young, and the "State was looking for older jurors that would not easily identify with the defendant." Trial Record 439; see App. 55 (pretrial hearing). Yet Garrett was 34, and the State declined to strike eight white prospective jurors under the age of 36. See Trial Record 439; Juror Questionnaire No. 4, p. 1; *id.*, No. 10, p. 1; *id.*, No. 23, p. 1; *id.*, No. 48, p. 1; *id.*, No. 70, p. 1; *id.*, No. 71, p. 1; *id.*, No. 92, p. 1; *id.*, No. 106, p. 1; see App. 22–31. Two of those white jurors served on the jury; one of those two was only 21 years old. See *id.,* at 35.

Lanier also explained to the trial court that he struck Garrett because he "felt that she was less than truthful" in her answers in *voir dire*. *Id.,* at 108 (new trial hearing). Specifically, the State pointed the trial court to the following exchange:

> "[Court]: Are you familiar with the neighborhood where [the victim] lived, North Rome?
> "[Garrett]: No." 5 Trial Transcript 950–951.

Lanier, in explaining the strike, told the trial court that in apparent contradiction to that exchange (which represented the only time that Garrett was asked about the topic during *voir dire*), he had "noted that [Garrett] attended Main High School, which is only two blocks from where [the victim] lived and certainly in the neighborhood. She denied any knowledge of the area." Trial Record 439 (brief in opposition to new trial).

We have no quarrel with the State's general assertion that it "could not trust someone who gave materially untruthful answers on voir dire." *Foster*, 258 Ga., at 739,

374 S. E. 2d, at 192. But even this otherwise legitimate reason is difficult to credit in light of the State's acceptance of (white) juror Duncan. Duncan gave practically the same answer as Garrett did during *voir dire*:

> "[Court]: Are you familiar with the neighborhood in which [the victim] live[d]?
> "[Duncan]: No. I live in Atteiram Heights, but it's not—I'm not familiar with up there, you know." 5 Trial Transcript 959.

But, as Lanier was aware, Duncan's "residence [was] less than a half a mile from the murder scene" and her workplace was "located less than 250 yards" away. Trial Record 430 (brief in opposition to new trial).

In sum, in evaluating the strike of Garrett, we are not faced with a single isolated misrepresentation.

C

We turn next to the strike of Hood. According to Lanier, Hood "was exactly what [the State] was looking for in terms of age, between forty and fifty, good employment and married." App. 44 (pretrial hearing). The prosecution nonetheless struck Hood, giving eight reasons for doing so. Hood: (1) had a son who was the same age as the defendant and who had previously been convicted of a crime; (2) had a wife who worked in food service at the local mental health institution; (3) had experienced food poisoning during *voir dire*; (4) was slow in responding to death penalty questions; (5) was a member of the Church of Christ; (6) had a brother who counseled drug offenders; (7) was not asked enough questions by the defense during *voir dire*; and (8) asked to be excused from jury service. See *id.*, at 44–47; *id.*, at 86, 105, 110–111 (new trial hearing); Trial Record 433–435 (brief in opposition to new trial). An examination of the record, however, convinces us that many of these justifications cannot be credited.

As an initial matter, the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual. In response to Foster's pretrial *Batson* challenge, District Attorney Lanier noted all eight reasons, but explained:

> "*The only thing I was concerned about*, and I will state it for the record. He has an eighteen year old son which is about the same age as the defendant.
>
> "In my experience prosecuting over twenty-five murder cases . . . individuals having the same son as [a] defendant who is charged with murder [have] serious reservations and are more sympathetic and lean toward that particular person.
>
> "It is ironic that his son, . . . Darrell Hood[,] has been sentenced . . . by the Court here, to theft by taking on April 4th, 1982. . . . [T]heft by taking is basically the same thing that this defendant is charged with." App. 44–45 (pretrial hearing; emphasis added).

But by the time of Foster's subsequent motion for a new trial, Lanier's focus had shifted. He still noted the similarities between Hood's son and Foster, see *id.*, at 105 (new trial hearing), but that was no longer the key reason behind the strike. Lanier instead told the court that his paramount concern was Hood's membership in the Church of Christ: "The Church of Christ people, while they may not take a formal stand against the death penalty, they are very, very reluctant to vote for the death penalty." *Id.*, at 84 (new trial hearing); accord, Trial Record 434–435 ("It is the opinion of this prosecutor that in a death penalty case, Church of Christ affiliates are reluctant to return a verdict of death." (brief in opposition to new trial)). Hood's religion, Lanier now explained, was the most important factor behind the strike: "I evaluated the whole Eddie Hood. . . . And *the bottom line* on Eddie Hood is the Church of Christ affiliation." App. 110–111 (new trial

hearing; emphasis added).

Of course it is possible that Lanier simply misspoke in one of the two proceedings. But even if that were so, we would expect at least *one* of the two purportedly principal justifications for the strike to withstand closer scrutiny. Neither does.

Take Hood's son. If Darrell Hood's age was the issue, why did the State accept (white) juror Billy Graves, who had a 17-year-old son? Juror Questionnaire No. 31, p. 3; see App. 24. And why did the State accept (white) juror Martha Duncan, even though she had a 20-year-old son? Juror Questionnaire No. 88, p. 3; see App. 30.

The comparison between Hood and Graves is particularly salient. When the prosecution asked Hood if Foster's age would be a factor for him in sentencing, he answered "None whatsoever." Trial Transcript 280. Graves, on the other hand, answered the same question "probably so." *Id.*, at 446. Yet the State struck Hood and accepted Graves.

The State responds that Duncan and Graves were not similar to Hood because Hood's son had been convicted of theft, while Graves's and Duncan's sons had not. See Brief for Respondent 34–35; see also App. 135–136 ("While the defense asserts that the state used different standards for white jurors, insofar as many of them had children near the age of the Defendant, the Court believes that [Darrell Hood's] conviction is a distinction that makes the difference." (trial court opinion denying new trial)). Lanier had described Darrell Hood's conviction to the trial court as being for "basically the same thing that this defendant is charged with." *Id.*, at 45 (pretrial hearing). Nonsense. Hood's son had received a 12-month suspended sentence for stealing hubcaps from a car in a mall parking lot five years earlier. Trial Record 446. Foster was charged with capital murder of a 79-year-old widow after a brutal sexual assault. The "implausible" and "fantastic"

assertion that the two had been charged with "basically the same thing" supports our conclusion that the focus on Hood's son can only be regarded as pretextual. *Miller-El* v. *Cockrell*, 537 U. S. 322, 339 (2003); see also *ibid*. ("Credibility can be measured by, among other factors, . . . how reasonable, or how improbable, the [State's] explanations are.").

The prosecution's second principal justification for striking Hood—his affiliation with the Church of Christ, and that church's alleged teachings on the death penalty—fares no better. Hood asserted no fewer than four times during *voir dire* that he could impose the death penalty.[5] A prosecutor is entitled to disbelieve a juror's *voir dire* answers, of course. But the record persuades us that Hood's race, and not his religious affiliation, was Lanier's true motivation.

The first indication to that effect is Lanier's mischaracterization of the record. On multiple occasions, Lanier asserted to the trial court that three white prospective jurors who were members of the Church of Christ had been struck for cause due to their opposition to the death penalty. See App. 46 ("[Hood's] religious preference is Church of Christ. There have been [three] other jurors that have been excused for cause by agreement that belong to the Church of Christ, Juror No. 35, 53, and 78." (pretrial hearing)); *id.,* at 114 ("Three out of four jurors who professed to be members of the Church of Christ,

[5] See 2 Trial Transcript 269 ("[Court]: Are you opposed to or against the death penalty? A: I am not opposed to it. Q: If the facts and circumstances warrant the death penalty, are you prepared to vote for the death penalty? A: Yes."); *id.,* at 270 ("[Court]: [A]re you prepared to vote for the death penalty? Now you said yes to that. A: All right. Q: Are you still saying yes? A: Uh-huh."); *id.,* at 274 ("[Court]: If the evidence warrants the death penalty, could you vote for the death penalty? A: Yes. I could vote for the death penalty."); *id.,* at 278 ("[Pullen]: And if the facts and circumstances warranted, you could vote to impose the death penalty? Yes.").

went off for [cause related to opposition to the death penalty]." (new trial hearing)); Trial Record 435 ("Church of Christ jurors Terry (#35), Green (#53), and Waters (#78) [were] excused for cause due to feeling[s] against the death penalty." (brief in opposition to new trial)).

That was not true. One of those prospective jurors was excused before even being questioned during *voir dire* because she was five-and-a-half months pregnant. 5 Trial Transcript 893. Another was excused by the agreement of both parties because her answers on the death penalty made it difficult to ascertain her precise views on capital punishment. See Brief for Respondent 39 ("[I]t was entirely unclear if [this juror] understood any of the trial court's questions and her answers are equivocal at best."). And the judge found cause to dismiss the third because she had already formed an opinion about Foster's guilt. See 3 Trial Transcript 558 ("[Court]: And you have made up your mind already as to the guilt of the accused? A: Yes, sir. [Court]: I think that's cause.").

The prosecution's file fortifies our conclusion that any reliance on Hood's religion was pretextual. The file contains a handwritten document titled "Church of Christ." The document notes that the church "doesn't take a stand on [the] Death Penalty," and that the issue is "left for each individual member." App. 302. The document then states: "NO. NO Black Church." *Ibid.* The State tries to downplay the significance of this document by emphasizing that the document's author is unknown. That uncertainty is pertinent. But we think the document is nonetheless entitled to significant weight, especially given that it is consistent with our serious doubts about the prosecution's account of the strike.

Many of the State's secondary justifications similarly come undone when subjected to scrutiny. Lanier told the trial court that Hood "appeared to be confused and slow in responding to questions concerning his views on the death

penalty." Trial Record 434 (brief in opposition to new trial). As previously noted, however, Hood unequivocally voiced his willingness to impose the death penalty, and a white juror who showed similar confusion served on the jury. Compare 5 Trial Transcript 1100–1101 (white juror Huffman's answers) with 2 *id.,* at 269–278 (Hood's answers); see App. 35. According to the record, such confusion was not uncommon. See *id.,* at 138 ("The Court notes that [Hood's] particular confusion about the death penalty questions was not unusual."); accord, 5 Trial Transcript 994 ("[Court]: I think these questions should be reworded. I haven't had a juror yet that understood what that meant."); *id.,* at 1101–1102 ("[Court]: I still say that these questions need changing overnight, because one out of a hundred jurors, I think is about all that's gone along with knowing what [you're asking].").

Lanier also stated that he struck Hood because Hood's wife worked at Northwest Regional Hospital as a food services supervisor. App. 45 (pretrial hearing). That hospital, Lanier explained, "deals a lot with mentally disturbed, mentally ill people," and so people associated with it tend "to be more sympathetic to the underdog." *Ibid.* But Lanier expressed no such concerns about white juror Blackmon, who had worked at the same hospital. Blackmon, as noted, served on the jury.

Lanier additionally stated that he struck Hood because the defense "didn't ask [Hood] any question[s] about the age of the defendant," "his feelings about criminal responsibility involved in insanity," or "publicity." *Id.,* at 47. Yet again, the trial transcripts clearly indicate the contrary. See 2 Trial Transcript 280 ("Q: Is age a factor to you in trying to determine whether or not a defendant should receive a life sentence or a death sentence? A: None whatsoever."); *ibid.* ("Q: Do you have any feeling about the insanity defense? A: Do I have any opinion about that? I have not formed any opinion about that."); *id.,* at 281 ("Q:

Okay. The publicity that you have heard, has that publicity affected your ability to sit as a juror in this case and be fair and impartial to the defendant? A: No, it has no effect on me.").

D

As we explained in *Miller-El* v. *Dretke*, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." 545 U. S. 231, 241 (2005). With respect to both Garrett and Hood, such evidence is compelling. But that is not all. There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file. Considering all of the circumstantial evidence that "bear[s] upon the issue of racial animosity," we are left with the firm conviction that the strikes of Garrett and Hood were "motivated in substantial part by discriminatory intent." *Snyder*, 552 U. S., at 478, 485.[6]

IV

Throughout all stages of this litigation, the State has strenuously objected that "race [was] not a factor" in its jury selection strategy. App. 41 (pretrial hearing); but see *id.,* at 120 (Lanier testifying that the strikes were "based on many factors and not *purely* on race." (emphasis added) (new trial hearing)). Indeed, at times the State has been downright indignant. See Trial Record 444 ("The Defenses's [*sic*] misapplication of the law and erroneous distor-

[6] In *Snyder*, we noted that we had not previously allowed the prosecution to show that "a discriminatory intent [that] was a substantial or motivating factor" behind a strike was nevertheless not "determinative" to the prosecution's decision to exercise the strike. 552 U. S., at 485. The State does not raise such an argument here and so, as in *Snyder*, we need not decide the availability of such a defense.

tion of the facts are an attempt to discredit the prosecutor. . . . The State and this community demand an apology." (brief in opposition to new trial)).

The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a "color-blind" manner. App. 41, 60 (pretrial hearing). The sheer number of references to race in that file is arresting. The State, however, claims that things are not quite as bad as they seem. The focus on black prospective jurors, it contends, does not indicate any attempt to exclude them from the jury. It instead reflects an effort to ensure that the State was "thoughtful and non-discriminatory in [its] consideration of black prospective jurors [and] to develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding [its] selections were pretextual." Brief for Respondent 6. *Batson*, after all, had come down only months before Foster's trial. The prosecutors, according to the State, were uncertain what sort of showing might be demanded of them and wanted to be prepared.

This argument falls flat. To begin, it "reeks of afterthought," *Miller-El*, 545 U. S., at 246, having never before been made in the nearly 30-year history of this litigation: not in the trial court, not in the state habeas court, and not even in the State's brief in opposition to Foster's petition for certiorari.

In addition, the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury. The State argues that it "was actively seeking a black juror." Brief for Respondent 12; see also App. 99 (new trial hearing). But this claim is not credible. An "N" appeared next to each of the black prospective jurors' names on the jury venire list. See, *e.g., id.,* at 253. An "N" was also noted next to the name of each black prospective juror on the list of the 42 qualified prospective jurors; each of those names also appeared on

the "definite NO's" list. See *id.,* 299–301. And a draft affidavit from the prosecution's investigator stated his view that "[i]f it comes down to *having to pick* one of the black jurors, [Marilyn] Garrett, might be okay." *Id.*, at 345 (emphasis added); see also *ibid.* (recommending Garrett "if we *had to pick* a black juror" (emphasis added)). Such references are inconsistent with attempts to "actively see[k]" a black juror.

The State's new argument today does not dissuade us from the conclusion that its prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows.

The order of the Georgia Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 14–8349

TIMOTHY TYRONE FOSTER, PETITIONER *v.* BRUCE CHATMAN, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

[May 23, 2016]

JUSTICE ALITO, concurring in the judgment.

I agree with the Court that the decision of the Supreme Court of Georgia cannot be affirmed and that the case must be remanded. I write separately to explain my understanding of the role of state law in the proceedings that must be held on remand.

I

As the Court recounts, in August 1986, Queen Madge White, a 79-year-old retired schoolteacher, was sexually assaulted and brutally murdered in her home in Rome, Georgia. Her home was ransacked, and various household items were stolen. *Foster* v. *State*, 258 Ga. 736, 374 S. E. 2d 188 (1988). About a month after the murder, police officers were called to respond to a local disturbance. The complainant, Lisa Stubbs, told them that her boyfriend, petitioner Timothy Foster, had killed White and had distributed the goods stolen from White's home to Stubbs and family members. Tr. 1719–1723. Officers arrested Foster, who confessed to the murder and robbery, 258 Ga., at 736, 374 S. E. 2d, at 190, and the police recovered some of the stolen goods.

Foster was put on trial for White's murder, convicted, and sentenced to death. Before, during, and after his trial, Foster argued that the prosecution violated his rights

under this Court's then-recent decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), by peremptorily challenging all the prospective jurors who were black. After the Georgia Supreme Court rejected Foster's *Batson a*rgument on direct appeal, he filed a petition for a writ of certiorari in this Court, but his petition did not raise a *Batson* claim,[1] and the petition was denied. *Foster* v. *Georgia*, 490 U. S. 1085 (1989).

In July 1989, Foster filed a state habeas petition in the Superior Court of Butts County, Georgia. For the next 10 years, most of Foster's claims (including his *Batson* claim) were held in abeyance while the Georgia courts adjudicated Foster's claim that he is "mentally retarded" and thus cannot be executed under Georgia law. *Zant* v. *Foster*, 261 Ga. 450, 406 S. E. 2d 74 (1991). After extensive court proceedings, including two visits to the State Supreme Court,[2] additional petitions for certiorari to this Court,[3] and a jury trial on the issue of intellectual disability, Foster was denied relief on that claim. He then amended his habeas petition, and the Superior Court considered the many other claims asserted in his petition, including his *Batson* claim. In support of that claim, Foster offered new evidence, namely, the prosecution's jury selection notes, which he had obtained through a Georgia open-records request. These notes showed that someone had highlighted the names of black jurors and had written the letter "B" next to their names.

The Superior Court issued a written decision in which it evaluated Foster's habeas claims. The opinion began by noting that many of his claims were barred by res judi-

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[1] Nor did his petition for rehearing, which was also denied. *Foster* v. *Georgia*, 492 U. S. 928 (1989).

[2] See *Zant* v. *Foster*, 261 Ga. 450, 406 S. E. 2d 74 (1991); *Foster* v. *State*, 272 Ga. 69, 525 S. E. 2d 78 (2000).

[3] See *Foster* v. *Georgia*, 503 U. S. 921 (1992); *Foster* v. *Georgia*, 531 U. S. 890, reh'g denied, 531 U. S. 1045 (2000).

cata. The opinion stated: "[T]his court notes . . . that the following claims are not reviewable based on the doctrine of res judicata, as the claims were raised and litigated adversely to the petitioner on his direct appeal to the Georgia Supreme Court." App. 175. Included in the list of barred claims was "Petitioner['s] alleg[ation] that the State used peremptory challenges in a racially discriminatory manner in violation of *Batson*." *Id.*, at 175–176.

Later in its opinion, the Superior Court again referred to the *Batson* claim and wrote as follows:

> "The Respondent argues that this claim is not reviewable due to the doctrine of res judicata. However, because the Petitioner claims that additional evidence allegedly supporting this ground was discovered subsequent to the Georgia Supreme Court's ruling in *Foster v. State*, 258 Ga. 736 (1988) [the decision affirming Foster's conviction on direct appeal], this court will review the *Batson* claim as to whether Petitioner has shown any change in the facts sufficient to overcome the res judicata bar." *Id.,* at 192.

The court then reviewed the evidence and concluded that it "[could not] find that the highlighting of the names of black jurors and the notation of their race can serve to override this previous consideration [on direct appeal]." *Id.,* at 193. Because "all jurors in this case, regardless of race, were thoroughly investigated and considered before the State exercised its peremptory challenges," the court found that "Petitioner fail[ed] to demonstrate purposeful discrimination on the basis that the race of prospective jurors was either circled, highlighted or otherwise noted on various lists." *Id.,* at 195. Thus, the court held that the *Batson* claim was "without merit." App. 196.

Foster subsequently sought review of the Superior Court's decision in the Georgia Supreme Court, but that court refused to issue a certificate of probable cause (CPC)

to appeal. In its entirety, the State Supreme Court order states:

> "Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur, except Benham, J., who dissents." *Id.,* at 246.

Foster sought review of this decision, and this Court granted certiorari to review the decision of the Georgia Supreme Court. 575 U. S. ___ (2015).

II

The decision of the Georgia Supreme Court was a decision on the merits of Foster's *Batson* claim, as presented in his state habeas petition. See Ga. Sup. Ct. Rule 36 (2016) (a CPC to appeal a final judgment in a habeas corpus case involving a criminal conviction "will be issued where there is arguable merit"); *Hittson* v. *Warden*, 759 F. 3d 1210, 1232 (CA11 2014) (The Georgia Supreme Court's standard for denying a CPC "clearly constitutes an adjudication on the merits"). Thus, what the Georgia Supreme Court held was that Foster's *Batson* claim, as presented in his state habeas petition, lacked arguable merit.

That holding was likely based at least in part on state law. As noted, the Superior Court quite clearly held that Foster's *Batson* claim was barred by res judicata. That conclusion, to be sure, was not entirely divorced from the merits of his federal constitutional claim, since the court went on to discuss the evidence advanced by petitioner in support of his argument that the prosecution's strikes of black members of the venire were based on race. Rather, it appears that the Superior Court understood state law to permit Foster to obtain reconsideration of his previously rejected *Batson* claim only if he was able to show that a "change in the facts" was "sufficient to overcome the res

judicata bar." App. 192.

In concluding that Foster's renewed *Batson* claim was required to meet a heightened standard, the Superior Court appears to have been following established Georgia law. Some Georgia cases seem to stand for the proposition that the bar is absolute, at least in some circumstances. See, *e.g., Roulain* v. *Martin*, 266 Ga. 353, 466 S. E. 2d 837, 839 (1996) ("Since this issue was raised and resolved in Martin's direct appeal, it should not have been readdressed by the habeas court"); *Davis* v. *Thomas*, 261 Ga. 687, 689, 410 S. E. 2d 110, 112 (1991) ("This issue was raised on direct appeal, and this court determined that it had no merit. Davis recognizes the principle that one who had an issue decided adversely to him on direct appeal is precluded from relitigating that issue on habeas corpus"); *Gunter* v. *Hickman*, 256 Ga. 315, 316, 348 S. E. 2d 644, 645 (1986) ("This issue was actually litigated, i.e., raised and decided, in the appellant's direct appeal . . . . For this reason, the issue cannot be reasserted in habeas-corpus proceedings"); *Elrod* v. *Ault*, 231 Ga. 750, 204 S. E. 2d 176 (1974) ("After an appellate review the same issues will not be reviewed on habeas corpus"). Other decisions, however, allow a defendant to overcome res judicata if he can produce newly discovered evidence that was not "reasonably available" to him on direct review. *Gibson* v. *Head*, 282 Ga. 156, 159, 646 S. E. 2d 257, 260 (2007); see also *Gibson* v. *Ricketts*, 244 Ga. 482, 483, 260 S. E. 2d 877, 878 (1979).[4]

[4] Georgia res judicata law may also include a "miscarriage of justice" exception, but that appears to capture only the exceptionally rare claim of actual innocence, and so is not at issue here. See *Walker* v. *Penn*, 271 Ga. 609, 611, 523 S. E. 2d 325, 327 (1999) ("The term miscarriage of justice is by no means to be deemed synonymous with procedural irregularity, or even with reversible error. To the contrary, it demands a much greater substance, approaching perhaps the imprisonment of one who, not only is *not* guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry. (A plain example is a case of mistaken identity)" (brackets omitted)).

In restricting the relitigation of previously rejected claims, Georgia is not alone. "[W]e have long and consistently affirmed that a collateral challenge may not do service for an appeal." *United States* v. *Frady*, 456 U. S. 152, 165 (1982). Accordingly, at least as a general rule, federal prisoners may not use a motion under 28 U. S. C. §2255 to relitigate a claim that was previously rejected on direct appeal. See, *e.g., Reed* v. *Farley*, 512 U. S. 339, 358 (1994) (Scalia, J., concurring in part and concurring in judgment) ("[C]laims will ordinarily not be entertained under §2255 that have already been rejected on direct review"); *Withrow* v. *Williams*, 507 U. S. 680, 721 (1993) (Scalia, J., concurring in part and dissenting in part) ("[A]bsent countervailing considerations, district courts may refuse to reach the merits of a constitutional claim previously raised and rejected on direct appeal"); *United States* v. *Lee*, 715 F. 3d 215, 224 (CA8 2013); *Rozier* v. *United States*, 701 F. 3d 681, 684 (CA11 2012); *United States* v. *Roane*, 378 F. 3d 382, 396, n. 7 (CA4 2004); *United States* v. *Webster*, 392 F. 3d 787, 791 (CA5 2004); *White* v. *United States*, 371 F. 3d 900, 902 (CA7 2004); *United States* v. *Jones*, 918 F. 2d 9, 10–11 (CA2 1990); *United States* v. *Prichard*, 875 F. 2d 789, 790–791 (CA10 1989). Cf. *Davis* v. *United States*, 417 U. S. 333, 342 (1974). As we have said, "[i]t has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice." *United States* v. *Addonizio*, 442 U. S. 178, 184 (1979) (footnote omitted).

In accordance with this principle, federal law provides that a state prisoner may not relitigate a claim that was rejected in a prior federal habeas petition. See 28 U. S. C. §§2244(b)(1)–(3). And even when a state prisoner's second

or successive federal habeas petition asserts a new federal constitutional claim based on what is asserted to be new evidence, the claim must be dismissed unless a very demanding test is met. See §2244(b)(2)(B) ("[T]he factual predicate for the claim could not have been discovered previously through the exercise of due diligence"; and the facts must "be sufficient to establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty").

"[T]he principle of finality" is "essential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U. S. 288, 309 (1989) (plurality opinion). Thus, once a criminal conviction becomes final—as Foster's did 30 years ago—state courts need not remain open indefinitely to relitigate claims related to that conviction which were raised and decided on direct review. States are under no obligation to permit collateral attacks on convictions that have become final, and if they allow such attacks, they are free to limit the circumstances in which claims may be relitigated.

To the extent that the decision of the Georgia Supreme Court was based on a state rule restricting the relitigation of previously rejected claims, the decision has a state-law component, and we have no jurisdiction to review a state court's decision on a question of state law. See 28 U. S. C. §1257(a). This Court, no less than every other federal court, has "an independent obligation to ensure that [we] do not exceed the scope of [our] jurisdiction, and therefore [we] must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson* v. *Shinseki*, 562 U. S. 428, 434 (2011).

III

"This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim

and an 'adequate' basis for the court's decision," *Harris* v. *Reed,* 489 U. S. 255, 260 (1989), and like the Court (and both petitioner and respondent) I agree that we cannot conclude from the brief order issued by the Supreme Court of Georgia that its decision was based wholly on state law. It is entirely possible that the State Supreme Court reached a conclusion about the effect of the state res judicata bar based in part on as assessment of the strength of Foster's *Batson* claim or the extent to which the new evidence bolstered that claim. And if that is what the State Supreme Court held, the rule that the court applied was an amalgam of state and federal law.

By the same token, however, the state-law res judicata rule applied by the Superior Court is clearly not like the rule in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), which appears to have been entirely dependent on federal law. In *Ake*, a prisoner argued that due process entitled him to obtain the services of a psychiatrist in order to prove that he was insane at the time when he committed a murder. The Oklahoma courts concluded that *Ake*'s claim was waived, but the Oklahoma waiver rule essentially made an exception for any case in which there was a violation of a fundamental federal constitutional right. See *id*., at 74–75 ("The Oklahoma waiver rule does not apply to fundamental trial error," including "federal constitutional errors [that] are 'fundamental'"). Thus, the state waiver rule was entirely dependent on federal law, and this Court therefore held that it had jurisdiction to review the underlying constitutional question—whether Ake was entitled to a psychiatrist. Then, having found a constitutional violation, the Court remanded for a new trial. *Id*., at 86–87.

The res judicata rule applied by the Superior Court in this case is quite different. That court obviously did not think that Georgia law included an *Ake*-like exception that would permit a defendant to overcome res judicata simply

by making the kind of showing of federal constitutional error that would have been sufficient when the claim was first adjudicated. Accordingly, *Ake* does not mean that we can simply disregard the possibility that the decision under review may have a state-law component.

Our cases chart the path that we must follow in a situation like the one present here. When "a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law," the proper course is for this Court to "revie[w] the federal question on which the state-law determination appears to have been premised. If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984). See also S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice 212 (10th ed. 2013). In a situation like the one presented here, the correct approach is for us to decide the question of federal law and then to remand the case to the state court so that it can reassess its decision on the state-law question in light of our decision on the underlying federal issue.[5]

IV

I agree with the Court that the totality of the evidence now adduced by Foster is sufficient to make out a *Batson* violation. On remand, the Georgia Supreme Court is

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[5]The Court relies on *Ake* solely for the proposition, with which I agree, that we have jurisdiction to review the federal question whether the totality of the circumstances (that is, all the facts brought to the attention of the state courts on direct appeal and collateral review) make out a *Batson* claim. *Ante*, at 9, n. 4. Thus, the Court does not preclude consideration of state law issues on remand. See *ante*, at 25.

bound to accept that evaluation of the federal question, but whether that conclusion justifies relief under state res judicata law is a matter for that court to decide.

Compliance with *Batson* is essential to ensure that defendants receive a fair trial and to preserve the public confidence upon which our system of criminal justice depends. But it is also important that this Court respect the authority of state courts to structure their systems of postconviction review in a way that promotes the expeditious and definitive disposition of claims of error.

Until recently, this Court rarely granted review of state-court decisions in collateral review proceedings, preferring to allow the claims adjudicated in such proceedings to be decided first in federal habeas proceedings. See *Lawrence* v. *Florida*, 549 U. S. 327, 335 (2007) ("[T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims, choosing instead to wait for federal habeas proceedings" (internal quotation marks omitted)); *Kyles* v. *Whitley*, 498 U. S. 931, 932 (1990) (Stevens, J., concurring in denial of stay of execution); *Huffman* v. *Florida*, 435 U. S. 1014, 1017–1018 (1978) (Stevens, J., respecting denial of certiorari). When cases reach this Court after habeas review in the lower federal courts, the standards of review set out in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. §2254, apply. Recently, this Court has evidenced a predilection for granting review of state-court decisions denying postconviction relief, see, *e.g., Wearry* v. *Cain*, 577 U. S. __ (2016) (*per curiam*). Particularly in light of that trend, it is important that we do not lightly brush aside the States' legitimate interest in structuring their systems of postconviction review in a way that militates against repetitive litigation and endless delay.

SUPREME COURT OF THE UNITED STATES

No. 14–8349

TIMOTHY TYRONE FOSTER, PETITIONER *v.* BRUCE CHATMAN, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

[May 23, 2016]

JUSTICE THOMAS, dissenting.

Thirty years ago, Timothy Foster confessed to murdering Queen Madge White after sexually assaulting her with a bottle of salad dressing. In the decades since, Foster has sought to vacate his conviction and death sentence on the ground that prosecutors violated *Batson* v. *Kentucky*, 476 U. S. 79 (1986), when they struck all black prospective jurors before his trial. Time and again, the state courts have rejected that claim. The trial court twice rejected it, and the Supreme Court of Georgia unequivocally rejected it when Foster directly appealed his conviction and sentence. *Foster* v. *State*, 258 Ga. 736, 736, n. 1, 738–739, 374 S. E. 2d 188, 190, n. 1, 192 (1988), cert. denied, 490 U. S. 1085 (1989). A state habeas court rejected it in 2013. App. 175–176, 192–196. And most recently, the Supreme Court of Georgia again rejected it as lacking "arguable merit," Ga. Sup. Ct. Rule 36 (2001). See App. 246.

Yet, today—nearly three decades removed from *voir dire*—the Court rules in Foster's favor. It does so without adequately grappling with the possibility that we lack jurisdiction. Moreover, the Court's ruling on the merits, based, in part, on new evidence that Foster procured decades after his conviction, distorts the deferential *Batson* inquiry. I respectfully dissent.

I

Federal law authorizes us to review the "judgments or decrees rendered by the highest court of a State in which a decision could be had," 28 U. S. C. §1257(a), but only if such a judgment or decree raises a question of federal law, *Michigan* v. *Long*, 463 U. S. 1032, 1038 (1983). The Court today errs by assuming that the Supreme Court of Georgia's one-line order—the "judgmen[t] . . . rendered by the highest court of a State in which a decision could be had," §1257—raises such a question. See *ante,* at 7–8. The far more likely explanation for the court's denial of habeas relief is that Foster's claim is procedurally barred. This disposition is ordinarily a question of state law that this Court is powerless to review. Before addressing the merits of Foster's *Batson* claim, the Court should have sought clarification that the resolution of a federal question was implicated in the Georgia high court's decision.

A

The Supreme Court of Georgia's order in this case states in full: "Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied." App. 246. Neither that order nor Georgia law provides adequate assurance that this case raises a federal question.

Under Georgia law, a state prisoner may file a state habeas petition in a state superior court. Ga. Code Ann. §§9–14–41 to 9–14–43 (2015). If the state superior court denies the petition, then the prisoner may appeal to the Supreme Court of Georgia, which has exclusive jurisdiction over habeas corpus cases, by timely filing a notice of appeal in the superior court and applying for a certificate of probable cause in the supreme court. See *Fullwood* v. *Sivley*, 271 Ga. 248, 250–251, 517 S. E. 2d 511, 513–515 (1999) (discussing requirements of §9–14–52). Much like certificates of appealability in federal court, *Miller-El* v.

Cockrell, 537 U. S. 322, 336 (2003), a Georgia prisoner must establish in his application that at least one of his claims has "arguable merit." Ga. Sup. Ct. Rule 36. If he cannot, the Supreme Court of Georgia summarily denies relief by denying the certificate of probable cause. *Ibid.*; see also §9–14–52(b); *Hittson* v. *GDCP Warden*, 759 F. 3d 1210, 1231–1232 (CA11 2014). If he can, then the court affords plenary review of the arguably meritorious claim. See, *e.g.*, *Sears* v. *Humphrey*, 294 Ga. 117, 117–118, 751 S. E. 2d 365, 368 (2013); *Hillman* v. *Johnson*, 297 Ga. 609, 611, 615, n. 5, 774 S. E. 2d 615, 617, 620, n. 5 (2015). The most we can glean, therefore, from the summary denial of Foster's state habeas petition is that the Supreme Court of Georgia concluded that Foster's claim lacked "arguable merit."

The most obvious ground for deciding that Foster's claim lacked "arguable merit" is that the Supreme Court of Georgia already considered that claim and rejected it decades ago.[1] Georgia law prohibits Foster from raising the same claim anew in his state habeas petition. See,

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[1] That is obvious, in part, because the Superior Court rested on this procedural bar to deny Foster's *Batson* claim. See, *e.g.,* App. 175–176. We need not blind ourselves to that lurking state-law ground merely because the Supreme Court of Georgia denied relief in an unexplained order. As we would do in the federal habeas context, we may "look through" to the last reasoned state-court opinion to discern whether that opinion rested on state-law procedural grounds. *Ylst* v. *Nunnemaker*, 501 U. S. 797, 806 (1991). If "the last reasoned opinion on the claim explicitly imposes a procedural default," then there is a rebuttable presumption "that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.,* at 803; see also, *e.g., Kernan* v. *Hinojosa*, *ante*, at 3 (*per curiam*). We presume, in other words, that the decision rests on a question of state law. That presumption arguably plays an even more important role in a state-court case like this, where a state-law procedural defect would oust this Court of its jurisdiction. See *Coleman* v. *Thompson*, 501 U. S. 722, 730 (1991) (distinguishing a state-law procedural bar's effect on a state case from its effect in federal habeas).

e.g., Davis v. *Thomas*, 261 Ga. 687, 689, 410 S. E. 2d 110, 112 (1991). "It is axiomatic" in the Georgia courts "that a habeas court is not to be used as a substitute for an appeal, or as a second appeal." *Walker* v. *Penn*, 271 Ga. 609, 612, 523 S. E. 2d 325, 327 (1999). Without such procedural bars, state prisoners could raise old claims again and again until they are declared victorious, and finality would mean nothing. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 145 (1970) ("The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction").

I would think that this state-law defect in Foster's state habeas petition would be the end of the matter: "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991). It is fundamental that this Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945). If an adequate and independent state-law ground bars Foster's claim, then the Court today has done nothing more than issue an impermissible advisory opinion.

B

To assure itself of jurisdiction, the Court wrongly assumes that the one-line order before us implicates a federal question. See *ante,* at 7–8. The lurking state-law procedural bar, according to the Court, is not an *independent* state-law ground because it "depends on a federal constitutional ruling." *Ante,* at 7 (internal quotation marks omitted).

I would not so hastily assume that the State Supreme Court's unelaborated order depends on the resolution of a federal question without first seeking clarification from the Supreme Court of Georgia. To be sure, we often presume that a "state court decide[s] the case the way it did because it believed that federal law required it to do so." *Long*, 463 U. S., at 1040–1041. But there still exist "certain circumstances in which clarification [from the state court] is necessary or desirable" before delving into the merits of a state court's decision. *Id.,* at 1041, n. 6.

This case presents such a circumstance. The *Long* presumption assumes that the ambiguous state-court ruling will come in the form of a reasoned decision: It applies in cases in which "it is not clear from the *opinion itself* that the state court relied upon an adequate and independent state ground and when it *fairly appears* that the state court rested its decision primarily on federal law." *Id.,* at 1042 (emphasis added). But here, when the decision is a one-line judgment, it hardly makes sense to invoke the *Long* presumption. There is neither an "opinion" nor any resolution of federal law that "fairly appears" on the face of the unexplained order. *Ibid.*

Confronted with cases like this in the past, this Court has vacated and remanded for clarification from the state court before proceeding to decide the merits of the underlying claim. I would follow that path instead of assuming that the one-line order implicates a federal question. We have "decline[d] . . . to review the federal questions asserted to be present" when "'there is considerable uncertainty as to the precise grounds for the [state court's] decision.'" *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U. S. 70, 78 (2000) (*per curiam*) (quoting *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 555 (1940)). *A fortiori*, when a State's highest court has denied relief without any explanation, the proper course is to vacate and remand for clarification before reaching the merits of a federal question that might

have nothing to do with the state court's decision. See, *e.g., Capital Cities Media, Inc.* v. *Toole*, 466 U. S. 378 (1984) (*per curiam*); see also, *e.g., Johnson* v. *Risk*, 137 U. S. 300, 306–307 (1890). This course respects weighty federalism concerns. "It is fundamental that state courts be left free and unfettered by us" in interpreting their own law, *National Tea Co.*, *supra*, at 557, especially when a state prisoner's long-final conviction is at stake.

Clarification is especially warranted here. Nothing in the reported decisions of the Supreme Court of Georgia suggests that federal law figures in how Georgia applies its res judicata procedural bar. Those decisions state that "new law or new facts" could "justify the reconsideration of the claims . . . raised on direct appeal," *Hall* v. *Lance*, 286 Ga. 365, 376–377, 687 S. E. 2d 809, 818 (2010), as might a showing that the prisoner is actually innocent, *Walker*, *supra*, at 611, 523 S. E. 2d, at 327. But it is for the Supreme Court of Georgia—not this Court—to decide what new facts suffice to reopen a claim already decided against a state habeas petitioner. It is up to the Georgia courts, for example, to decide whether a petitioner was diligent in discovering those new facts, see, *e.g., Gibson* v. *Head*, 282 Ga. 156, 159, 646 S. E. 2d 257, 260 (2007) (noting that whether a petitioner could overcome the procedural bar "depend[ed] on factual findings" including "the precise timing of [his] discovery of" the new evidence), or whether the new facts are "material," *Rollf* v. *Carter*, 298 Ga. 557, 558, ___ S. E. 2d ___, ___ (2016).

Instead of leaving the application of Georgia law to the Georgia courts, the Court takes it upon itself to decide that the procedural bar implicates a federal question. Worse still, the Court surmises that Georgia's procedural bar depends on the resolution of a federal question by parsing the wrong court's decision, the opinion of the Superior Court of Butts County. *Ante,* at 7–8. Invoking *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), the Court rea-

sons that "*the state habeas court's* application of res judicata to Foster's *Batson* claim was not independent of the merits of his federal constitutional challenge." *Ante,* at 8. (emphasis added). Accordingly, whether Foster has alleged a sufficient "'change in the facts'" to overcome the Georgia procedural bar depends on whether Foster's *Batson* claim would succeed in light of those changed facts. *Ante,* at 7–8. But the State Superior Court's opinion is not the "judgmen[t] . . . by the highest court of [Georgia] in which a decision could be had" subject to our certiorari jurisdiction. 28 U. S. C. §1257. The unexplained denial of relief by the Supreme Court of Georgia is.

I cannot go along with the Court's decision to assure itself of its jurisdiction by attributing snippets of the State Superior Court's reasoning to the Supreme Court of Georgia. The reported decisions of the Supreme Court of Georgia do not resolve what "type of new alleged facts . . . could ever warrant setting aside the procedural bar," *Hall, supra,* at 377, 687 S. E. 2d, at 818, let alone intimate that a prisoner may relitigate a claim already decided against him merely because he might win this second time around. Cf. *Roulain* v. *Martin*, 266 Ga. 353, 354, 466 S. E. 2d 837, 839 (1996) (opining that a state habeas court "would certainly be bound by the ruling [in the petitioner's direct appeal] regardless of whether that ruling may be erroneous"). I therefore refuse to presume that the unexplained denial of relief by the Supreme Court of Georgia presents a federal question.[2]

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[2]The Court takes me to task for not "follow[ing my] own rule," *ante,* at 8–9, n. 3, because I acknowledge that the State Superior Court's decision is strong evidence that Foster's claim was denied as procedurally defaulted. See *supra,* at 3–4, and n. 1. It is one thing to look to the reasoning of a lower state court's decision to confirm that the Court *lacks* jurisdiction. It is quite another for the Court to probe that lower state court's decision to *assure* itself of jurisdiction. The Court reads the tea leaves of a single State Superior Court's decision to decide that

The Court today imposes an opinion-writing requirement on the States' highest courts. Lest those high courts be subject to lengthy digressions on constitutional claims that might (or might not) be at issue, they must offer reasoned opinions why—after rejecting the same claim decades ago—they refuse to grant habeas relief now. But "[o]pinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court," including "concentrat[ing their] resources on the cases where opinions are most needed." *Harrington* v. *Richter*, 562 U. S. 86, 99 (2011). Rather than demand detailed opinions of overburdened state courts, the Court should vacate and remand cases such as this one to assure itself of its jurisdiction.

II

The Court further errs by deciding that Foster's *Batson* claim has arguable merit. Because the adjudication of his *Batson* claim is, at bottom, a credibility determination, we owe "great deference" to the state court's initial finding that the prosecution's race-neutral reasons for striking veniremen Eddie Hood and Marilyn Garrett were credible. *Batson*, 476 U. S., at 98, n. 21. On a record far less cold than today's, the Supreme Court of Georgia long ago (on direct appeal) rejected that claim by giving great deference to the trial court's credibility determinations. Evaluating the strike of venireman Hood, the court highlighted that his son had been convicted of a misdemeanor and that

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the state-law procedural bar depends on the resolution of a federal question. That is a question of Georgia law that is best answered by the decisions of the Supreme Court of Georgia. See *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 465 (1967) (concluding that when "the underlying substantive rule involved is based on state law," "the State's highest court is the best authority on its own law"); cf. *King* v. *Order of United Commercial Travelers of America*, 333 U. S. 153, 160–162 (1948) (rejecting an unreported state trial court decision as binding under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)).

both his demeanor and religious affiliation indicated that he might be reluctant to impose the death penalty. *Foster*, 258 Ga., at 738, 374 S. E. 2d, at 192. And the prosecution reasonably struck venireman Garrett, according to the court, because it feared that she would sympathize with Foster given her work with "low-income, underprivileged children" and because she was "related to someone with a drug or alcohol problem." *Id.,* at 739, 374 S. E. 2d, at 192. That should have been the last word on Foster's *Batson* claim.

But now, Foster has access to the prosecution's file. By allowing Foster to relitigate his *Batson* claim by bringing this newly discovered evidence to the fore, the Court upends *Batson*'s deferential framework. Foster's new evidence does not justify this Court's reassessment of who was telling the truth nearly three decades removed from *voir dire*.

A

The new evidence sets the tone for the Court's analysis, but a closer look reveals that it has limited probative value. For this reason, the Court's conclusion that the prosecution violated *Batson* rests mostly on arguments at Foster's disposal decades ago. See *ante,* at 14–16 (concluding that trial transcripts belie proffered reasons for striking Garrett); *ante,* at 17–22 (relying on transcripts and briefs as evidence of the prosecution's shifting explanations for striking Hood). The new evidence is no excuse for the Court's reversal of the state court's credibility determinations.

As even the Court admits, *ante,* at 9–10, we do not know who wrote most of the notes that Foster now relies upon as proof of the prosecutors' race-based motivations. We do know, however, that both prosecutors averred that they "did not make any of the highlighted marks on the jury venire list" and "did not instruct anyone to make the green

highlighted marks." App. 168–169, 171. In particular, prosecutor Stephen Lanier reaffirmed his earlier testimony, given during Foster's hearing for a new trial, that he relied only on race-neutral factors in striking the jury. *Id.*, at 169; see also *id.*, at 80–125. And, prosecutor Douglas Pullen swore that he "did not rely on the highlighted jury venire list." *Id.*, at 171.

The hazy recollections of the prosecution's investigator, Clayton Lundy, are not to the contrary. As part of the postconviction proceedings, Lundy testified that he "[v]aguely" remembered parts of jury selection, he "kind of remember[ed]" some of the documents used during jury selection, and cautioned that he "ain't done this in a long time." Tr. 181–182. (When Lundy testified in 2006, nearly 20 years had passed since Foster's trial and he had changed careers. *Id.*, at 174.) He thought others at the district attorney's office "probably" passed venire lists around the office and "guess[ed]" that everyone would make notations. *Id.*, at 182, 190.

As for the other documents in the prosecution's file, Lundy could not identify who authored any of them, with two exceptions.[3] First, Lundy said he prepared handwritten lists describing seven veniremen, including Garrett, but her race is not mentioned. See *id.*, at 205; App. 293–294. Second, Lundy "guess[ed]" that prosecutor Lanier suggested the handwritten edits to a draft of an affidavit that Lundy later submitted to the trial court. Tr. 203; see App. 343–347 (draft affidavit); *id.*, at 127–129 (final affi-

[3] At oral argument, counsel for Georgia also stipulated that "one of the two prosecutors" must have drafted another document comprising a "definite NO's" list and a "questionables" list of veniremen. Tr. of Oral Arg. 45; App. 301. Both veniremen Hood and Garrett appeared on the "definite NO's" list. Of course we cannot know when these lists were created, or whether Lanier himself relied upon them. See Tr. of Oral Arg. 45 (calling into question whether Lanier's "thought process" was based on those lists).

davit). The relevant edits suggested deleting two statements that, "*solely* [*in Lundy's*] *opinion*," prosecutors ought to pick Garrett "[i]f it comes down to having to pick one of the black jurors." *Id.*, at 345 (emphasis added). Perhaps this look inside the district attorney's office reveals that the office debated internally who would be the best black juror. Or perhaps it reveals only Lundy's personal thoughts about selecting black jurors, an "opinion" with which (we can "guess") Lanier disagreed.

The notion that this "newly discovered evidence" could warrant relitigation of a *Batson* claim is flabbergasting. In *Batson* cases, the "decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez* v. *New York*, 500 U. S. 352, 365 (1991) (plurality opinion). And because "[t]here will seldom be much evidence bearing on that issue," "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Ibid.* Time and again, we have said that the credibility of the attorney is best judged by the trial court and can be overturned only if it is clearly erroneous. See *ibid.*; see also *Snyder* v. *Louisiana*, 552 U. S. 472, 477 (2008); *Miller-El*, 537 U. S., at 339; *Hernandez*, *supra,* at 375 (O'Connor, J., concurring in judgment).

But the Court today invites state prisoners to go searching for new "evidence" by demanding the files of the prosecutors who long ago convicted them. If those prisoners succeed, then apparently this Court's doors are open to conduct the credibility determination anew. Alas, "every end is instead a new beginning" for a majority of this Court. *Welch* v. *United States*, *ante,* at 15 (THOMAS, J., dissenting). I cannot go along with that "sort of sandbagging of state courts." *Miller-El* v. *Dretke*, 545 U. S. 231, 279 (2005) (THOMAS, J., dissenting). New evidence should not justify the relitigation of *Batson* claims.

B

Perhaps the Court's decision to reconsider a decades-old *Batson* claim based on newly discovered evidence would be less alarming if the new evidence revealed that the trial court had misjudged the prosecutors' reasons for striking Garrett and Hood. It does not. Not only is the probative value of the evidence severely limited, *supra,* at 8–11, but also pieces of the new evidence corroborate the trial court's conclusion that the race-neutral reasons were valid. The Court's substitution of its judgment for the trial court's credibility determinations is flawed both as a legal and factual matter.

1

The Court's analysis with respect to Hood is unavailing. The Court first compares Hood with other jurors who had similarly aged children, *ante,* at 18–19, just as the trial court did decades ago, App. 135–136. The trial court was well aware that Hood's son's conviction was for theft, not murder. But in the words of the trial court, "the conviction is a distinction that makes the difference" between Hood and the other jurors, and the prosecution's "apprehension that this would tend to, perhaps only subconsciously, make the venireman sympathetic to [Foster] was a rational one." *Ibid.* Because "the trial court believe[d] the prosecutor's nonracial justification, and that finding is not clearly erroneous, that [should be] the end of the matter." *Hernandez*, *supra,* at 375 (O'Connor, J., concurring in judgment).

The Court also second-guesses the prosecution's strike of Hood because of his questionable stance on the death penalty. The Court concludes that Hood's transcribed statements at *voir dire* "unequivocally voiced [Hood's] willingness to impose the death penalty." *Ante,* at 22. There is nothing unequivocal about a decades-old record. Our case law requires the Court to defer to the trial court's

finding that the State's race-neutral concerns about Hood's "soft-spoken[ness] and slow[ness] in responding to the death penalty questions" were "credible." App. 138; see *Snyder*, *supra,* at 477 ("[R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.,* nervousness, inattention), making the trial court's firsthand observations of even greater importance"). The "evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province." *Hernandez*, *supra,* at 365 (plurality opinion) (internal quotation marks omitted).

The new evidence, moreover, supports the prosecution's concern about Hood's views on capital punishment. A handwritten document in the prosecution's file stated that the Church of Christ "doesn't take a stand on [the] Death Penalty." App. 302. Perplexingly, the Court considers this proof that the prosecution misled the trial court about its reasons for striking Hood. *Ante,* at 20–21. Hardly. That document further states that capital punishment is an issue "left for each individual member," App. 302, and thus in no way discredits the prosecutor's statement that, in his experience, "Church of Christ people, while they may not take a formal stand against the death penalty, . . . are very, very reluctant to vote for the death penalty." *Id.*, at 84. And other notes in the file say that Hood gave "slow D[eath] P[enalty] answers" and that he "hesitated . . . when asked about [the] D[eath] P[enalty]." *Id.*, at 295, 303. This new evidence supports the prosecution's stated reason for striking Hood—that he, as a member of the Church of Christ, had taken an uncertain stance on capital punishment.

2

Likewise, the Court's evaluation of the strike of Garrett is riddled with error. The Court is vexed by a single misrepresentation about the prosecution's decision to strike

Garrett—the prosecution stated that Garrett was listed as "'questionable'" but the new evidence reveals that Garrett was on the "'definite NO's'" list from the beginning. *Ante,* at 13–14. But whether the prosecution planned to strike Garrett all along or only at the last minute seems irrelevant to the more than 10 race-neutral reasons the prosecution supplied for striking Garrett.

The prosecution feared that Garrett might sympathize with Foster at sentencing. She worked with disadvantaged children, she was young, and she failed to disclose that her cousin had been recently arrested. See App. 55–57, 105. And prosecutors were concerned that she gave short answers, appeared nervous, and did not ask to be off the jury even though she was a divorced mother of two children and worked more than 70 hours per week. See *id.,* at 55–56, 93–94. The prosecution also stated repeatedly that they were concerned about female jurors, who "appear to be more sympathetic . . . in . . . death penalty case[s] than men." *Id.*, at 42; see *id.,* at 57.[4]

Pieces of the new evidence support some of these concerns. The notes in the prosecutors' file reveal that someone on the prosecution team was aware that Garrett's cousin was Angela Garrett (who had been arrested for drug-related charges and fired from her job on the eve of trial, *id.*, at 105, 129), that Garrett "would not look a[t] [the] C[our]t during V[oir] D[ire]," that she gave "very short answers," and that she "[l]ooked @ floor during D[eath] P[enalty]" questioning. *Id.*, at 293, 308.

Nevertheless, the Court frets that these indisputably race-neutral reasons were pretextual. The Court engages in its own comparison of the jurors to highlight the prosecution's refusal to strike white jurors with similar charac-

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[4]This Court's decision in *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127 (1994), which held that peremptory strikes on the basis of sex were unconstitutional, postdated Foster's direct appeal.

teristics. *Ante,* at 14–16. But as with venireman Hood, the Georgia courts were faced with the same contentions regarding Garrett decades ago, and the Supreme Court of Georgia rightly decided that the trial court's findings were worthy of deference. After conducting a post-trial hearing in which one of the prosecutors testified, App. 80–125, the trial court credited the prosecution's concerns. The trial court, for example, agreed that Garrett's association with Head Start might be troubling and "believe[d] that the state [was] honest in voicing its concern that the combination of holding down two jobs and being the divorced mother of two indicates a less stable home environment," which "was the prime defense in [Foster's] case." *Id.*, at 142; see *id.,* at 141. Again, that should be "the end of the matter." *Hernandez,* 500 U. S., at 375 (O'Connor, J., concurring in judgment).

* * *

Today, without first seeking clarification from Georgia's highest court that it decided a federal question, the Court affords a death-row inmate another opportunity to relitigate his long-final conviction. In few other circumstances could I imagine the Court spilling so much ink over a factbound claim arising from a state postconviction proceeding. It was the trial court that observed the veniremen firsthand and heard them answer the prosecution's questions, and its evaluation of the prosecution's credibility on this point is certainly far better than this Court's nearly 30 years later. See *Hernandez, supra*, at 365 (plurality opinion). I respectfully dissent.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PENA-RODRIGUEZ *v.* COLORADO

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 15–606. Argued October 11, 2016—Decided March 6, 2017

A Colorado jury convicted petitioner Peña-Rodriguez of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H. C. had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Counsel, with the trial court's supervision, obtained affidavits from the two jurors describing a number of biased statements by H. C. The court acknowledged H. C.'s apparent bias but denied petitioner's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The Colorado Court of Appeals affirmed, agreeing that H. C.'s alleged statements did not fall within an exception to Rule 606(b). The Colorado Supreme Court also affirmed, relying on *Tanner* v. *United States*, 483 U. S. 107, and *Warger* v. *Shauers*, 574 U. S. ___, both of which rejected constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias.

Held: Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Pp. 6–21.

(a) At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. Some American jurisdictions adopted a more flexible version of the no-impeachment bar, known as the "Iowa rule," which prevented jurors from testifying only about their own subjective beliefs, thoughts, or motives during deliberations. An alternative approach, later referred to as the federal ap-

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proach, permitted an exception only for events extraneous to the deliberative process. This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule, appearing open to the Iowa rule in *United States* v. *Reid*, 12 How. 361, and *Mattox* v. *United States*, 146 U. S. 140, but rejecting that approach in *McDonald* v. *Pless*, 238 U. S. 264.

The common-law development of the rule reached a milestone in 1975 when Congress adopted Federal Rule of Evidence 606(b), which sets out a broad no-impeachment rule, with only limited exceptions. This version of the no-impeachment rule has substantial merit, promoting full and vigorous discussion by jurors and providing considerable assurance that after being discharged they will not be summoned to recount their deliberations or otherwise harassed. The rule gives stability and finality to verdicts. Pp. 6–9.

(b) Some version of the no-impeachment rule is followed in every State and the District of Columbia, most of which follow the Federal Rule. At least 16 jurisdictions have recognized an exception for juror testimony about racial bias in deliberations. Three Federal Courts of Appeals have also held or suggested there is a constitutional exception for evidence of racial bias.

In addressing the common-law no-impeachment rule, this Court noted the possibility of an exception in the "gravest and most important cases." *United States* v. *Reid*, *supra,* at 366; *McDonald* v. *Pless*, *supra,* at 269. The Court has addressed the question whether the Constitution mandates an exception to Rule 606(b) just twice, rejecting an exception each time. In *Tanner,* where the evidence showed that some jurors were under the influence of drugs and alcohol during the trial, the Court identified "long-recognized and very substantial concerns" supporting the no-impeachment rule. 483 U. S., at 127. The Court also outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony: members of the venire can be examined for impartiality during *voir dire*; juror misconduct may be observed the court, counsel, and court personnel during the trial; and jurors themselves can report misconduct to the court before a verdict is rendered. In *Warger*, a civil case where the evidence indicated that the jury forewoman failed to disclose a prodefendant bias during *voir dire*, the Court again put substantial reliance on existing safeguards for a fair trial. But the Court also warned, as in *Reid* and *McDonald,* that the no-impeachment rule may admit of exceptions for "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U. S., at ___–___, n. 3. *Reid*, *McDonald*, and *Warger* left open the question here: whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indi-

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cate that racial animus was a significant motivating factor in his or her finding of guilt. Pp. 9–13.

(c) The imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. "[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida*, 379 U. S. 184, 192. Time and again, this Court has enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system. The Court has interpreted the Fourteenth Amendment to prohibit the exclusion of jurors based on race, *Strauder* v. *West Virginia*, 100 U. S. 303, 305–309; struck down laws and practices that systematically exclude racial minorities from juries, see, *e.g., Neal* v. *Delaware*, 103 U. S. 370; ruled that no litigant may exclude a prospective juror based on race, see, *e.g., Batson* v. *Kentucky*, 476 U. S. 79; and held that defendants may at times be entitled to ask about racial bias during *voir dire,* see, *e.g., Ham* v. *South Carolina*, 409 U. S. 524. The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose* v. *Mitchell*, 443 U. S. 545, 555, damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State," *Powers* v. *Ohio*, 499 U. S. 400, 411. Pp. 13–15.

(d) This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and those seeking to eliminate racial bias in the jury system. Those lines of precedent need not conflict. Racial bias, unlike the behavior in *McDonald*, *Tanner*, or *Warger,* implicates unique historical, constitutional, and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice. It is also distinct in a pragmatic sense, for the *Tanner* safeguards may be less effective in rooting out racial bias. But while all forms of improper bias pose challenges to the trial process, there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after a verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right. Pp. 15–17.

(e) Before the no-impeachment bar can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote

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to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. The experience of those jurisdictions that have already recognized a racial-bias exception to the no-impeachment rule, and the experience of courts going forward, will inform the proper exercise of trial judge discretion. The Court need not address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias or the appropriate standard for determining when such evidence is sufficient to require that the verdict be set aside and a new trial be granted. Standard and existing safeguards may also help prevent racial bias in jury deliberations, including careful *voir dire* and a trial court's instructions to jurors about their duty to review the evidence, deliberate together, and reach a verdict in a fair and impartial way, free from bias of any kind. Pp. 17–21.

350 P. 3d 287, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 15–606

MIGUEL ANGEL PENA-RODRIGUEZ, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[March 6, 2017]

JUSTICE KENNEDY delivered the opinion of the Court.

The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

In the era of our Nation's founding, the right to a jury trial already had existed and evolved for centuries, through and alongside the common law. The jury was considered a fundamental safeguard of individual liberty. See The Federalist No. 83, p. 451 (B. Warner ed. 1818) (A. Hamilton). The right to a jury trial in criminal cases was part of the Constitution as first drawn, and it was restated in the Sixth Amendment. Art. III, §2, cl. 3; Amdt. 6. By operation of the Fourteenth Amendment, it is applicable to

the States. *Duncan* v. *Louisiana*, 391 U. S. 145, 149–150 (1968).

Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense. A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. This principle, itself centuries old, is often referred to as the no-impeachment rule. The instant case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.

I

State prosecutors in Colorado brought criminal charges against petitioner, Miguel Angel Peña-Rodriguez, based on the following allegations. In 2007, in the bathroom of a Colorado horse-racing facility, a man sexually assaulted two teenage sisters. The girls told their father and identified the man as an employee of the racetrack. The police located and arrested petitioner. Each girl separately identified petitioner as the man who had assaulted her.

The State charged petitioner with harassment, unlawful sexual contact, and attempted sexual assault on a child. Before the jury was empaneled, members of the venire were repeatedly asked whether they believed that they could be fair and impartial in the case. A written questionnaire asked if there was "anything about you that you feel would make it difficult for you to be a fair juror." App.

14. The court repeated the question to the panel of prospective jurors and encouraged jurors to speak in private with the court if they had any concerns about their impartiality. Defense counsel likewise asked whether anyone felt that "this is simply not a good case" for them to be a fair juror. *Id.,* at 34. None of the empaneled jurors expressed any reservations based on racial or any other bias. And none asked to speak with the trial judge.

After a 3-day trial, the jury found petitioner guilty of unlawful sexual contact and harassment, but it failed to reach a verdict on the attempted sexual assault charge. When the jury was discharged, the court gave them this instruction, as mandated by Colorado law:

> "The question may arise whether you may now discuss this case with the lawyers, defendant, or other persons. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. . . . If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me." *Id.,* at 85–86.

Following the discharge of the jury, petitioner's counsel entered the jury room to discuss the trial with the jurors. As the room was emptying, two jurors remained to speak with counsel in private. They stated that, during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Petitioner's counsel reported this to the court and, with the court's supervision, obtained sworn affidavits from the two jurors.

The affidavits by the two jurors described a number of biased statements made by another juror, identified as Juror H. C. According to the two jurors, H. C. told the other jurors that he "believed the defendant was guilty because, in [H. C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to

believe they could do whatever they wanted with women." *Id.*, at 110. The jurors reported that H. C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "'I think he did it because he's Mexican and Mexican men take whatever they want.'" *Id.,* at 109. According to the jurors, H. C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.,* at 110. Finally, the jurors recounted that Juror H. C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was "'an illegal.'" *Ibid.* (In fact, the witness testified during trial that he was a legal resident of the United States.)

After reviewing the affidavits, the trial court acknowledged H. C.'s apparent bias. But the court denied petitioner's motion for a new trial, noting that "[t]he actual deliberations that occur among the jurors are protected from inquiry under [Colorado Rule of Evidence] 606(b)." *Id.*, at 90. Like its federal counterpart, Colorado's Rule 606(b) generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict. See Fed. Rule Evid. 606(b). The Colorado Rule reads as follows:

> "(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any out-

> side influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." Colo. Rule Evid. 606(b) (2016).

The verdict deemed final, petitioner was sentenced to two years' probation and was required to register as a sex offender. A divided panel of the Colorado Court of Appeals affirmed petitioner's conviction, agreeing that H. C.'s alleged statements did not fall within an exception to Rule 606(b) and so were inadmissible to undermine the validity of the verdict. ___ P. 3d ___, 2012 WL 5457362.

The Colorado Supreme Court affirmed by a vote of 4 to 3. 350 P. 3d 287 (2015). The prevailing opinion relied on two decisions of this Court rejecting constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias. See *Tanner* v. *United States*, 483 U. S. 107 (1987); *Warger* v. *Shauers*, 574 U. S. ___ (2014). After reviewing those precedents, the court could find no "dividing line between different *types* of juror bias or misconduct," and thus no basis for permitting impeachment of the verdicts in petitioner's trial, notwithstanding H. C.'s apparent racial bias. 350 P. 3d, at 293. This Court granted certiorari to decide whether there is a constitutional exception to the no-impeachment rule for instances of racial bias. 578 U. S. ___ (2016).

Juror H. C.'s bias was based on petitioner's Hispanic identity, which the Court in prior cases has referred to as ethnicity, and that may be an instructive term here. See, *e.g., Hernandez* v. *New York*, 500 U. S. 352, 355 (1991) (plurality opinion). Yet we have also used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons. See, *e.g., ibid.*; *Fisher*

v. *University of Tex. at Austin*, 570 U. S. ___ (2013); *Rosales-Lopez* v. *United States*, 451 U. S. 182, 189–190 (1981) (plurality opinion). Petitioner and respondent both refer to race, or to race and ethnicity, in this more expansive sense in their briefs to the Court. This opinion refers to the nature of the bias as racial in keeping with the primary terminology employed by the parties and used in our precedents.

II

A

At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. This rule originated in *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B. 1785). There, Lord Mansfield excluded juror testimony that the jury had decided the case through a game of chance. The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations.

American courts adopted the Mansfield rule as a matter of common law, though not in every detail. Some jurisdictions adopted a different, more flexible version of the no-impeachment bar known as the "Iowa rule." Under that rule, jurors were prevented only from testifying about their own subjective beliefs, thoughts, or motives during deliberations. See *Wright* v. *Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866). Jurors could, however, testify about objective facts and events occurring during deliberations, in part because other jurors could corroborate that testimony.

An alternative approach, later referred to as the federal approach, stayed closer to the original Mansfield rule. See *Warger*, *supra*, at ___ (slip op., at 5). Under this version of the rule, the no-impeachment bar permitted an exception only for testimony about events extraneous to the deliber-

ative process, such as reliance on outside evidence—newspapers, dictionaries, and the like—or personal investigation of the facts.

This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule. In *United States* v. *Reid*, 12 How. 361 (1852), the Court appeared open to the admission of juror testimony that the jurors had consulted newspapers during deliberations, but in the end it barred the evidence because the newspapers "had not the slightest influence" on the verdict. *Id.,* at 366. The *Reid* Court warned that juror testimony "ought always to be received with great caution." *Ibid.* Yet it added an important admonition: "cases might arise in which it would be impossible to refuse" juror testimony "without violating the plainest principles of justice." *Ibid.*

In a following case the Court required the admission of juror affidavits stating that the jury consulted information that was not in evidence, including a prejudicial newspaper article. *Mattox* v. *United States*, 146 U. S. 140, 151 (1892). The Court suggested, furthermore, that the admission of juror testimony might be governed by a more flexible rule, one permitting jury testimony even where it did not involve consultation of prejudicial extraneous information. *Id.,* at 148–149; see also *Hyde* v. *United States*, 225 U. S. 347, 382–384 (1912) (stating that the more flexible Iowa rule "should apply," but excluding evidence that the jury reached the verdict by trading certain defendants' acquittals for others' convictions).

Later, however, the Court rejected the more lenient Iowa rule. In *McDonald* v. *Pless*, 238 U. S. 264 (1915), the Court affirmed the exclusion of juror testimony about objective events in the jury room. There, the jury allegedly had calculated a damages award by averaging the numerical submissions of each member. *Id.,* at 265–266. As the Court explained, admitting that evidence would

have "dangerous consequences": "no verdict would be safe" and the practice would "open the door to the most pernicious arts and tampering with jurors." *Id.*, at 268 (internal quotation marks omitted). Yet the Court reiterated its admonition from *Reid*, again cautioning that the no-impeachment rule might recognize exceptions "in the gravest and most important cases" where exclusion of juror affidavits might well violate "the plainest principles of justice." 238 U. S., at 269 (quoting *Reid*, *supra*, at 366; internal quotation marks omitted).

The common-law development of the no-impeachment rule reached a milestone in 1975, when Congress adopted the Federal Rules of Evidence, including Rule 606(b). Congress, like the *McDonald* Court, rejected the Iowa rule. Instead it endorsed a broad no-impeachment rule, with only limited exceptions.

The version of the rule that Congress adopted was "no accident." *Warger*, 574 U. S., at ___ (slip op., at 7). The Advisory Committee at first drafted a rule reflecting the Iowa approach, prohibiting admission of juror testimony only as it related to jurors' mental processes in reaching a verdict. The Department of Justice, however, expressed concern over the preliminary rule. The Advisory Committee then drafted the more stringent version now in effect, prohibiting all juror testimony, with exceptions only where the jury had considered prejudicial extraneous evidence or was subject to other outside influence. Rules of Evidence for United States Courts and Magistrates, 56 F. R. D. 183, 265 (1972). The Court adopted this second version and transmitted it to Congress.

The House favored the Iowa approach, but the Senate expressed concern that it did not sufficiently address the public policy interest in the finality of verdicts. S. Rep. No. 93–1277, pp. 13–14 (1974). Siding with the Senate, the Conference Committee adopted, Congress enacted, and the President signed the Court's proposed rule. The sub-

stance of the Rule has not changed since 1975, except for a 2006 modification permitting evidence of a clerical mistake on the verdict form. See 574 U. S., at ___.

The current version of Rule 606(b) states as follows:

> "(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> "(2) *Exceptions.* A juror may testify about whether:
>
> "(A) extraneous prejudicial information was improperly brought to the jury's attention;
>
> "(B) an outside influence was improperly brought to bear on any juror; or
>
> "(C) a mistake was made in entering the verdict on the verdict form."

This version of the no-impeachment rule has substantial merit. It promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts.

B

Some version of the no-impeachment rule is followed in every State and the District of Columbia. Variations make classification imprecise, but, as a general matter, it appears that 42 jurisdictions follow the Federal Rule, while 9 follow the Iowa Rule. Within both classifications there is a diversity of approaches. Nine jurisdictions that

follow the Federal Rule have codified exceptions other than those listed in Federal Rule 606(b). See Appendix, *infra.* At least 16 jurisdictions, 11 of which follow the Federal Rule, have recognized an exception to the no-impeachment bar under the circumstances the Court faces here: juror testimony that racial bias played a part in deliberations. *Ibid.* According to the parties and *amici*, only one State other than Colorado has addressed this issue and declined to recognize an exception for racial bias. See *Commonwealth* v. *Steele*, 599 Pa. 341, 377–379, 961 A. 2d 786, 807–808 (2012).

The federal courts, for their part, are governed by Federal Rule 606(b), but their interpretations deserve further comment. Various Courts of Appeals have had occasion to consider a racial bias exception and have reached different conclusions. Three have held or suggested there is a constitutional exception for evidence of racial bias. See *United States* v. *Villar*, 586 F. 3d 76, 87–88 (CA1 2009) (holding the Constitution demands a racial-bias exception); *United States* v. *Henley*, 238 F. 3d 1111, 1119–1121 (CA9 2001) (finding persuasive arguments in favor of an exception but not deciding the issue); *Shillcutt* v. *Gagnon*, 827 F. 2d 1155, 1158–1160 (CA7 1987) (observing that in some cases fundamental fairness could require an exception). One Court of Appeals has declined to find an exception, reasoning that other safeguards inherent in the trial process suffice to protect defendants' constitutional interests. See *United States* v. *Benally*, 546 F. 3d 1230, 1240–1241 (CA10 2008). Another has suggested as much, holding in the habeas context that an exception for racial bias was not clearly established but indicating in dicta that no such exception exists. See *Williams* v. *Price*, 343 F. 3d 223, 237–239 (CA3 2003) (Alito, J.). And one Court of Appeals has held that evidence of racial bias is excluded by Rule 606(b), without addressing whether the Constitution may at times demand an exception. See *Martinez* v.

Food City, Inc., 658 F. 2d 369, 373–374 (CA5 1981).

C

In addressing the scope of the common-law no-impeachment rule before Rule 606(b)'s adoption, the *Reid* and *McDonald* Courts noted the possibility of an exception to the rule in the "gravest and most important cases." *Reid*, 12 How., at 366; *McDonald*, 238 U. S., at 269. Yet since the enactment of Rule 606(b), the Court has addressed the precise question whether the Constitution mandates an exception to it in just two instances.

In its first case, *Tanner*, 483 U. S. 107, the Court rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial. *Id.*, at 125. Central to the Court's reasoning were the "long-recognized and very substantial concerns" supporting "the protection of jury deliberations from intrusive inquiry." *Id.,* at 127. The *Tanner* Court echoed *McDonald*'s concern that, if attorneys could use juror testimony to attack verdicts, jurors would be "harassed and beset by the defeated party," thus destroying "all frankness and freedom of discussion and conference." 483 U. S., at 120 (quoting *McDonald*, *supra,* at 267–268). The Court was concerned, moreover, that attempts to impeach a verdict would "disrupt the finality of the process" and undermine both "jurors' willingness to return an unpopular verdict" and "the community's trust in a system that relies on the decisions of laypeople." 483 U. S., at 120–121.

The *Tanner* Court outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony. At the outset of the trial process, *voir dire* provides an opportunity for the court and counsel to examine members of the venire for impartiality. As a trial proceeds, the court, counsel, and court personnel have some opportunity to

learn of any juror misconduct. And, before the verdict, jurors themselves can report misconduct to the court. These procedures do not undermine the stability of a verdict once rendered. Even after the trial, evidence of misconduct other than juror testimony can be used to attempt to impeach the verdict. *Id.,* at 127. Balancing these interests and safeguards against the defendant's Sixth Amendment interest in that case, the Court affirmed the exclusion of affidavits pertaining to the jury's inebriated state. *Ibid.*

The second case to consider the general issue presented here was *Warger*, 574 U. S. ___. The Court again rejected the argument that, in the circumstances there, the jury trial right required an exception to the no-impeachment rule. *Warger* involved a civil case where, after the verdict was entered, the losing party sought to proffer evidence that the jury forewoman had failed to disclose prodefendant bias during *voir dire*. As in *Tanner*, the Court put substantial reliance on existing safeguards for a fair trial. The Court stated: "Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." 574 U. S., at ___ (slip op., at 10).

In *Warger*, however, the Court did reiterate that the no-impeachment rule may admit exceptions. As in *Reid* and *McDonald*, the Court warned of "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U. S., at ___–___, n. 3 (slip op., at 10–11, n. 3). "If and when such a case arises," the Court indicated it would "consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Ibid.*

The recognition in *Warger* that there may be extreme cases where the jury trial right requires an exception to

the no-impeachment rule must be interpreted in context as a guarded, cautious statement. This caution is warranted to avoid formulating an exception that might undermine the jury dynamics and finality interests the no-impeachment rule seeks to protect. Today, however, the Court faces the question that *Reid*, *McDonald*, and *Warger* left open. The Court must decide whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.

III

It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.

"[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964). In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial. "Almost immediately after the Civil War, the South began a practice that would continue for many decades: All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans." Forman, Juries and Race in the Nineteenth Century, 113 Yale L. J. 895, 909–910 (2004). To take one example, just in the years 1865 and 1866, all-white juries in Texas decided a total of 500 prosecutions of white defendants

charged with killing African-Americans. All 500 were acquitted. *Id.,* at 916. The stark and unapologetic nature of race-motivated outcomes challenged the American belief that "the jury was a bulwark of liberty," *id.,* at 909, and prompted Congress to pass legislation to integrate the jury system and to bar persons from eligibility for jury service if they had conspired to deny the civil rights of African-Americans, *id.,* at 920–930. Members of Congress stressed that the legislation was necessary to preserve the right to a fair trial and to guarantee the equal protection of the laws. *Ibid.*

The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. Beginning in 1880, the Court interpreted the Fourteenth Amendment to prohibit the exclusion of jurors on the basis of race. *Strauder* v. *West Virginia*, 100 U. S. 303, 305–309 (1880). The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from juries. See, *e.g., Neal* v. *Delaware*, 103 U. S. 370 (1881); *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935) (*per curiam*); *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Castaneda* v. *Partida*, 430 U. S. 482 (1977). To guard against discrimination in jury selection, the Court has ruled that no litigant may exclude a prospective juror on the basis of race. *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991); *Georgia* v. *McCollum*, 505 U. S. 42 (1992). In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*. *Ham* v. *South Carolina*, 409 U. S. 524 (1973); *Rosales-Lopez*, 451 U. S. 182; *Turner* v. *Murray*, 476 U. S. 28 (1986).

The unmistakable principle underlying these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose* v. *Mitchell*, 443 U. S. 545, 555 (1979). The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey* v. *Kemp*, 481 U. S. 279, 310 (1987) (quoting *Strauder*, *supra*, at 309). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991); cf. *Aldridge* v. *United States*, 283 U. S. 308, 315 (1931); *Buck* v. *Davis*, *ante,* at 22.

IV

A

This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system. The two lines of precedent, however, need not conflict.

Racial bias of the kind alleged in this case differs in critical ways from the compromise verdict in *McDonald*, the drug and alcohol abuse in *Tanner*, or the pro-defendant bias in *Warger*. The behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course. Jurors are presumed to follow their oath, cf. *Penry* v. *Johnson*, 532 U. S. 782, 799 (2001), and neither history nor common experience show that the jury system is rife with mischief of these or similar kinds. To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny. "It is not at all clear . . . that the jury system could survive such efforts to perfect it." *Tanner*, 483 U. S., at 120.

The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk

systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Racial bias is distinct in a pragmatic sense as well. In past cases this Court has relied on other safeguards to protect the right to an impartial jury. Some of those safeguards, to be sure, can disclose racial bias. *Voir dire* at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias. Yet their operation may be compromised, or they may prove insufficient. For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire*. See *Rosales-Lopez*, *supra*; *Ristaino* v. *Ross*, 424 U. S. 589 (1976). Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Rosales-Lopez*, *supra*, at 195 (Rehnquist, J., concurring in result).

The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.

The recognition that certain of the *Tanner* safeguards may be less effective in rooting out racial bias than other

kinds of bias is not dispositive. All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

B

For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. See 27 C. Wright & V. Gold, Federal Practice and Proce-

dure: Evidence §6076, pp. 580–583 (2d ed. 2007) (Wright); see also Variations of ABA Model Rules of Professional Conduct, Rule 3.5 (Sept. 15, 2016) (overview of state ethics rules); 2 Jurywork Systematic Techniques §13:18 (2016–2017) (overview of Federal District Court rules). These limits seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord.

That is what happened here. In this case the alleged statements by a juror were egregious and unmistakable in their reliance on racial bias. Not only did juror H. C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis.

Petitioner's counsel did not seek out the two jurors' allegations of racial bias. Pursuant to Colorado's mandatory jury instruction, the trial court had set limits on juror contact and encouraged jurors to inform the court if anyone harassed them about their role in the case. Similar limits on juror contact can be found in other jurisdictions that recognize a racial-bias exception. See, *e.g.,* Fla. Standard Jury Instrs. in Crim. Cases No. 4.2 (West 2016) ("Although you are at liberty to speak with anyone about your deliberations, you are also at liberty to refuse to speak to anyone"); Mass. Office of Jury Comm'r, Trial Juror's Handbook (Dec. 2015) ("You are not required to speak with anyone once the trial is over. . . . If anyone tries to learn this confidential information from you, or if you feel harassed or embarrassed in any way, you should report it to the court . . . immediately"); N. J. Crim. Model Jury Charges, Non 2C Charges, Dismissal of Jury (2014) ("It will be up to each of you to decide whether to speak about your service as a juror").

With the understanding that they were under no obligation to speak out, the jurors approached petitioner's counsel, within a short time after the verdict, to relay their concerns about H. C.'s statements. App. 77. A similar pattern is common in cases involving juror allegations of racial bias. See, *e.g., Villar*, 586 F. 3d, at 78 (juror e-mailed defense counsel within hours of the verdict); *Kittle* v. *United States*, 65 A. 3d 1144, 1147 (D. C. 2013) (juror wrote a letter to the judge the same day the court discharged the jury); *Benally*, 546 F. 3d, at 1231 (juror approached defense counsel the day after the jury announced its verdict). Pursuant to local court rules, petitioner's counsel then sought and received permission from the court to contact the two jurors and obtain affidavits limited to recounting the exact statements made by H. C. that exhibited racial bias.

While the trial court concluded that Colorado's Rule 606(b) did not permit it even to consider the resulting affidavits, the Court's holding today removes that bar. When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.

C

As the preceding discussion makes clear, the Court relies on the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule—some for over half a century—with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations.

The experience of these jurisdictions, and the experience of the courts going forward, will inform the proper exercise of trial judge discretion in these and related matters. This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial

bias. See 27 Wright 575–578 (noting a divergence of authority over the necessity and scope of an evidentiary hearing on alleged juror misconduct). The Court also does not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted. Compare, *e.g., Shillcutt*, 827 F. 2d, at 1159 (inquiring whether racial bias "pervaded the jury room"), with, *e.g., Henley*, 238 F. 3d, at 1120 ("One racist juror would be enough").

D

It is proper to observe as well that there are standard and existing processes designed to prevent racial bias in jury deliberations. The advantages of careful *voir dire* have already been noted. And other safeguards deserve mention.

Trial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind. Some instructions are framed by trial judges based on their own learning and experience. Model jury instructions likely take into account these continuing developments and are common across jurisdictions. See, *e.g.,* 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal §10:01, p. 22 (6th ed. 2008) ("Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way"). Instructions may emphasize the group dynamic of deliberations by urging jurors to share their questions and conclusions with their colleagues. See, *e.g., id.*, §20:01, at 841 ("It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment").

Probing and thoughtful deliberation improves the likeli-

hood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases, whether racial or otherwise. These dynamics can help ensure that the exception is limited to rare cases.

* * *

The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.

The judgment of the Supreme Court of Colorado is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX

Codified Exceptions in Addition to Those Enumerated in Fed. Rule Evid. 606(b)

See Ariz. Rules Crim. Proc. 24.1(c)(3), (d) (2011) (exception for evidence of misconduct, including verdict by game of chance or intoxication); Idaho Rule Evid. 606(b) (2016) (game of chance); Ind. Rule Evid. 606(b)(2)(A) (Burns 2014) (drug or alcohol use); Minn. Rule Evid. 606(b) (2014) (threats of violence or violent acts); Mont. Rule Evid. 606(b) (2015) (game of chance); N. D. Rule Evid. 606(b)(2)(C) (2016–2017) (same); Tenn. Rule Evid. 606(b) (2016) (quotient verdict or game of chance); Tex. Rule Evid. 606(b)(2)(B) (West 2016) (rebutting claim juror was unqualified); Vt. Rule Evid. 606(b) (Cum. Supp. 2016) (juror communication with nonjuror); see also 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence §6071, p. 447, and n. 66 (2d ed. 2007); *id.,* at 451, and n. 70; *id.,* at 452, and n. 72.

Judicially Recognized Exceptions for Evidence of Racial Bias

See *State* v. *Santiago*, 245 Conn. 301, 323–340, 715 A. 2d 1, 14–22 (1998); *Kittle* v. *United States*, 65 A. 3d 1144, 1154–1556 (D. C. 2013); *Fisher* v. *State*, 690 A. 2d 917, 919–921, and n. 4 (Del. 1996) (Appendix to opinion), *Powell* v. *Allstate Ins. Co.*, 652 So. 2d 354, 357–358 (Fla. 1995); *Spencer* v. *State*, 260 Ga. 640, 643–644, 398 S. E. 2d 179, 184–185 (1990); *State* v. *Jackson*, 81 Haw. 39, 48–49, 912 P. 2d 71, 80–81 (1996); *Commonwealth* v. *Laguer*, 410 Mass. 89, 97–98, 571 N. E. 2d 371, 376 (1991); *State* v. *Callender*, 297 N. W. 2d 744, 746 (Minn. 1980); *Fleshner* v. *Pepose Vision Inst., P. C.*, 304 S. W. 3d 81, 87–90 (Mo.

2010); *State* v. *Levitt*, 36 N. J. 266, 271–273, 176 A. 2d 465, 467–468 (1961); *People* v. *Rukaj*, 123 App. Div. 2d 277, 280–281, 506 N. Y. S. 2d 677, 679–680 (1986); *State* v. *Hidanovic*, 2008 ND 66, ¶¶21–26, 747 N. W. 2d 463, 472–474; *State* v. *Brown*, 62 A. 3d 1099, 1110 (R. I. 2013); *State* v. *Hunter*, 320 S. C. 85, 88, 463 S. E. 2d 314, 316 (1995); *Seattle* v. *Jackson*, 70 Wash. 2d 733, 738, 425 P. 2d 385, 389 (1967); *After Hour Welding, Inc.* v. *Laneil Management Co.*, 108 Wis. 2d 734, 739–740, 324 N. W. 2d 686, 690 (1982).

SUPREME COURT OF THE UNITED STATES

No. 15–606

MIGUEL ANGEL PENA-RODRIGUEZ, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[March 6, 2017]

JUSTICE THOMAS, dissenting.

The Court today holds that the Sixth Amendment requires the States to provide a criminal defendant the opportunity to impeach a jury's guilty verdict with juror testimony about a juror's alleged racial bias, notwithstanding a state procedural rule forbidding such testimony. I agree with JUSTICE ALITO that the Court's decision is incompatible with the text of the Amendment it purports to interpret and with our precedents. I write separately to explain that the Court's holding also cannot be squared with the original understanding of the Sixth or Fourteenth Amendments.

I

The Sixth Amendment's protection of the right, "[i]n all criminal prosecutions," to a "trial, by an impartial jury," is limited to the protections that existed at common law when the Amendment was ratified. See, *e.g., Apprendi* v. *New Jersey*, 530 U. S. 466, 500, and n. 1 (2000) (THOMAS, J., concurring); 3 J. Story, Commentaries on the Constitution of the United States §1773, pp. 652–653 (1833) (Story) (explaining that "the trial by jury in criminal cases" protected by the Constitution is the same "great privilege" that was "a part of that admirable common law" of England); cf. 5 St. G. Tucker, Blackstone's Commentaries 349,

n. 2 (1803). It is therefore "entirely proper to look to the common law" to ascertain whether the Sixth Amendment requires the result the Court today reaches. *Apprendi*, *supra,* at 500, n. 1.

The Sixth Amendment's specific guarantee of impartiality incorporates the common-law understanding of that term. See, *e.g.,* 3 W. Blackstone, Commentaries on the Laws of England 365 (1769) (Blackstone) (describing English trials as "impartially just" because of their "caution against all partiality and bias" in the jury). The common law required a juror to have "freedome of mind" and to be "indifferent as hee stands unsworne." 1 E. Coke, First Part of the Institutes of the Laws of England §234, p. 155a (16th ed. 1809); accord, 3 M. Bacon, A New Abridgment of the Law 258 (3d ed. 1768); cf. T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 319 (1868) ("The jury must be indifferent between the prisoner and the commonwealth"). Impartial jurors could "have no interest of their own affected, and no personal bias, or pre-possession, in favor [of] or against either party." *Pettis* v. *Warren*, 1 Kirby 426, 427 (Conn. Super. 1788).

II

The common-law right to a jury trial did not, however, guarantee a defendant the right to impeach a jury verdict with juror testimony about juror misconduct, including "a principal species of [juror] misbehaviour"—"notorious partiality." 3 Blackstone 388. Although partiality was a ground for setting aside a jury verdict, *ibid.,* the English common-law rule at the time the Sixth Amendment was ratified did not allow jurors to supply evidence of that misconduct. In 1770, Lord Mansfield refused to receive a juror's affidavit to impeach a verdict, declaring that such an affidavit "can't be read." *Rex* v. *Almon*, 5 Burr. 2687,

98 Eng. Rep. 411 (K. B.). And in 1785, Lord Mansfield solidified the doctrine, holding that "[t]he Court [could not] receive such an affidavit from any of the jurymen" to prove that the jury had cast lots to reach a verdict. *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B.).[1]

At the time of the founding, the States took mixed approaches to this issue. See *Cluggage* v. *Swan*, 4 Binn. 150, 156 (Pa. 1811) (opinion of Yeates, J.) ("The opinions of *American* judges . . . have greatly differed on the point in question"); *Bishop* v. *Georgia*, 9 Ga. 121, 126 (1850) (describing the common law in 1776 on this question as "in a *transition* state"). Many States followed Lord Mansfield's no-impeachment rule and refused to receive juror affidavits. See, *e.g., Brewster* v. *Thompson*, 1 N. J. L. 32 (1790) (*per curiam*); *Robbins* v. *Windover*, 2 Tyl. 11, 14 (Vt. 1802); *Taylor* v. *Giger*, 3 Ky. 586, 597–598 (1808); *Price* v. *McIlvain*, 2 Tread. 503, 504 (S. C. 1815); *Tyler* v. *Stevens*, 4 N. H. 116, 117 (1827); 1 Z. Swift, A Digest of the Laws of the State of Connecticut 775 (1822) ("In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct of the jury . . . and this is, most unquestionably, the correct principle"). Some States, however, permitted juror affidavits about juror misconduct. See, *e.g., Crawford* v. *State*, 10 Tenn. 60, 68 (1821); *Cochran* v. *Street*, 1 Va. 79, 81 (1792). And others initially permitted such evidence but quickly reversed course. Compare, *e.g., Smith* v. *Cheetham*, 3 Cai. R. 57,

[1] Prior to 1770, it appears that juror affidavits were sometimes received to impeach a verdict on the ground of juror misbehavior, although only "with great caution." *McDonald* v. *Pless*, 238 U. S. 264, 268 (1915); see, *e.g., Dent* v. *The Hundred of Hertford*, 2 Salk. 645, 91 Eng. Rep. 546 (K. B. 1696); *Philips* v. *Fowler*, Barnes. 441, 94 Eng. Rep. 994 (K. B. 1735). But "previous to our Revolution, and at least as early as 1770, the doctrine in England was distinctly ruled the other way, and has so stood ever since." 3 T. Waterman, A Treatise on the Principles of Law and Equity Which Govern Courts in the Granting of New Trials in Cases Civil and Criminal 1429 (1855).

59–60 (N. Y. 1805) (opinion of Livingston, J.) (permitting juror testimony), with *Dana* v. *Tucker*, 4 Johns. 487, 488–489 (N. Y. 1809) (*per curiam*) (overturning *Cheetham*); compare also *Bradley's Lessee* v. *Bradley*, 4 Dall. 112 (Pa. 1792) (permitting juror affidavits), with, *e.g., Cluggage*, *supra,* at 156–158 (opinion of Yeates, J.) (explaining that *Bradley* was incorrectly reported and rejecting affidavits); compare also *Talmadge* v. *Northrop*, 1 Root 522 (Conn. 1793) (admitting juror testimony), with *State* v. *Freeman*, 5 Conn. 348, 350–352 (1824) ("The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations").

By the time the Fourteenth Amendment was ratified, Lord Mansfield's no-impeachment rule had become firmly entrenched in American law. See Lettow, New Trial for Verdict Against Law: Judge-Jury Relations in Early-Nineteenth Century America, 71 Notre Dame L. Rev. 505, 536 (1996) ("[O]pponents of juror affidavits had largely won out by the middle of the century"); 8 J. Wigmore, Evidence in Trials at Common Law §2352, p. 697 (J. McNaughton rev. 1961) (Wigmore) (Lord Mansfield's rule "came to receive in the United States an adherence almost unquestioned"); J. Proffatt, A Treatise on Trial by Jury §408, p. 467 (1877) ("It is a well established rule of law that no affidavit shall be received from a juror to impeach his verdict"). The vast majority of States adopted the no-impeachment rule as a matter of common law. See, *e.g., Bull* v. *Commonwealth*, 55 Va. 613, 627–628 (1857) ("[T]he practice appears to be now generally settled, to reject the testimony of jurors when offered to impeach their verdict. The cases on the subject are too numerous to be cited"); *Tucker* v. *Town Council of South Kingstown*, 5 R. I. 558, 560 (1859) (collecting cases); *State* v. *Coupenhaver*, 39 Mo. 430 (1867) ("The law is well settled that a traverse juror cannot be a witness to prove misbehavior in the jury in

regard to their verdict"); *Peck* v. *Brewer*, 48 Ill. 54, 63 (1868) ("So far back as . . . 1823, the doctrine was held that the affidavits of jurors cannot be heard to impeach their verdict"); *Heffron* v. *Gallupe*, 55 Me. 563, 566 (1868) (ruling inadmissible "depositions of . . . jurors as to what transpired in the jury room"); *Withers* v. *Fiscus*, 40 Ind. 131, 131–132 (1872) ("In the United States it seems to be settled, notwithstanding a few adjudications to the contrary . . . , that such affidavits cannot be received").[2]

The Court today acknowledges that the States "adopted the Mansfield rule as a matter of common law," *ante,* at 6, but ascribes no significance to that fact. I would hold that it is dispositive. Our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct. In fact, it strongly suggests that such evidence was prohibited. In the absence of a definitive common-law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision that merely "follow[s] out the established course of the common law in all trials for crimes," 3 Story §1785, at 662, to overturn Colorado's decision to preserve the no-impeachment rule, cf. *Boumediene* v. *Bush*, 553 U. S. 723, 832–833 (2008) (Scalia, J., dissenting).

* * *

Perhaps good reasons exist to curtail or abandon the no-impeachment rule. Some States have done so, see Appendix to majority opinion, *ante*, and others have not. Ulti-

[2] Although two States declined to follow the rule in the mid-19th century, see *Wright* v. *Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866); *Perry* v. *Bailey*, 12 Kan. 539, 544–545 (1874), "most of the state courts" had already "committed themselves upon the subject," 8 Wigmore §2354, at 702.

mately, that question is not for us to decide. It should be left to the political process described by JUSTICE ALITO. See *post,* at 5–7 (dissenting opinion). In its attempt to stimulate a "thoughtful, rational dialogue" on race relations, *ante,* at 21, the Court today ends the political process and imposes a uniform, national rule. The Constitution does not require such a rule. Neither should we.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 15–606

MIGUEL ANGEL PENA-RODRIGUEZ, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[March 6, 2017]

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Our legal system has many rules that restrict the admission of evidence of statements made under circumstances in which confidentiality is thought to be essential. Statements made to an attorney in obtaining legal advice, statements to a treating physician, and statements made to a spouse or member of the clergy are familiar examples. See *Trammel* v. *United States*, 445 U. S. 40, 51 (1980). Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way. The goal of avoiding interference with confidential communications of great value has long been thought to justify the loss of important evidence and the effect on our justice system that this loss entails.

The present case concerns a rule like those just mentioned, namely, the age-old rule against attempting to overturn or "impeach" a jury's verdict by offering statements made by jurors during the course of deliberations. For centuries, it has been the judgment of experienced judges, trial attorneys, scholars, and lawmakers that allowing jurors to testify after a trial about what took place in the jury room would undermine the system of trial by jury that is integral to our legal system.

Juries occupy a unique place in our justice system. The other participants in a trial—the presiding judge, the attorneys, the witnesses—function in an arena governed by strict rules of law. Their every word is recorded and may be closely scrutinized for missteps.

When jurors retire to deliberate, however, they enter a space that is not regulated in the same way. Jurors are ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding. The jury trial right protects parties in court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.

Today, with the admirable intention of providing justice for one criminal defendant, the Court not only pries open the door; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution. This is a startling development, and although the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today's holding.

The Court justifies its decision on the ground that the nature of the confidential communication at issue in this particular case—a clear expression of what the Court terms racial bias[1]—is uniquely harmful to our criminal

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[1]The bias at issue in this case was a "bias against Mexican men." App. 160. This might be described as bias based on national origin or ethnicity. Cf. *Hernandez* v. *New York*, 500 U. S. 352, 355 (1991) (plurality opinion); *Hernandez* v. *Texas*, 347 U. S. 475, 479 (1954). However, no party has suggested that these distinctions make a substantive

justice system. And the Court is surely correct that even a tincture of racial bias can inflict great damage on that system, which is dependent on the public's trust. But until today, the argument that the Court now finds convincing has not been thought to be sufficient to overcome confidentiality rules like the one at issue here.

Suppose that a prosecution witness gives devastating but false testimony against a defendant, and suppose that the witness's motivation is racial bias. Suppose that the witness admits this to his attorney, his spouse, and a member of the clergy. Suppose that the defendant, threatened with conviction for a serious crime and a lengthy term of imprisonment, seeks to compel the attorney, the spouse, or the member of the clergy to testify about the witness's admissions. Even though the constitutional rights of the defendant hang in the balance, the defendant's efforts to obtain the testimony would fail. The Court provides no good reason why the result in this case should not be the same.

I

Rules barring the admission of juror testimony to impeach a verdict (so-called "no-impeachment rules") have a long history. Indeed, they pre-date the ratification of the Constitution. They are typically traced back to *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B. 1785), in which Lord Mansfield declined to consider an affidavit from two jurors who claimed that the jury had reached its verdict by lot. See *Warger* v. *Shauers*, 574 U. S. ___, ___ (2014) (slip op., at 4). Lord Mansfield's approach "soon took root in the United States," *ibid.,* and "[b]y the beginning of [the 20th] century, if not earlier, the near-universal and firmly established common-law rule in the

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difference in this case.

United States flatly prohibited the admission of juror testimony to impeach a jury verdict," *Tanner* v. *United States*, 483 U. S. 107, 117 (1987); see 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence §6071, p. 431 (2d ed. 2007) (Wright & Gold) (noting that the Mansfield approach "came to be accepted in almost all states").

In *McDonald* v. *Pless*, 238 U. S. 264 (1915), this Court adopted a strict no-impeachment rule for cases in federal court. *McDonald* involved allegations that the jury had entered a quotient verdict—that is, that it had calculated a damages award by taking the average of the jurors' suggestions. *Id.*, at 265–266. The Court held that evidence of this misconduct could not be used. *Id.,* at 269. It applied what it said was "unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict." *Ibid.* The Court recognized that the defendant had a powerful interest in demonstrating that the jury had "adopted an arbitrary and unjust method in arriving at their verdict." *Id.*, at 267. "But," the Court warned, "let it once be established that verdicts . . . can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding." *Ibid.* This would lead to "harass[ment]" of jurors and "the destruction of all frankness and freedom of discussion and conference." *Id.*, at 267–268. Ultimately, even though the no-impeachment rule "may often exclude the only possible evidence of misconduct," relaxing the rule "would open the door to the most pernicious arts and tampering with jurors." *Id.*, at 268 (internal quotation marks omitted).

The firm no-impeachment approach taken in *McDonald* came to be known as "the federal rule." This approach categorically bars testimony about jury deliberations, except where it is offered to demonstrate that the jury was

subjected to an extraneous influence (for example, an attempt to bribe a juror). *Warger*, *supra*, at ___ (slip op., at 5); *Tanner*, *supra*, at 117;[2] see 27 Wright & Gold §6071, at 432–433.

Some jurisdictions, notably Iowa, adopted a more permissive rule. Under the Iowa rule, jurors were generally permitted to testify about any subject except their "subjective intentions and thought processes in reaching a verdict." *Warger*, *supra*, at ___ (slip op., at 4). Accordingly, the Iowa rule allowed jurors to "testify as to events or conditions which might have improperly influenced the verdict, even if these took place during deliberations within the jury room." 27 Wright & Gold §6071, at 432.

Debate between proponents of the federal rule and the Iowa rule emerged during the framing and adoption of Federal Rule of Evidence 606(b). Both sides had their supporters. The contending arguments were heard and considered, and in the end the strict federal approach was retained.

An early draft of the Advisory Committee on the Federal Rules of Evidence included a version of the Iowa rule, 51 F. R. D. 315, 387–388 (1971). That draft was forcefully criticized, however,[3] and the Committee ultimately pro-

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[2] As this Court has explained, the extraneous influence exception "do[es] not detract from, but rather harmonize[s] with, the weighty government interest in insulating the jury's deliberative process." *Tanner*, 483 U. S., at 120. The extraneous influence exception, like the no-impeachment rule itself, is directed at protecting jury deliberations against unwarranted interference. *Ibid.*

[3] In particular, the Justice Department observed that "[s]trong policy considerations continue to support" the federal approach and that "[r]ecent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations on the instances in which jurors may be questioned about their verdict." Letter from R. Kliendienst, Deputy Attorney General, to Judge A. Maris (Aug. 9, 1971), 117 Cong. Rec. 33648, 33655 (1971).

duced a revised draft that retained the well-established federal approach. *Tanner*, *supra*, at 122; see Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates 73 (Oct. 1971). Expressly repudiating the Iowa rule, the new draft provided that jurors generally could not testify "as to any matter or statement occurring during the course of the jury's deliberations." *Ibid.* This new version was approved by the Judicial Conference and sent to this Court, which adopted the rule and referred it to Congress. 56 F. R. D. 183, 265–266 (1972).

Initially, the House rejected this Court's version of Rule 606(b) and instead reverted to the earlier (and narrower) Advisory Committee draft. *Tanner*, *supra*, at 123; see H. R. Rep. No. 93–650, pp. 9–10 (1973) (criticizing the Supreme Court draft for preventing jurors from testifying about "quotient verdict[s]" and other "irregularities which occurred in the jury room"). In the Senate, however, the Judiciary Committee favored this Court's rule. The Committee Report observed that the House draft broke with "long-accepted Federal law" by allowing verdicts to be "challenge[d] on the basis of what happened during the jury's internal deliberations." S. Rep. No. 93–1277, p. 13 (1974) (S. Rep.). In the view of the Senate Committee, the House rule would have "permit[ted] the harassment of former jurors" as well as "the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Id.*,

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And Senator McClellan, an influential member of the Senate Judiciary Committee, insisted that the "mischief in this Rule ought to be plain for all to see" and that it would be impossible "to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations." Letter from Sen. J. McClellan to Judge A. Maris (Aug. 12, 1971), *id.,* at 33642, 33645.

at 14. This result would have undermined the finality of verdicts, violated "common fairness," and prevented jurors from "function[ing] effectively." *Ibid.* The Senate rejected the House version of the rule and returned to the Court's rule. A Conference Committee adopted the Senate version, see H. R. Conf. Rep. No. 93–1597, p. 8 (1974), and this version was passed by both Houses and was signed into law by the President.

As this summary shows, the process that culminated in the adoption of Federal Rule of Evidence 606(b) was the epitome of reasoned democratic rulemaking. The "distinguished, Supreme Court-appointed" members of the Advisory Committee went through a 7-year drafting process, "produced two well-circulated drafts," and "considered numerous comments from persons involved in nearly every area of court-related law." Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L. J. 125 (1973). The work of the Committee was considered and approved by the experienced appellate and trial judges serving on the Judicial Conference and by our predecessors on this Court. After that, the matter went to Congress, which "specifically understood, considered, and rejected a version of [the rule] that would have allowed jurors to testify on juror conduct during deliberations." *Tanner*, 483 U. S., at 125. The judgment of all these participants in the process, which was informed by their assessment of an empirical issue, *i.e.*, the effect that the competing Iowa rule would have had on the jury system, is entitled to great respect.

Colorado considered this same question, made the same judgment as the participants in the federal process, and adopted a very similar rule. In doing so, it joined the overwhelming majority of States. *Ante,* at 9. In the great majority of jurisdictions, strong no-impeachment rules continue to be "viewed as both promoting the finality of verdicts and insulating the jury from outside influences."

Warger, 574 U. S., at ___ (slip op., at 4).

II

A

Recognizing the importance of Rule 606(b), this Court has twice rebuffed efforts to create a Sixth Amendment exception—first in *Tanner* and then, just two Terms ago, in *Warger*.

The *Tanner* petitioners were convicted of committing mail fraud and conspiring to defraud the United States. 483 U. S., at 109–110, 112–113. After the trial, two jurors came forward with disturbing stories of juror misconduct. One claimed that several jurors "consumed alcohol during lunch breaks . . . causing them to sleep through the afternoons." *Id.*, at 113. The second added that jurors also smoked marijuana and ingested cocaine during the trial. *Id.*, at 115–116. This Court held that evidence of this bacchanalia could properly be excluded under Rule 606(b). *Id.*, at 127.

The Court noted that "[s]ubstantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict." *Id.,* at 119. While there is "little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," the Court observed, it is "not at all clear . . . that the jury system could survive such efforts to perfect it." *Id.*, at 120. Allowing such post-verdict inquiries would "seriously disrupt the finality of the process." *Ibid.* It would also undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.*, at 120–121.

The *Tanner* petitioners, of course, had a Sixth Amendment right "to 'a tribunal both impartial and mentally competent to afford a hearing.'" *Id.*, at 126 (quoting *Jor-*

dan v. *Massachusetts*, 225 U. S. 167, 176 (1912)). The question, however, was whether they also had a right to an evidentiary hearing featuring "one particular kind of evidence inadmissible under the Federal Rules." 483 U. S., at 126–127. Turning to that question, the Court noted again that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id.*, at 127. By contrast, "[p]etitioners' Sixth Amendment interests in an unimpaired jury . . . [were] protected by several aspects of the trial process." *Ibid.*

The Court identified four mechanisms that protect defendants' Sixth Amendment rights. First, jurors can be "examined during *voir dire*." *Ibid.* Second, "during the trial the jury is observable by the court, by counsel, and by court personnel." *Ibid.* Third, "jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." *Ibid.* And fourth, "after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct." *Ibid.* These "other sources of protection of petitioners' right to a competent jury" convinced the Court that the juror testimony was properly excluded. *Ibid.*

Warger involved a negligence suit arising from a motorcycle crash. 574 U. S., at ___ (slip op., at 1). During *voir dire*, the individual who eventually became the jury's foreperson said that she could decide the case fairly and impartially. *Id.,* at ___ (slip op., at 2). After the jury returned a verdict in favor of the defendant, one of the jurors came forward with evidence that called into question the truthfulness of the foreperson's responses during *voir dire*. According to this juror, the foreperson revealed during the deliberations that her daughter had once caused a deadly car crash, and the foreperson expressed the belief that a lawsuit would have ruined her daughter's life. *Ibid.*

In seeking to use this testimony to overturn the jury's verdict, the plaintiff's primary contention was that Rule 606(b) does not apply to evidence concerning a juror's alleged misrepresentations during *voir dire*. If otherwise interpreted, the plaintiff maintained, the rule would threaten his right to trial by an impartial jury.[4] The Court disagreed, in part because "any claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*." *Id.,* at ___ (slip op., at 10). The Court explained that "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by" two of the other *Tanner* safeguards: pre-verdict reports by the jurors and non-juror evidence. 574 U. S., at ___ (slip op., at 10).

Tanner and *Warger* fit neatly into this Court's broader jurisprudence concerning the constitutionality of evidence rules. As the Court has explained, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes* v. *South Carolina*, 547 U. S. 319, 324 (2006) (internal quotation marks and alteration omitted). Thus, evidence rules of this sort have been invalidated only if they "serve no legitimate purpose or . . . are disproportionate to the ends that they are asserted to promote." *Id.,* at 326. *Tanner* and *Warger* recognized that Rule 606(b) serves vital purposes and does not impose a disproportionate burden on the jury trial right.

Today, for the first time, the Court creates a constitutional exception to no-impeachment rules. Specifically, the Court holds that no-impeachment rules violate the Sixth Amendment to the extent that they preclude courts

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[4] Although *Warger* was a civil case, we wrote that "[t]he Constitution guarantees both criminal and civil litigants a right to an impartial jury." 574 U. S., at ___ (slip op., at 9).

from considering evidence of a juror's racially biased comments. *Ante,* at 17. The Court attempts to distinguish *Tanner* and *Warger,* but its efforts fail.

Tanner and *Warger* rested on two basic propositions. First, no-impeachment rules advance crucial interests. Second, the right to trial by an impartial jury is adequately protected by mechanisms other than the use of juror testimony regarding jury deliberations. The first of these propositions applies regardless of the nature of the juror misconduct, and the Court does not argue otherwise. Instead, it contends that, in cases involving racially biased jurors, the *Tanner* safeguards are less effective and the defendant's Sixth Amendment interests are more profound. Neither argument is persuasive.

B

As noted above, *Tanner* identified four "aspects of the trial process" that protect a defendant's Sixth Amendment rights: (1) *voir dire*; (2) observation by the court, counsel, and court personnel; (3) pre-verdict reports by the jurors; and (4) non-juror evidence. 483 U. S., at 127.[5] Although the Court insists that that these mechanisms "may be compromised" in cases involving allegations of racial bias, it addresses only two of them and fails to make a sustained argument about either. *Ante,* at 16.

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First, the Court contends that the effectiveness of *voir dire* is questionable in cases involving racial bias because

[5] The majority opinion in this case identifies a fifth mechanism: jury instructions. It observes that, by explaining the jurors' responsibilities, appropriate jury instructions can promote "[p]robing and thoughtful deliberation," which in turn "improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases." *Ante,* at 20–21. This mechanism, like those listed in *Tanner*, can help to prevent bias from infecting a verdict.

pointed questioning about racial attitudes may highlight racial issues and thereby exacerbate prejudice. *Ibid.* It is far from clear, however, that careful *voir dire* cannot surmount this problem. Lawyers may use questionnaires or individual questioning of prospective jurors[6] in order to elicit frank answers that a juror might be reluctant to voice in the presence of other prospective jurors.[7] Moreover, practice guides are replete with advice on conducting effective *voir dire* on the subject of race. They outline a variety of subtle and nuanced approaches that avoid pointed questions.[8] And of course, if an attorney is con-

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[6] Both of those techniques were used in this case for other purposes. App. 13–14; Tr. 56–78 (Feb. 23, 2010, morning session).

[7] See *People* v. *Harlan*, 8 P. 3d 448, 500 (Colo. 2000) ("The trial court took precautions at the outset of the trial to foreclose the injection of improper racial considerations by including questions concerning racial issues in the jury questionnaire"); *Brewer* v. *Marshall,* 119 F. 3d 993, 996 (CA1 1997) ("The judge asked each juror, out of the presence of other jurors, whether they had any bias or prejudice for or against black persons or persons of Hispanic origin"); 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure §22.3(a), p. 92 (4th ed. 2015) (noting that "[j]udges commonly allow jurors to approach the bench and discuss sensitive matters there" and are also free to conduct "in chambers discussions").

[8] See, *e.g.*, J. Gobert, E. Kreitzberg, & C. Rose, Jury Selection: The Law, Art, and Science of Selecting a Jury §7:41, pp. 357–358 (3d ed. 2014) (explaining that "the issue should be approached more indirectly" and suggesting the use of "[o]pen-ended questions" on subjects like "the composition of the neighborhood in which the juror lives, the juror's relationship with co-workers or neighbors of different races, or the juror's past experiences with persons of other races"); W. Jordan, Jury Selection §8.11, p. 237 (1980) (explaining that "the whole matter of prejudice" should be approached "delicately and cautiously" and giving an example of an indirect question that avoids the word "prejudice"); R. Wenke, The Art of Selecting a Jury 67 (1979) (discussing questions that could identify biased jurors when "your client is a member of a minority group"); *id.*, at 66 (suggesting that instead of "asking a juror if he is 'prejudiced'" the attorney should "inquire about his 'feeling,' 'belief' or 'opinion'"); 2 National Jury Project, Inc., Jurywork: Systematic Tech-

cerned that a juror is concealing bias, a peremptory strike may be used.[9]

The suggestion that *voir dire* is ineffective in unearthing bias runs counter to decisions of this Court holding that *voir dire* on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case

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niques §17.23 (E. Krauss ed., 2d ed. 2010) (listing sample questions about racial prejudice); A. Grine & E. Coward, Raising Issues of Race in North Carolina Criminal Cases, p. 8–14 (2014) (suggesting that attorneys "share a brief example about a judgment shaped by a racial stereotype" to make it easier for jurors to share their own biased views), http://defendermanuals.sog.unc.edu/race/8-addressing-race-trial (as last visited Mar. 3, 2017); *id*., at 8–15 to 8–17 (suggesting additional strategies and providing sample questions); T. Mauet, Trial Techniques 44 (8th ed. 2010) (suggesting that "likely beliefs and attitudes are more accurately learned through indirection"); J. Lieberman & B. Sales, Scientific Jury Selection 114–115 (2007) (discussing research suggesting that "participants were more likely to admit they were unable to abide by legal due process guarantees when asked open-ended questions that did not direct their responses").

[9]To the extent race does become salient during *voir dire*, there is social science research suggesting that this may actually combat rather than reinforce the jurors' biases. See, *e.g*., Lee, A New Approach to *Voir Dire* on Racial Bias, 5 U. C. Irvine L. Rev. 843, 861 (2015) ("A wealth of fairly recent empirical research has shown that when race is made salient either through pretrial publicity, voir dire questioning of prospective jurors, opening and closing arguments, or witness testimony, White jurors are more likely to treat similarly situated Black and White defendants the same way"). See also Sommers & Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7 Psychology, Pub. Pol'y, & L. 201, 222 (2001); Sommers & Ellsworth, How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research, 78 Chi.-Kent L. Rev. 997, 1013–1014, 1027 (2003); Schuller, Kazoleas, & Kawakami, The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom, 33 Law & Human Behavior 320, 326 (2009); Cohn, Bucolo, Pride, & Somers, Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes, 39 J. Applied Soc. Psychology 1953, 1964–1965 (2009).

if a defendant requests it. See *Turner* v. *Murray*, 476 U. S. 28, 36–37 (1986); *Rosales-Lopez* v. *United States*, 451 U. S. 182, 192 (1981) (plurality opinion); *Ristaino* v. *Ross*, 424 U. S. 589, 597, n. 9 (1976). If *voir dire* were not useful in identifying racial prejudice, those decisions would be pointless. Cf. *Turner*, *supra*, at 36 (plurality opinion) (noting "the ease with which [the] risk [of racial bias] could have been minimized" through *voir dire*). Even the majority recognizes the "advantages of careful *voir dire*" as a "proces[s] designed to prevent racial bias in jury deliberations." *Ante,* at 20. And reported decisions substantiate that *voir dire* can be effective in this regard. *E.g.*, *Brewer* v. *Marshall,* 119 F. 3d 993, 995–996 (CA1 1997); *United States* v. *Hasting*, 739 F. 2d 1269, 1271 (CA7 1984); *People* v. *Harlan*, 8 P. 3d 448, 500 (Colo. 2000); see Brief for Respondent 23–24, n. 7 (listing additional cases). Thus, while *voir dire* is not a magic cure, there are good reasons to think that it is a valuable tool.

In any event, the critical point for present purposes is that the effectiveness of *voir dire* is a debatable empirical proposition. Its assessment should be addressed in the process of developing federal and state evidence rules. Federal and state rulemakers can try a variety of approaches, and they can make changes in response to the insights provided by experience and research. The approach taken by today's majority—imposing a federal constitutional rule on the entire country—prevents experimentation and makes change exceedingly hard.[10]

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[10] It is worth noting that, even if *voir dire* were entirely ineffective at detecting racial bias (a proposition no one defends), that still would not suffice to distinguish this case from *Warger* v. *Shauers*, 574 U. S. ___ (2014). After all, the allegation in *Warger* was that the foreperson had entirely circumvented *voir dire* by lying in order to shield her bias. The Court, nevertheless, concluded that even where "jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured"

The majority also argues—even more cursorily—that "racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Ante,* at 16. This is so, we are told, because it is difficult to "call [another juror] a bigot." *Ibid.*

Since the Court's decision mandates the admission of the testimony of one juror about a statement made by another juror during deliberations, what the Court must mean in making this argument is that jurors are less willing to report biased comments by fellow jurors prior to the beginning of deliberations (while they are still sitting with the biased juror) than they are after the verdict is announced and the jurors have gone home. But this is also a questionable empirical assessment, and the Court's seat-of-the-pants judgment is no better than that of those with the responsibility of drafting and adopting federal and state evidence rules. There is no question that jurors *do* report biased comments made by fellow jurors prior to the beginning of deliberations. See, *e.g., United States* v. *McClinton*, 135 F. 3d 1178, 1184–1185 (CA7 1998); *United States* v. *Heller*, 785 F. 2d 1524, 1525–1529 (CA11 1986); *Tavares* v. *Holbrook*, 779 F. 2d 1, 1–3 (CA1 1985) (Breyer, J.); see Brief for Respondent 31–32, n. 10; Brief for United States as *Amicus Curiae* 31. And the Court marshals no evidence that such pre-deliberation reporting is rarer than the post-verdict variety.

Even if there is something to the distinction that the Court makes between pre- and post-verdict reporting, it is debatable whether the difference is significant enough to merit different treatment. This is especially so because post-verdict reporting is both more disruptive and may be the result of extraneous influences. A juror who is ini-

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through other means. *Id.*, at ___ (slip op., at 10).

tially in the minority but is ultimately persuaded by other jurors may have second thoughts after the verdict is announced and may be angry with others on the panel who pressed for unanimity. In addition, if a verdict is unpopular with a particular juror's family, friends, employer, coworkers, or neighbors, the juror may regret his or her vote and may feel pressured to rectify what the jury has done.

In short, the Court provides no good reason to depart from the calculus made in *Tanner* and *Warger*. Indeed, the majority itself uses hedged language and appears to recognize that this "pragmatic" argument is something of a makeweight. *Ante,* at 16–17 (noting that the argument is "not dispositive"); *ante,* at 16 (stating that the operation of the safeguards "may be compromised, or they may prove insufficient").

III

A

The real thrust of the majority opinion is that the Constitution is less tolerant of racial bias than other forms of juror misconduct, but it is hard to square this argument with the nature of the Sixth Amendment right on which petitioner's argument and the Court's holding are based. What the Sixth Amendment protects is the right to an "impartial jury." Nothing in the text or history of the Amendment or in the inherent nature of the jury trial right suggests that the extent of the protection provided by the Amendment depends on the nature of a jury's partiality or bias. As the Colorado Supreme Court aptly put it, it is hard to "discern a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while another would not." 350 P. 3d 287, 293

(2015).[11]

Nor has the Court found any decision of this Court suggesting that the Sixth Amendment recognizes some sort of hierarchy of partiality or bias. The Court points to a line of cases holding that, in some narrow circumstances, the Constitution requires trial courts to conduct *voir dire* on the subject of race. Those decisions, however, were not based on a ranking of types of partiality but on the Court's conclusion that in certain cases racial bias was especially likely. See *Turner,* 476 U. S., at 38, n. 12 (plurality opinion) (requiring *voir dire* on the subject of race where there is "a particularly compelling need to inquire into racial prejudice" because of a qualitatively higher "risk of racial bias"); *Ristaino*, 424 U. S., at 596 (explaining that the requirement applies only if there is a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be [impartial]").[12] Thus, this line of cases does not advance the majority's argument.

It is undoubtedly true that "racial bias implicates unique historical, constitutional, and institutional concerns." *Ante,* at 16. But it is hard to see what that has to do with the scope of an *individual criminal defendant's* Sixth Amendment right to be judged impartially. The Court's efforts to reconcile its decision with *McDonald*,

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[11] The majority's reliance on footnote 3 of *Warger*, *ante,* at 12–13, is unavailing. In that footnote, the Court noted that some "cases of juror bias" might be "so extreme" as to prompt the Court to "*consider* whether the usual safeguards are or are not sufficient to protect the integrity of the process." 574 U. S., at ___–___, n. 3 (slip op., at 10–11, n. 3) (emphasis added). Considering this question is very different from adopting a constitutionally based exception to long-established no-impeachment rules.

[12] In addition, those cases did not involve a challenge to a long-established evidence rule. As such, they offer little guidance in performing the analysis required by this case.

Tanner, and *Warger* illustrate the problem. The Court writes that the misconduct in those cases, while "troubling and unacceptable," was "anomalous." *Ante,* at 15. By contrast, racial bias, the Court says, is a "familiar and recurring evil" that causes "systemic injury to the administration of justice." *Ante,* at 15–16.

Imagine two cellmates serving lengthy prison terms. Both were convicted for homicides committed in unrelated barroom fights. At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because he was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror said in the jury room. The Court would say to the first prisoner: "You are entitled to introduce the jurors' testimony, because racial bias is damaging to our society." To the second, the Court would say: "Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue."

This disparate treatment is unsupportable under the Sixth Amendment. If the Sixth Amendment requires the admission of juror testimony about statements or conduct during deliberations that show one type of juror partiality, then statements or conduct showing any type of partiality should be treated the same way.

B

Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification—such as national origin[13] or

[13] See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440

religion[14]—would merit equal treatment. So, I think, would bias based on sex, *United States* v. *Virginia*, 518 U. S. 515, 531 (1996), or the exercise of the First Amendment right to freedom of expression or association. See *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540, 545 (1983). Indeed, convicting a defendant on the basis of any irrational classification would violate the Equal Protection Clause.

Attempting to limit the damage worked by its decision, the Court says that only "clear" expressions of bias must be admitted, *ante*, at 17, but judging whether a statement is sufficiently "clear" will often not be easy. Suppose that the allegedly biased juror in this case never made reference to Peña-Rodriguez's race or national origin but said that he had a lot of experience with "this macho type" and knew that men of this kind felt that they could get their way with women. Suppose that other jurors testified that they were certain that "this macho type" was meant to refer to Mexican or Hispanic men. Many other similarly suggestive statements can easily be imagined, and under today's decision it will be difficult for judges to discern the dividing line between those that are "clear[ly]" based on racial or ethnic bias and those that are at least somewhat ambiguous.

IV

Today's decision—especially if it is expanded in the ways that seem likely—will invite the harms that no-impeachment rules were designed to prevent.

First, as the Court explained in *Tanner*, "postverdict scrutiny of juror conduct" will inhibit "full and frank dis-

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(1985).

[14] See, *e.g.*, *United States* v. *Armstrong*, 517 U. S. 456, 464 (1996); *Burlington Northern R. Co.* v. *Ford*, 504 U. S. 648, 651 (1992); *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) (*per curiam*).

cussion in the jury room." 483 U. S., at 120–121; see also *McDonald*, 238 U. S., at 267–268 (warning that the use of juror testimony about misconduct during deliberations would "make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference"). Or, as the Senate Report put it: "[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation." S. Rep., at 14.

Today's ruling will also prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens' willingness to serve on juries. Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive today's decision is an open question—as is the effect of this decision on privilege rules such as those noted at the outset of this opinion.[15]

Where post-verdict approaches are permitted or occur,

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[15] The majority's emphasis on the unique harms of racial bias will not succeed at cabining the novel exception to no-impeachment rules, but it may succeed at putting other kinds of rules under threat. For example, the majority approvingly refers to the widespread rules limiting attorneys' contact with jurors. *Ante*, at 17–18. But under the reasoning of the majority opinion, it is not clear why such rules should be enforced when they come into conflict with a defendant's attempt to introduce evidence of racial bias. For instance, what will happen when a lawyer obtains clear evidence of racist statements by contacting jurors in violation of a local rule? (Something similar happened in *Tanner*. 483 U. S., at 126.) It remains to be seen whether rules of this type—or other rules which exclude probative evidence, such as evidentiary privileges—will be allowed to stand in the way of the "imperative to purge racial prejudice from the administration of justice." *Ante*, at 13.

there is almost certain to be an increase in harassment, arm-twisting, and outright coercion. See *McDonald, supra*, at 267; S. Rep., at 14 (explaining that a laxer rule "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors"); 350 P. 3d, at 293. As one treatise explains, "[a] juror who reluctantly joined a verdict is likely to be sympathetic to overtures by the loser, and persuadable to the view that his own consent rested on false or impermissible considerations, and the truth will be hard to know." 3 C. Mueller & L. Kirkpatrick, Federal Evidence §6:16, p. 75 (4th ed. 2013).

The majority's approach will also undermine the finality of verdicts. "Public policy requires a finality to litigation." S. Rep., at 14. And accusations of juror bias—which may be "raised for the first time days, weeks, or months after the verdict"—can "seriously disrupt the finality of the process." *Tanner*, *supra*, at 120. This threatens to "degrad[e] the prominence of the trial itself" and to send the message that juror misconduct need not be dealt with promptly. *Engle* v. *Isaac*, 456 U. S. 107, 127 (1982). See H. R. Conf. Rep. No. 93–1597, at 8 ("The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations").

The Court itself acknowledges that strict no-impeachment rules "promot[e] full and vigorous discussion," protect jurors from "be[ing] harassed or annoyed by litigants seeking to challenge the verdict," and "giv[e] stability and finality to verdicts." *Ante,* at 9. By the majority's own logic, then, imposing exceptions on no-impeachment rules will tend to defeat full and vigorous discussion, expose jurors to harassment, and deprive verdicts of stability.

The Court's only response is that some jurisdictions already make an exception for racial bias, and the Court

detects no signs of "a loss of juror willingness to engage in searching and candid deliberations." *Ante,* at 19. One wonders what sort of outward signs the Court would expect to see if jurors in these jurisdictions do not speak as freely in the jury room as their counterparts in jurisdictions with strict no-impeachment rules. Gathering and assessing evidence regarding the quality of jury deliberations in different jurisdictions would be a daunting enterprise, and the Court offers no indication that anybody has undertaken that task.

In short, the majority barely bothers to engage with the policy issues implicated by no-impeachment rules. But even if it had carefully grappled with those issues, it still would have no basis for exalting its own judgment over that of the many expert policymakers who have endorsed broad no-impeachment rules.

V

The Court's decision is well-intentioned. It seeks to remedy a flaw in the jury trial system, but as this Court said some years ago, it is questionable whether our system of trial by jury can endure this attempt to perfect it. *Tanner*, 483 U. S., at 120.

I respectfully dissent.

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 18, 2016 106477

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v MEMORANDUM AND ORDER

ANDREW JONES,
Appellant.

Calendar Date: January 8, 2016

Before: Peters, P.J., Garry, Egan Jr. and Clark, JJ.

Bruce Evans Knoll, Albany, for appellant.

P. David Soares, District Attorney, Albany (Michael C. Wetmore of counsel), for respondent.

Egan Jr., J.

Appeal from a judgment of the County Court of Albany County (Ryan, J.), rendered July 18, 2001, upon a verdict convicting defendant of the crime of assault in the second degree.

During the early morning hours of October 6, 2000, defendant[1] and two of his friends – Julio Vazquez and Wayne

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[1] Although defendant was indicted as Andrew Jones, the People subsequently discovered that defendant's true name was Andrew James. At trial, County Court granted the People's oral motion to amend the indictment, but various posttrial materials in the record on appeal, including correspondence from the Department of Corrections and Community Supervision, nonetheless

Holmes – were patrons at a bar in the City of Albany. While there, defendant paid a dancer $20 for a lap dance. Apparently dissatisfied with the dancer's performance, defendant began to quarrel with her, prompting the establishment's owner, Daniel Cadalso, to intervene. Although Cadalso issued defendant a refund, defendant remained irate, stating that "he was going to shoot the place up" and generally "making a huge scene in front of the whole bar." Cadalso enlisted the assistance of Vazquez in an effort to remove defendant from the premises, but Vazquez assured Cadalso that everything was under control; defendant, who had just ordered a drink from the bar, was not inclined to leave.

Cadalso then went to speak with Christopher Disonell, who was working the door at the club, and apprised him of the situation. As Cadalso and Disonnell were speaking, defendant approached and launched into another verbal tirade, during the course of which Holmes charged Cadalso and pinned him against the wall while Vazquez blocked the exit. Following a brief struggle, Cadalso broke free, ran outside and called 911. Meanwhile, defendant approached Disonell, leaned in and said that "he was going to stick [Disonell]." Believing that he "was going to get stabbed," Disonell punched defendant in the face and thereafter was struck on the right side of his face with a beer bottle wielded by Holmes. Immediately thereafter, defendant struck Disonell on the left side of his face with "[a] mixed drink glass." Both the beer bottle and the drink glass broke upon impact, cutting Disonell's face and sending blood "all over the place." Disonell then went to the bathroom and attempted to stop the bleeding. Cadalso, who still was outside on the phone with the police, saw defendant, Holmes and Vazquez exit the club and climb into "a big, white, flatbed towing vehicle."

When Cadalso reentered the establishment, he observed "[b]roken glass, broken chairs and a lot of blood." Cadalso then

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refer to defendant as Andrew Jones. For that reason, we have captioned this matter in accordance with defendant's name as it appeared on the underlying indictment. There is, however, no question that defendant and Andrew James are one and the same person.

went in search of Disonell, whom he found – "cut pretty bad" – in the bathroom holding a towel to his face. According to Cadalso, Disonell had "[d]eep – very deep, wide-open lacerations in both his cheeks and a big, deep cut . . . on the bridge of his nose" and "was really, really bleeding profusely." Cadalso drove Disonell to a local hospital,[2] following which Cadalso returned to the scene and identified defendant, Holmes and Vazquez as the individuals involved in the disturbance at the club. Defendant and Holmes then were placed under arrest.

As a result of this incident, defendant was indicted and charged in December 2000 with assault in the second degree.[3] Following a jury trial in April 2001, defendant was found guilty as charged and thereafter was sentenced, as a second felony offender, to seven years in prison followed by five years of postrelease supervision. This appeal by defendant ensued.[4]

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[2] A member of the Albany Police Department, who saw Disonell at the hospital, offered a similar assessment of Disonell's injuries, stating, "He was sliced up very badly. Both sides of his nose had pretty big gashes and into his cheek area."

[3] According to the People, Holmes separately pleaded guilty to assault in the second degree for his role in the attack.

[4] Although defendant filed a notice of appeal in July 2001, defendant, for reasons that are not apparent from the record, did not perfect his appeal in this Court until June 2015. The People did not move to dismiss the appeal in the interim, and this Court's rule regarding the abandonment of criminal appeals (see 22 NYCRR 800.14 [j]) did not go into effect until July 28, 2014 – after the point in time when this Court, among other things, granted defendant's motion for permission to proceed as a poor person and for the assignment of counsel. As for the underlying delay, defense counsel acknowledged at oral argument that, while this appeal was pending, defendant was convicted of murder in the second degree – for which he is serving a lengthy term of imprisonment – and suggested that the delay in pursuing the instant appeal was attributable to that intervening criminal matter.

Defendant first asserts that he was deprived of a fair trial due to the People's intermingling of the proof relative to Holmes' and defendant's respective actions on the morning in question. Specifically, defendant contends that the People failed to sufficiently differentiate between the injuries to the right and left sides of Disonell's face, thereby raising the possibility that defendant was indicted for – and ultimately was convicted of – a crime that he did not actually commit. We disagree. The grand jury minutes, as well as the trial transcript – from the opening statements, to the testimony offered by Cadalso and Disonell, to the People's closing argument – reflect that the People drew a clear distinction between both the injuries that Disonell received to the right and the left sides of his face and the individuals who caused such injuries. Accordingly, we are satisfied that defendant was "tried and convicted of only those crimes and upon only those theories charged in the indictment" (People v Wilson, 61 AD3d 1269, 1271 [2009] [internal quotation marks and citations omitted], lv denied 14 NY3d 774 [2010]).

Although defendant's present challenge to the legal sufficiency of the evidence is unpreserved for our review, "our weight of the evidence review necessarily involves an evaluation of whether all elements of the charged crime were proven beyond a reasonable doubt at trial" (People v Burch, 97 AD3d 987, 989 n 2 [2012] [internal quotation marks and citations omitted], lv denied 19 NY3d 1101 [2012]). In this regard, "[a] person is guilty of assault in the second degree when . . . [h]e [or she] recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument" (Penal Law § 120.05 [4]; see People v Heier, 90 AD3d 1336, 1337 [2011], lv denied 18 NY3d 994 [2012]). "Serious physical injury" includes, insofar as is relevant here, "serious and protracted disfigurement" (Penal Law § 10.00 [10]), and a "[d]angerous instrument" is defined as "any instrument, article or substance, . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00 [13]; see People v Griffith, 254 AD2d 753, 753-754 [1998] [10-ounce bar glass qualifies as a dangerous instrument]). Finally, a person acts "recklessly" when he or she "is aware of

and consciously disregards a substantial and unjustifiable risk that [a] result will occur" (Penal Law § 15.05 [3]; see People v Gallo, 133 AD3d 1088, 1089 [2015]). Specifically, the risk at issue "must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (Penal Law § 15.05 [3]; accord People v Briskin, 125 AD3d 1113, 1119 [2015], lv denied 25 NY3d 1069 [2015]).

Here, defendant primarily disputes the proof adduced with respect to the "serious physical injury" element of the charged crime. Specifically, defendant contends that the record as a whole does not establish that Disonell suffered "serious and protracted disfigurement" as the result of defendant's actions in cutting the left side of Disonell's face with the drink glass. We disagree. Disonell testified – without contradiction – that he had "plastic surgery" and received 150 stitches to close his facial wounds. Disonell further testified that he was on prescription pain medication for approximately one week following the attack and that he missed three or four weeks of work as a result thereof. Additionally, a photograph taken shortly after the assault and admitted into evidence at trial clearly depicts a significant wound to the left side of Disonell's face, and Disonell testified at trial (some six months after the incident occurred) that he had facial scarring as a result of the assault – specifically, a scar on the left side of his face that was a "[f]ew inches" long. Finally, the record reflects that Disonell separately displayed the scars on each side of his face to the jury. Although Disonell's medical records admittedly did not shed much light on the extent of his injuries, we nonetheless are satisfied that the jury's verdict was in accord with the weight of the evidence.

To the extent that defendant argues that County Court failed to define "serious and protracted disfigurement" for the jury, we need note only that defendant neither objected to the charge as given nor requested additional or different language. Accordingly, this issue is unpreserved for our review (see People v Davis, 133 AD3d 911, 914 [2015]). In any event, County Court can hardly be faulted for failing to provide the jury with the definition of "serious and protracted disfigurement" set forth in

People v McKinnon (15 NY3d 311 [2010]) when the Court of Appeals did not craft that definition until more than nine years after defendant's jury trial. Defendant's remaining arguments relative to the jury charge and resulting verdict – including his assertion that County Court erred in refusing to charge the lesser included offense of assault in the third degree and that the jury improperly rejected his justification defense – have been examined and found to be lacking in merit.

That said, we do find merit to defendant's claim that County Court erred in denying his Batson challenge with respect to prospective juror No. 2 and, therefore, we reverse the judgment and remit this matter for a new trial. As a threshold matter, we reject the People's assertion that defendant failed to preserve this issue for our review. "[A] Batson claim can be raised at any time during the jury selection process" (People v Perez, 37 AD3d 152, 154 [2007]; see Matter of Robar v LaBuda, 84 AD3d 129, 138 n 6 [2011]). More to the point, the People's present assertion – that defendant failed to specifically object to the prosecutor's refusal to provide a race-neutral explanation for the exclusion of prospective juror No. 2 – "is inconsistent with the process by which a Batson analysis is made . . .; it is defendant's objections that give rise to the prosecutor's obligation to state race-neutral reasons for the disputed challenges in the first place" (People v Davis, 253 AD2d 634, 635 [1998]).[5]

As to the merits, where a Batson challenge is raised (see Batson v Kentucky, 476 US 79 [1986]), the trial court must engage in a three-step process. "At step one, the moving party bears the burden of establishing a prima facie case of discrimination in the exercise of peremptory challenges. Once a prima facie case of discrimination has been established, the burden shifts, at step two, to the nonmoving party to offer a facially neutral explanation for each suspect challenge. At the third step, the

[5] In any event, defense counsel did expressly note "that there ha[d]n't been any race-neutral reason provided" with respect to prospective juror No. 2.

burden shifts back to the moving party to prove purposeful discrimination and the trial court must determine whether the proffered reasons are pretextual" (People v Hecker, 15 NY3d 625, 634-635 [2010] [internal quotation marks and citations omitted]; see People v Grafton, 132 AD3d 1065, 1066 [2015]).

Here, the record reflects that the People sought to exercise peremptory challenges to exclude four of the five nonwhite individuals comprising the second panel of prospective trial jurors. Indeed, as defense counsel noted, "The only [nonwhite juror] who was not excluded [from this panel] was the daughter-in-law of the former Chief of Police of the Albany Police Department." In response to defense counsel's Batson challenge, County Court asked the People – "based upon the peremptory challenges" asserted – to "give a race-neutral reason . . . for th[o]se selections," thereby implicitly finding that defendant had made a prima facie showing of discrimination. The People provided such an explanation as to prospective juror Nos. 4, 6 and 17 but refused to offer a race-neutral explanation as to prospective juror No. 2, noting that this juror was the first nonwhite juror that they had sought to exclude by use of a peremptory challenge. As the prosecuting attorney succinctly put it, "I shouldn't be made to give a reason for the first one." Defense counsel took issue with the People's lack of a race-neutral explanation for the exclusion of this juror, noting that "the fact that [prospective juror No. 2] was the first person of color [to be] excluded [was] . . . merely fortuitous." County Court rejected defendant's argument on this point and allowed the People to exercise a peremptory challenge to exclude prospective juror No. 2, as well as prospective juror Nos. 4 and 6.

The foregoing stance – that the People were not required to provide a race-neutral explanation for seeking to exclude prospective juror No. 2 because she was the first person of color upon whom the People sought to exercise a peremptory challenge – is simply wrong. "The purpose of the Batson rule is to eliminate discrimination, not minimize it" (People v Bolling, 79 NY2d 317, 321 [1992]). Accordingly, because "[t]he exclusion of any [nonwhite prospective jurors] solely because of their race is constitutionally forbidden" (id. at 321 [internal quotation marks and citation omitted]), a defendant asserting a Batson challenge

need not show a pattern of discrimination. "Although as part of their prima facie case parties often rely on numbers to show a pattern of strikes against a particular group of jurors, a prima facie case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination" (People v Smocum, 99 NY2d 418, 421-422 [2003]; see People v Morgan, 75 AD3d 1050, 1053 [2010], lv denied 15 NY3d 894 [2010]).

Here, County Court implicitly concluded that defendant had made a prima facie showing of discrimination as to all four of the jurors in question, and the burden then shifted to the People to provide race-neutral explanations for all four – not just three – of the nonwhite prospective jurors against whom the People asserted peremptory challenges. Given the People's failure to provide – and County Court's failure to require – such an explanation as to all four prospective jurors, defendant is entitled to a new trial.

Peters, P.J., Garry and Clark, JJ., concur.

ORDERED that the judgment is reversed, on the law, and matter remitted to the County Court of Albany County for a new trial.

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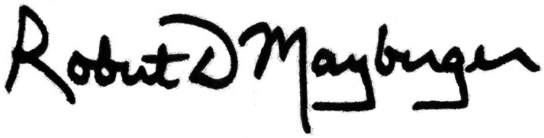

Robert D. Mayberger
Clerk of the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Criminal Action No.: 15-cr-00073-PAB
Courtroom Deputy: Sabrina Grimm

Date: April 27, 2018
Court Reporter: Janet Coppock

Parties:	*Counsel:*
UNITED STATES OF AMERICA,	Anna Kaminska Kyle Hankey
Plaintiff,	
v.	
KENNETH BREWINGTON,	Robert Pepin Mary Butterton
Defendant.	

COURTROOM MINUTES

TRIAL PREPARATION CONFERENCE

1:05 p.m. Court in session.

Court calls case. Appearances of counsel.

Also present and seated at Plaintiff's counsel table, paralegal Ruthie Wu.

Defendant present on bond.

Trial is set to commence on May 7, 2018 at 8:00 a.m.

Discussion regarding trial schedule, jury selection, jury questionnaire, orientation video, opening statements limited to 30 minutes per side, voir dire by counsel limited to 30 minutes per side, witnesses, and exhibits.

Jury selection with proceed with 32 jurors and a final jury panel of 14 jurors, with 2 alternates. The alternate jurors will be seated at seats 7 and 8.

The orientation video will be played in the jury assembly room for potential jurors. However, the questionnaire will not be administered.

ORDERED: Mr. Brewington's Motion for a Case-Specific Jury Questionnaire, Jury Instruction, and Related Relief [215] is GRANTED IN PART AND DENIED IN PART, as stated on record.

ORDERED: Defendant is permitted to play the ABC video, as discussed, as part of his voir dire time. Government will also be permitted to ask additional questions regarding the video.

ORDERED: The parties shall submit a brief statement of the case, as discussed, on or before May 2, 2018.

ORDERED: Witnesses will be sequestered.

ORDERED: Witness Francie Rakiec will be designated as an advisory witness.

Discussion regarding original documents related to a subpoena duces tecum.

ORDERED: Defendant's bond is continued.

2:25 p.m. Court in recess.

Hearing concluded.
Total in-court time: 1:20

The Western District of Washington's bench and bar have long-standing commitments to a fair and unbiased judicial process. As a result, the emerging social and neuroscience research regarding unconscious bias prompted the Court to create a bench-bar-academic committee to explore the issue in the context of the jury system and to develop and offer tools to address it.

One tool the committee developed was a set of jury instructions that address the issue of unconscious bias. Research regarding the efficacy of jury instructions is still young and some of the literature has raised questions whether highlighting the notion of unconscious bias would do more harm than good.[1] However, the body of research supports that, as a general matter, awareness and mindfulness about one's own unconscious associations are important and thus a decision-maker's ability to avoid these associations, however that is achieved, will likely result in fairer decisions.[2]

Accordingly, the proposed instructions are intended to alert the jury to the concept of unconscious bias and then to instruct the jury in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making. The instructions thus serve the purposes of raising awareness to the associations jurors may be making without express knowledge and directing the jurors to avoid using these associations.

The committee has incorporated unconscious bias language into a preliminary instruction, into the witness credibility instruction, and into a closing instruction.[3] In addition, the committee has developed an instruction that can be given before jury selection if the parties are going to ask questions during *voir dire* regarding bias, including unconscious bias.

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[1] See, e.g., Irene V. Blair, The Malleability of Automatic Stereotypes and Prejudice, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (cumulating research on value of instruction to suppress stereotype and finding it mixed); Jennifer K. Elek & Paula Hannaford-Agor, First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making, 49 CT. REV. 190, 193 195, 198 (2013), available at http://aja.ncsc.dni.us/publications/courtrv/cr49-4/CR49-4Elek.pdf; Jennifer A. Richeson & J. Nicole Shelton, Negotiating Interracial Interactions: Costs, Consequences, and Possibilities, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316 (2007); Jacquie D. Vorauer, Completing the Implicit Association Test Reduces Positive Intergroup Interaction Behavior, 23 PSYCHOL. SCI. 1168 (2012) (finding that White participants' taking race-based IAT led to their non-White (Aboriginal) partners feeling less well regarded than after interactions after a non-race-based IAT); Jennifer K. Elek & Paula Hannaford-Agor, Can Explicit Instructions Reduce Expressions of Implicit Bias?: New Questions Following a Test of a Specialized Jury Instruction, NAT'L CENTER FOR STATE CTS. (Apr. 2014), available at http://ncsc.contentdm.oclc.org/cdm/ref/collection/juries/id/273 (finding "no significant effects of the instruction on judgments of guilt, confidence, strength of prosecution's evidence, or sentence length"; but the study's authors also reported that they were unable to identify the more traditionally-expected baseline bias, "which prevented a complete test of the value of the instructional intervention.").

[2] See Adam Benforado & John Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 EMORY L.J. 311, 325–26 (2007).

[3] The committee suggests introducing the topic as part of the preliminary instructions as there is research that suggests priming jurors may be more effective than waiting until the end of a case. See, e.g., Lisa Kern Griffin, Narrative, Truth, and Trial, 101 GEO. L.J. 281, 232 (2013); Kurt Hugenberg, Jennifer Miller & Heather M. Claypool, Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem, 43 J. EXPERIMENTAL SOC. PSYCH. 334 (2007) (finding that warnings given ahead of time about likely misperceptions of other race faces may be effective).

PRELIMINARY INSTRUCTION TO BE GIVEN
TO THE ENTIRE PANEL BEFORE JURY SELECTION

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.

PRELIMINARY INSTRUCTIONS TO BE GIVEN BEFORE OPENING STATEMENTS

DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]

In addition, please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is similar to Model Civil Instruction 1.1B.

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[1] Definitions modified by combining writings and comments by Harvard Professor Mahzarin Banaji.

[2] http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;
(2) the witness's memory;
(3) the witness's manner while testifying;
(4) the witness's interest in the outcome of the case, if any;
(5) the witness's bias or prejudice, if any;
(6) whether other evidence contradicted the witness's testimony;
(7) the reasonableness of the witness's testimony in light of all the evidence; and
(8) any other factors that bear on believability.

You must avoid bias, conscious or unconscious, based on the witness's race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Model Ninth Circuit Criminal Instruction 1.7 (modified)

INSTRUCTION TO BE GIVEN
DURING CLOSING INSTRUCTIONS
(perhaps before 7.5 – Verdict Form)

DUTY OF JURY

I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]

Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is similar to Model Civil Instruction 1.1B.

[1] Definitions modified by combining writings and comments by Harvard Professor Mahzarin Banaji.

[2] http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 1:15-cr-00073-PAB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH BREWINGTON,

Defendant.

MR. BREWINGTON'S MOTION FOR A CASE-SPECIFIC JURY QUESTIONNAIRE, JURY INSTRUCTION, AND RELATED RELIEF

Kenneth Brewington, by and through undersigned counsel, hereby moves the Court for a case-specific jury questionnaire, jury instruction and related relief. Specifically, Mr. Brewington requests that the Court use the following procedures during voir dire: (1) a case-specific juror questionnaire that includes questions related to implicit bias; (2) an orientation video explaining implicit bias; (3) a preliminary instruction on implicit bias; and (4) supplemental attorney-conducted voir dire, including use of a 4:40 minute-long video clip from the television show *What Would You Do?* As set forth more fully below, the requested relief is necessary in order to minimize the impact of implicit bias and ensure that Mr. Brewington receives a fair trial.

I. There Is A Significant Risk That Implicit Bias Will Have A Negative Impact On The Fairness Of Mr. Brewington's Trial

"Implicit bias, or stereotyping, consists of the unconscious assumptions that humans make about individuals." *United States v. Mateo-Medina*, 845 F.3d 546, 553 (3d Cir. 2017). While implicit bias may play a particularly large role in situations requiring "rapid decision-making, such as police encounters," *id.*, it can also affect legal decision-making by jurors. Studies of mock jurors have, for example, shown that a defendant's skin color can "alter[] how jurors evaluated the evidence presented and also how they answered the crucial question 'How guilty is the defendant,'" with the darker-skinned defendant judged to be guiltier than the lighter-skinned defendant. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1144-45 (2012).

Individuals may "unconsciously act on such biases even though [they] may consciously abhor them." The Hon. 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). Many of the same mock jurors who found the darker-skinned defendant to be guiltier than the lighter-skinned defendant based on the same body of evidence, for instance, could not even *recall* the defendant's race. *See* Kang, 59 UCLA L. Rev. at 1145. There was, moreover, no correlation between the mock jurors' levels of explicit racial bias, and their weighing of the evidence or assessment of guilt. *See id.*; *see also* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and*

Misremembering, 57 Duke L.J. 345, 398-99 (2007) (finding that test subjects "misremembered certain legally relevant facts in a racially biased manner," and in particular tended to make memory errors "in a manner harmful to African Americans").

The risk that these implicit biases will have a negative impact on the fairness of this trial is heightened by two factors. First, Mr. Brewington is an African American man, and his race will be rendered more conspicuous by the fact that the witnesses against him, the prosecutors, the defense counsel, and the judge are not. Second, and somewhat counterintuitively, the risk that implicit bias will play a role in Mr. Brewington's trial is actually *increased* by the fact that his case is not otherwise racially charged. Research suggests that, "[w]hen the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions," whereas "when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their decision-making." Kang, 59 UCLA L. Rev. at 1143. Unless measures are taken to combat implicit bias, then, there is a significant risk that the trial will be driven, at least in part, by these unconscious, and unfair, thought processes.

II. This Court Can And Should Take Steps To Limit Impact Of Implicit Bias

Importantly, there are strategies for limiting the negative impact of implicit bias and promote impartial decision-making. Individuals with inflated senses of their own objectivity, for example, seem to be at particular risk for behaving in biased ways. *See*

Kang, 59 UCLA L. Rev. at 1172-73. Learning about the possible influence of nonconscious thought processes on decision-making, on the other hand, may actually lead people to be *more* objective. *See id.* at 1173. Similarly, research suggests that individuals who are consciously motivated to counteract their implicit biases make more objective decisions. *See id.* at 1174-75. In combination, these factors may explain why, for instance, trained police officers and judges seem to be able to engage in more objective decision-making than laypeople, even when they harbor the same kinds of implicit bias as the general population. *See* Bennett, 4 Harv. L. & Pol'y Rev. at 156-57.

"A probing voir dire examination is the best way to ensure that jurors do not harbor biases for or against the parties." *Sampson v. United States*, 724 F.3d 150, 163-64 (1st Cir. 2013) (internal citation omitted). And increasingly, state and federal courts across the country have adopted voir dire procedures intended to counteract the negative impacts of implicit bias by educating jurors and increasing their motivation to evaluate the evidence objectively, free from implicit bias. *See, e.g.*, *Unconscious Bias*, United States District Court for the Western District of Washington, http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited Apr. 6, 2018) (video and jury instructions created by a committee of judges and attorneys to be presented to jurors "highlighting and combating the problems presented by unconscious bias"). Accordingly, Mr. Brewington requests that the Court exercise its broad discretion over matters related to jury selection and instruction in order to limit the impact of implicit bias on the trial by instituting the following procedures at trial:

A. Case-Specific Juror Questionnaire

Mr. Brewington requests that the Court order the use of a case-specific juror questionnaire. *See* Exhibit A (Proposed Juror Questionnaire). This is a complex white-collar case in which the defendant, Mr. Brewington, is black, and almost everybody else involved—including the alleged victims of the offense and his alleged co-conspirators—is not. And as previously discussed, the risk that implicit bias will have an impact on jurors' assessment of the evidence in this case is actually exacerbated by the fact that it is not otherwise racially charged.

Under these circumstances, a case-specific juror questionnaire is the appropriate tool to enable the selection of a fair and impartial jury. The case-specific juror questionnaire is particularly valuable in this case because it may be completed in private. Racial prejudice and implicit bias are sensitive subjects, and prospective jurors are likely to be more forthcoming on the page. The completed juror questionnaires will, moreover, enable counsel to use their limited time in court to address the subjects of racial prejudice and implicit bias more efficiently.

Accordingly, Mr. Brewington requests that this Court grant his request to use a case-specific juror questionnaire.

B. Orientation Video Explaining Implicit Bias

Mr. Brewington also requests that the Court play "Unconscious Bias," the attached video produced by the United States District Court for the Western District of Washington on the subject of unconscious or implicit bias, to all potential jurors during

orientation. *See Unconscious Bias*, United States District Court for the Western District of Washington ("Washington Video") (Exhibit B).[1],[2] The video, which is 10:53 minutes long, was "created by a committee of judges and attorneys" in the Western District of Washington, and is intended to "be presented to jurors with the intent of highlighting and combating problems presented by unconscious bias." *Id.*

Relevant here, the Washington Video provides viewers with a brief but thorough education on the subject of implicit bias—and strategies for combating it. As previously discussed, research suggests that educating individuals about implicit bias can help reduce its impact, both by encouraging them to question their own objectivity, and by increasing their motivation to make fair decisions. *See* Kang, 59 UCLA L. Rev. at 1172-77. The Washington Video works on both of these fronts, simultaneously raising juror awareness of the potential pitfalls of unconscious bias, and encouraging jurors to combat any such bias within themselves by carefully reflecting on their decisions. The video is, moreover, measured in tone, rather than accusatory, and grounded in evidence-based, scientific terms—both factors that are likely to increase its efficacy in reducing implicit bias, and increasing juror fairness. *See id.* at 1183.

Accordingly, Mr. Brewington requests that this Court play the Washington Video to potential jurors during orientation.

---

[1] The video is also available at the following link: http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited Apr. 6, 2018).

[2] Exhibit B is a single compact disk containing both of the recordings addressed in this motion. The disk is filed conventionally.

C. Preliminary Instruction On Implicit Bias

Mr. Brewington further requests that this Court issue the following preliminary instruction to the entire panel of potential jurors, prior to voir dire, which is based upon the model instruction used in the Western District of Washington:

> It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.
>
> Accordingly, during this voir dire and selection process, you may be asked questions related to the issues of bias and unconscious bias.

Cf. Preliminary Instruction To Be Given To The Entire Panel Before Jury Selection, Western District of Washington, http://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf.

In addition to setting the stage for voir dire, the proposed preliminary instruction "alert[s] the jury to the concept of unconscious bias" and instructs them "in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making." *Id.* In these ways, the proposed preliminary instruction helps to ensure that jurors are educated about implicit bias. As previously discussed, education helps to ensure that potential jurors are both "skeptical about their own objectivity" and "motivated to check against implicit bias," and thus more likely to make objective decisions. 59 UCLA L. Rev. at 1181.

Accordingly, Mr. Brewington requests that this Court read the proposed preliminary instruction to the entire panel prior to voir dire.

D. Supplemental Attorney-Conducted Voir Dire, Including Use Of *What Would You Do?* Video Clip

Mr. Brewington further requests that the Court provide undersigned counsel with the opportunity for 30 minutes of attorney-conducted voir dire, including questions related to the attached clip from *What Would You Do?* (Exhibit B), a television show produced by ABC that uses hidden cameras to capture bystander reactions to staged situations.[3]

The requested relief is appropriate for several reasons. To begin with, counsel "are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome." Bennett, 4 Harv. L. & Pol'y Rev. at 160. There is, furthermore, research suggesting "that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges." *Id.* Thus, attorney-led voir dire in this arena is more likely to achieve the goal of identifying biased jurors, including those who "may not appreciate it and, in any event, may be reluctant to admit [their] lack of objectivity." *Sampson*, 724 F.3d at 164.

To this end, the *What Would You Do?* clip provides an accessible and direct example of implicit bias. The clip, which is less than five minutes long,

[3] The clip can also be found here: https://www.youtube.com/watch?v=ge7i60GuNRg.

> opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock!

Kang, 59 UCLA L. Rev. at 1182 n.250. The clip provides such an effective introduction to the concept of implicit bias that the Honorable Mark W. Bennett, U.S. District Judge for the Northern District of Iowa, regularly shows it to jurors as part of jury selection. *See id.* at 1181-82 & 1182 n.250.

Accordingly, Mr. Brewington requests that this Court provide undersigned counsel with the opportunity to conduct 30 minutes of attorney-led voir dire, including questions related to the “What Would You Do?” clip..

III. **Conclusion**

For the foregoing reasons, Mr. Brewington respectfully requests that this motion be granted, and that this Court order the requested relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I electronically filed the foregoing ***Mr. Brewington's Motion for a Case-Specific Jury Questionnaire, Jury Instruction, and Related Relief*** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Jennifer G. Ballantyne, Assistant United States Attorney
USDOJ-DC-Criminal Div-Fraud
E-mail: jennifer.ballentyne@usdoj.gov

Anna G. Kaminska, Assistant United States Attorney
U.S. Department of Justice-DC-1400 NY Ave.
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Kyle Conrad Hankey, Assistant United States Attorney
E-mail: kyle.hankey@usdoj.gov

and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participant in the manner (mail, hand-delivery, etc.) indicated by the non-participant's name:

Kenneth Brewington (via Mail)

s/Robert W. Pepin
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Attorney for Defendant

Exhibit A

JUROR QUESTIONNAIRE

Use back if additional room is needed to answer.

The information you provide in this questionnaire will be confidential and will only be used for this trial.

1. Did you attend business school, study finance, securities, asset management, investment strategy, or other associated disciplines?

☐ Yes ☐ No

Details, please:

2. Have you studied for and/or obtained licensing or certifications associated with finance, securities trading, asset management, or related fields?

☐ Yes ☐ No

Details, please:

3. Have you worked in finance, securities trading, asset management, investment strategy, or related fields?

☐ Yes ☐ No

Details, please:

4. Have you experienced disputes between you and people with whom you were doing business?

☐ Yes ☐ No

Details, please:

5. Have you ever made an investment that went bad? ☐ Yes ☐ No

Details, please:

6. Have you or someone close to you ever been the victim of fraud? ☐ Yes ☐ No

What kind of fraud?

Who was the victim?

What was the value and type of loss?

7. What was the race or ethnicity of the person or persons who committed fraud against you or someone close to you?

8. Have you or someone close to you ever been the victim of a crime other than fraud?

☐ Yes ☐ No

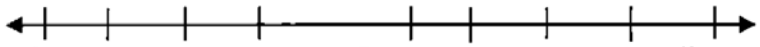
Details, please.

9. Do criminals have too many rights?

☐ Yes ☐ No

Please tell us why you feel that way.

10. Do you agree or disagree that racial prejudice still exists in America?



0 5 10

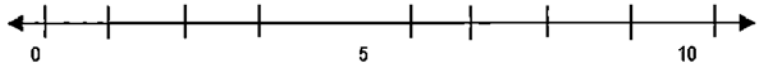
Strongly Disgree Disagree Neutral Agree Strongly Agree

11. Do people accused of crimes have too many rights?

☐ Yes ☐ No

Please tell us why you feel that way.

12. Do you agree or disagree that a person can be unintentionally biased against African Americans?



0 5 10

Strongly Disgree Disagree Neutral Agree Strongly Agree

13. Do you believe African-Americans commit more crimes than whites?

☐ Yes ☐ No

14. How do you feel when you hear negative remarks about African Americans?

15. What would you do if you were selected as a juror and during deliberations another juror made comments about African Americans and/or race?

16. Is there any reason why you would be unwilling/unable to serve as a juror in a case where an African American is charged with a crime?

☐ Yes ☐ No

Please explain:

The answers contained in this questionnaire are true and correct to the best of my ability.

Juror's Name (printed)

Juror's Signature Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 15-cr-00073-PAB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH BREWINGTON,

Defendant.

EXHIBIT B
CONVENTIONALLY SUBMITTED DISK CONTAINING TWO VIDEOS

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1. *Unconscious Bias*, United States District Court for the Western District of Washington; http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited Apr. 6, 2018)

2. *What Would You Do?;* https://www.youtube.com/watch?v=ge7i60GuNRg

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February 5, 2018

BY ECF & BY HAND
The Honorable Gregory H. Woods
United States District Court Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: United States v. Verdell Pickney et al; S2 16 Cr. 656 (GHW)

Dear Judge Woods:

We represent Junior Griffin in the above-referenced matter, having been appointed pursuant to the provisions of the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A.

Pursuant to the Court's Order dated July 10, 2017, please find our motions in limine. For reasons set forth below, it is respectfully requested that the Court: 1) permit attorney-conducted *voir dire* pursuant to Fed. R. Crim. P. 24(a) and examine prospective jurors about racial bias; 2) allow additional peremptory challenges to the defendants pursuant to Fed. R. Crim P. 24(b); and 3) order the Government to immediately identify all electronic communications involving Mr. Griffin that it intends to use during their case at trial.

1. The Court Should Exercise Its' Discretion Pursuant To Fed. R. Crim. P. 24(a) To Permit Attorney-Conducted *Voir Dire,* And Examine Prospective Jurors About Racial Bias

It is within this Court's discretion to permit counsel to conduct *voir dire*, either exclusively or in addition to the Court, pursuant to Fed. R. Crim. P. 24(a).

Voir dire is an integral, vital element of a fair trial. Without a meaningful *voir dire*, criminal defendants are deprived of their constitutional right to a fair trial. To ensure a fair trial, an impartial jury must be selected. Under Fed. R. Crim. P. 24(a), a trial court is empowered to allow counsel to explore prospective jurors prejudices and biases on a variety of topics, including the nature of the charges, legal principles such as the presumption of innocence, experiences as a witness, defendant or victim, potential

allegiances to the parties, and racial bias. It is an abuse of discretion to empanel a jury that has not been adequately vetted for potential biases and prejudices.

While Fed. R. Crim. P. 24(a) permits a trial court to conduct *voir dire* and allow for supplemental questions from counsel, attorney-conducted *voir dire* improves the truth-finding function of the trial court for two important reasons. First, at the outset of a trial, the attorneys possess in-depth knowledge of the key facts of a case, and are aware of the strengths and weaknesses of their theories and defenses. Accordingly, attorneys are better positioned to ascertain prospective jurors' potential biases. In *United States v. Ledee*, the 5th Circuit observed:

> [W]e must acknowledge that voir dire examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties … A judge cannot have the same grasp of the facts, the complexities and nuances as the trial attorneys entrusted with the preparation of the case. The court does not know the strength and weaknesses of the litigant's case. Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed.

Id. at 993 (citing Frates & Greer, *Jury Voir Dire: The Lawyer's Perspective*, 2 A.B.A. Litigation No. 2 (1976)).

Legal scholars have also identified limitations in court-only conducted *voir dire*. Judges, as figures of authority, may inadvertently chill responses to questions during *voir dire*. Studies have shown that when prospective jurors are only questioned by judges, they are likely to give responses they perceive will satisfy the judge.[1] In addition, prospective jurors who are uncomfortable about expressing themselves openly about personal details of their opinions and beliefs, are less likely to make such disclosures when asked by a judge. Where prospective jurors are motivated to satisfy or receive the approval of a judge, the truth-seeking purpose of *voir dire* is compromised. Furthermore, where judges conduct *voir dire* through closed-ended questioning, court-only conducted *voire dire* is even less effective at uncovering biases and prejudices.

Attorneys, as opposed to judges, are more likely to reveal biases and prejudices of prospective jurors through attorney conducted *voir dire*. Because of their knowledge of the case, ability to probe relevant bias-influencing factors and elicit honest responses, attorneys can contribute to the truth-finding function of the trial court during *voir dire*.

The second reason for the need for attorney-conducted *voir dire* is to assist the trial court in preventing race and gender from entering into peremptory challenges. In

[1] Ream, *Limited Voir Dire: Why it Fails to Detect Juror Bias*, 23 Criminal Justice 4, 8 (2009); Hans & Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi Kent Law Review 1179, 1195-1196 (2003); 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, 159-161 (2010).

Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny, the Supreme Court held that the use of race and gender in peremptory challenges violates the equal protection rights of criminal defendants, as well as the jurors improperly excluded. *See* 545 U.S. 231, 237-238 (2005). Moreover, the use of race and gender in peremptory challenges undermines the public's confidence in the judicial system and the impartiality of jurors. *See Miller-el v. Dretke*, 545 U.S. 231, 237-238 (2005). Given the risk, trial courts should make all efforts to prevent race and gender from entering into peremptory challenges. During attorney-conducted *voir dire*, the impermissible use of race or gender in peremptory challenges is more easily uncovered. Additionally, without attorney-conducted *voir dire*, attorneys are more likely to strike potential jurors based on stereotypes, including those based on race and gender, in violation of the jurors' equal protection rights. The use of such stereotypes injects arbitrariness into the jury selection process, hinders the ability to obtain a fair trial and undermines the public's confidence in the jury system and criminal justice system. To enable a criminal defendant to exercise his peremptory challenges intelligently and adequately, *voir dire* by counsel is essential. In *J.E.B. v. Alabama ex rel. T.B.*, the Supreme Court declared:

> If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently, *See e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 602 … (1976) (Brennan, J., concurring) (*voir dire* "facilitate[s] intelligent exercise or peremptory challenges and [helps] uncover factors that would dictate disqualification for cause").

511 U.S. 127 at 143 (1994).

As Justice O'Connor pointed out in her concurring opinion in *J.E.B.*, since litigants can no longer simply rely on their intuition in exercising peremptory challenges, 511 U.S. 127 at 149 (O'Connor, J., concurring), fairness dictates that counsel be given an opportunity to *voir dire* prospective jurors to ensure that a fair and impartial jury is selected consistent with the dictates of *Batson* and its progeny.

The history of racism in the United States, racial attitudes and experiences (or the lack thereof), and social expectations based on racial identity, make race at issue in a criminal trial where the defendants are persons of color. This is true even in a "common" or "ordinary" narcotics trial. In such a trial, as we anticipate here, race may be more subtle.[2] Yet, with four men of color on trial for their alleged participation in a narcotics conspiracy, possession of firearms and violence, it will be an inescapable backdrop. It

[2] Where race is an obvious issue in a case, studies have shown that it is *less* important to examine prospective jurors on racial bias. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Pol'y $ L. 201, 210 (2001).

will be impossible to ignore. Accordingly, race must be discussed and prospective jurors should be examined about racial bias.

Racial bias may be explicit or implicit. "Explicit bias" refers to the attitudes and beliefs we have about a person or group on a conscious level. Of perhaps greater concern in *voir dire* is "implicit bias." "Implicit bias" is described by the Honorable Mark W. Bennett, United States District Court Judge in the Northern District of Iowa, as "the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgment … that we are, for the most part, unaware of … As a result, we unconsciously act on such biases even though we may consciously abhor them."[3] Implicit bias affects prospective jurors' ability to be fair and impartial. Studies have shown that when evidence is presented against persons of color, jurors are more likely to draw adverse inferences against such defendants.

Making race salient in *voir dire* can reverse the effects of implicit bias. Through meaningful and constructive *voir dire*, by directly calling attention to racial bias, jurors can think about their attitudes toward race and the perceptions and stereotypes they have that affect their day-to-day judgment and how they may honestly view the trial evidence.[4] In so doing, jurors can be encouraged and directed to view the trial evidence without the usual preconceptions and associations involving race that many make and that we all are susceptible to.

In our proposed examination of jurors, we included questions related to racial bias that we request are used during *voir dire*, either by the Court or attorneys. Furthermore, Judge Bennett's interview concerning implicit racial bias and the necessity of educating and examining prospective jurors about it (referenced in footnote 3), is a helpful resource.

2. The Court Should Allow The Trial Defendants To Have Additional Peremptory Challenges Pursuant To Fed. R. Crim. P. 24(b)

A trial court may grant additional peremptory challenges under Fed. R. Crim. P. 24(b) where there are multiple defendants. *See Estes v. United States*, 335 F.2d 609 (5th Cir. 1964). The court may determine whether peremptory challenges should be exercised jointly or separately. *See United States v. Aloi*, 511 F.2d 585, 598 (2d Cir. 1975).

Courts have granted additional peremptory challenges in multi-defendant trials. *United States v. Maldonado-Rivera*, 922 F.2d 934, 971 (2d Cir. 1990) (in four-defendant trial, court granted three peremptory challenges to each defendant, giving a total of 15,

[3] 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 (2010); Judge Mark Bennett - Addressing Unconscious Implicit Bias in Voir Dire, https://vimeo.com/163018292.

[4] Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi-Kent L. Rev. 997, 1026-27 (2003).

and allowed defendants five peremptory challenges that could be exercised with respect to the proposed alternate jurors); *United States v. Gibbs*, 182 F.3d 408, 435 (6th Cir. 1999) (in seven-defendant trial, court granted sixteen peremptory challenges to be shared by defendants); *United States v. Magna*, 118 F.3d 1173, 1206 (7th Cir. 1997) (court granted two additional peremptory challenges to defendants).

Since there are four trial defendants in this case, we respectfully request additional peremptory challenges to excuse potentially biased jurors to ensure the selection of a fair and impartial jury.

3. The Government Should Be Ordered To Immediately Identify All Electronic Communications Involving Mr. Griffin That It Intends To Use During Their Case At Trial

The Government produced hundreds of electronic communications, some of which involve Mr. Griffin. With trial less than one month away, the Government has not identified the electronic communications that it intends to use as part of their case. We ask that the Court order the Government to immediately identify all electronic communications it intends to use against Mr. Griffin.

Respectfully submitted,

/s/

Anthony Cecutti
Jennifer Louis-Jeune

Attorneys for Junior Griffin

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

- against - S2 16 Cr. 656 (GHW)

VERDELL PICKNEY et al,

Defendants.
----------X

DEFENDANT JUNIOR GRIFFIN'S PROPOSED EXAMINATION OF PROSPECTIVE JURORS

Defendant Junior Griffin respectfully requests that the Court include the following instruction and questions in its examination of prospective jurors pursuant to Rule 24(a) of the Federal Rules of Criminal Procedure. The Court is requested to pursue more detailed questioning if a particular juror's answer reveals that further inquiry is appropriate and, in such instance, to conclude with an inquiry whether the particular fact or circumstance would influence the juror in favor of or against either the government or Mr. Griffin.

In addition, Mr. Griffin respectfully requests that Your Honor permit attorney-conducted *voir dire* through which defense counsel may ask the questions below, along with appropriate follow-up questions.

PROPOSED QUESTIONS TO ALL JURORS

Questions Specific to this Case

1. During the trial, you will hear evidence concerning illegal narcotics, and the unlawful use, carrying, and possession of firearms in relation to drug trafficking. Does the fact that the charges involve illegal narcotics and the unlawful possession of firearms in relation to

drug trafficking affect your ability to render a fair verdict? Of course, many of you will have strong reactions to such allegations. However, it is imperative that such reactions do not interfere with your ability to be a fair and impartial juror. What is your reaction to these allegations? Is there anything about the nature of these charges that might affect your ability to be fair and impartial in this case? Do you feel that you could not decide fairly and impartially a case involving such charges? Could you still decide the case solely on the evidence despite whatever reactions you have to the charges against Mr. Griffin?

2. Do you have any opinion about the enforcement of the federal drug laws? What is it?

3. The indictment in this case charges Mr. Griffin with the distribution of narcotics. What are your feelings about drug offenses?

4. Have you ever been involved, as a defendant, victim, or in any other way, in a case involving illegal drugs? If so, is there anything about such experience that affects your ability to be fair and impartial in this case?

5. Have any of your relatives, close friends, or associates ever been involved, as a defendant, victim, or in any other way, in a case involving illegal drugs?

6. Have you had any personal experience (for example, addiction, rehabilitation, or a family member who suffered from an addiction or rehabilitation) with any drugs? What are they? Is there anything about those experiences that would make it difficult for you to be impartial? [As to any prospective juror who answers affirmatively, the Court is respectfully requested to inquire, at the bench or in the robing room, into the circumstances of that prospective juror's experience.]

Relationship with the Government

7. Have you, or has any close friend or relative, ever worked in law enforcement—for example, as a police officer; as a security guard; at a jail or prison; in a local, state, or Federal prosecutor's office; or in some other law enforcement capacity? Have you had any contact with anyone in law, law enforcement, the justice system, or the courts that might influence your ability to evaluate this case?

8. Do you know, or have any association -- professional, business, or social, direct or indirect -- with any member of the staff of the United States Attorney's Office for the Southern District of New York or the NYPD? Is any member of your family employed by any law enforcement agency, whether federal, state, or local?

9. Have you, either through any experience you have had or anything you have seen or read, developed any bias, prejudice or other feelings for or against the NYPD? For or against the United States Attorney's Office? For or against any other law enforcement agency?

10. Have you, or has any member of your family, either as an individual or in the course of business, ever been a party to any legal action or dispute with the United States or any of the offices, departments, agencies, or employees of the United States, including the IRS? Have you, or has any member of your family, ever had such a dispute concerning money owed to you by the Government or owed by you to the Government?

Experience as a Witness, Defendant, or Crime Victim

11. Have you, or any of your relatives or close friends, ever been involved in or appeared as a witness in any investigation by a federal or state grand jury, or by a Congressional or state legislative committee, licensing authority, or governmental agency?

12. Have you or anyone close to you been questioned in any matter by a law

enforcement agency? If so, does anything about that experience make it difficult for you to render a fair and impartial verdict?

13. Have you ever been a witness or a complainant in any hearing or trial?

14. Are you or is any member of your family now under subpoena, or, to your knowledge, about to be subpoenaed in any case?

15. Have you, or any of your relatives or close friends, ever been the subject of any investigation or accusation by any federal or state grand jury, or by a Congressional committee, to your knowledge? [As to any prospective juror who answers affirmatively, the Court is respectfully requested to inquire further into the circumstances.]

16. Have you, any member of your family, or any of your close friends ever been arrested and charged with a crime? [As to any prospective juror who answers affirmatively, the Court is respectfully requested to inquire into the circumstances of each crime and whether the juror was satisfied with how law enforcement handled the investigation of that crime and whether anything about that experience may affect his or her ability to serve as a fair and impartial juror in this case.]

17. Have you, any member of your family, or any of your close friends ever been the victim of a crime? [As to any prospective juror who answers affirmatively, the Court is respectfully requested to inquire into the circumstances of each crime and whether the juror was satisfied with how law enforcement handled the investigation of that crime and whether anything about that experience may affect his or her ability to serve as a fair and impartial juror in this case.]

Views on Certain Witnesses, Investigative Techniques, and Evidence

18. The witnesses in this case will include law enforcement witnesses, including NYPD Officers. Would you be any more or less likely to believe a witness merely because he or she is a member of a law enforcement agency?

19. Do you have any feelings with regard to the law enforcement agencies that I have listed above that have affected your feelings in general regarding law enforcement?

20. Some of the evidence that may be introduced in this case will come from intercepted phone calls performed by law enforcement officers. Do you have strong feelings about intercepted communications conducted by law enforcement officers or the use of evidence obtained from such interceptions at trial, such that those feelings might prevent you from being fair in this case?

21. Do you have any expectations about the types of evidence that the Government should or will present in this criminal trial, or in a criminal trial more generally?

22. Do you have any personal feelings or experiences concerning law enforcement witnesses that would in any way affect your ability to be fair and impartial in this case?

Basic Legal Principles

23. Under the law, a defendant is presumed to be innocent and cannot be found guilty of the crime charged in the Indictment until and unless a jury, after having heard all of the evidence in the case, unanimously decides that the evidence proves that particular defendant's guilt beyond a reasonable doubt. Would you have any difficulty accepting and applying this rule of law?

24. Does anyone believe that Junior Griffin must be guilty or he would not have been charged?

25. For the jury to return a verdict of guilty as to any charge, the prosecution must prove beyond a reasonable doubt each and every element of the charge you are considering. A person charged with a crime does not have the burden of proving that he is not guilty. In this trial, Mr. Griffin is not required to offer any evidence at all. Mr. Griffin can stay silent throughout the trial and has absolutely no obligation to prove his own innocence. If he were to present evidence, the government still retains the burden to prove his guilt, beyond a reasonable doubt. Is there anyone who disagrees or who has difficulty with these legal principles?

26. I will also instruct the jury that as you consider whether the government has met its burden of proof, you must consider each count of the Indictment separately. Do you for any reason feel that you cannot evaluate each count separately?

27. You are required by law to make your decision based solely on the evidence or lack of evidence presented in Court, and not on the basis of conjecture, suspicion, sympathy, bias, stereotypes or prejudice. Would you have any difficulty accepting and applying this rule of law?

28. A defendant in a criminal case has the right to testify and the right not to testify. The fact that a defendant chooses not to testify may not enter into a jury's deliberation at all. Are you for any reason unable to accept that instruction? Do you need to hear his testimony? Should Mr. Griffin not testify in this case, would you hold that against him?

28. Do you believe that our system of criminal justice improperly favors either the prosecution or the defense?

29. If the government fails to prove a defendant's guilt beyond a reasonable doubt, do you feel that you could not render a verdict of not guilty with respect to that defendant?

Separate trials

30. In these questions, I have tried to direct your attention to possible reasons why you might not be able to sit as a fair and impartial juror. Apart from any prior question, do you have the slightest doubt in your mind, for any reason whatsoever, that you will be able to serve conscientiously, fairly, and impartially in this case, and to render a true and just verdict without fear, favor, sympathy, or prejudice, and according to the law as it will be explained to you?

Racial Bias and Prejudice

31. Do you believe that racism is still a problem in our country? Why? Why not?

32. Do you believe that people of color still experience racial discrimination? Why? Why not?

33. Do you believe that the criminal justice system treats people of all races equally? Why? Why not? Does the race of a defendant influence the treatment he or she receives in the criminal justice system?

34. The defendants in this case are African-American and Latino. How might this affect your perceptions of the evidence at trial?

35. Have you ever been afraid of someone of another race? Please explain.

36. Do you think that some people use racism as an excuse for their own shortcomings?

37. Have you been exposed to persons who have exhibited racial prejudice?

38. Have you ever felt that you were the target of racial prejudice? Please explain.

Dated: New York, New York
February 5, 2018

Respectfully submitted,

_____*/S/*_____
Anthony Cecutti
Jennifer Louis-Jeune
Attorneys for Junior Griffin

The Supreme Court
State of Washington

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SENT BY EMAIL ONLY

April 5, 2018

TO: PROPOSED NEW GR 37—JURY SELECTION WORKGROUP MEMBERS
Mr. Sal Mungia, American Civil Liberties Union of Washington
Ms. La Rond Baker, American Civil Liberties Union of Washington
Ms. Pam Loginsky, Washington Association of Prosecuting Attorneys
Judge Laurel Siddoway, Court of Appeals Presiding Chief Judge
Judge Sean O'Donnell, Superior Court Judges' Association
Judge Scott Ahlf, District and Municipal Court Judges' Association

FROM: Justice Charles W. Johnson, Rules Committee Chair

SUBJECT: ADOPTION OF NEW GENERAL RULE (GR) 37—JURY SELECTION

On behalf of the court, I am notifying you that the court adopted proposed new General Rule (GR) 37—Jury Selection after review of the original proposals, the comments submitted thereto, and the final report of the Proposed New GR 37—Jury Selection Workgroup. This rule will become effective upon publication in the Washington Reports.

cc: Chief Justice Mary Fairhurst
Justice Barbara A. Madsen
Justice Susan Owens
Justice Debra Stephens
Justice Charles K. Wiggins
Justice Steven C. Gonzalez
Justice Sheryl Gordon McCloud
Justice Mary I. Yu
Lynne Alfasso, AOC
Janet Skreen, AOC
Sharon Harvey, AOC

Attachment (BY EMAIL)

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE PROPOSED NEW RULE GENERAL RULE 37 — JURY SELECTION

ORDER

NO. 25700-A- 1221

The Proposed New GR 37 — Jury Selection Workgroup, convened by the Supreme Court having recommended the adoption of the proposed new General Rule 37 — Jury Selection, and the Court having considered the new rule, the workgroup's final report, and comments submitted to the rule originally proposed by the American Civil Liberties Union of Washington, and having determined that the proposed new rule will aid in the prompt and orderly administration of justice;

Now, therefore, it is hereby

ORDERED:

(a) That the new rule as attached hereto is adopted.

(b) The new rule will be published in the Washington Reports and will become effective upon publication.

DATED at Olympia, Washington this 5th day of April, 2018.

Johnson, J.
Madsen, J. *
Owens, J.
Stephens, J.

Fairhurst, C.J.
Wiggins, J.
Gonzalez, J.
Yu, J.

* I agree with sections (a)-(g). I disagree with (h) and (i) as both overinclusive and underinclusive.

NEW General Rule 37. JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

> (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 88086-7
v.	)	EN BANC
ALLEN EUGENE GREGORY, Appellant.	)	FILED OCT 11 2018

FAIRHURST, C.J.—Washington's death penalty laws have been declared unconstitutional not once, not twice, but three times. *State v. Baker*, 81 Wn.2d 281, 501 P.2d 284 (1972); *State v. Green*, 91 Wn.2d 431, 588 P.2d 1370 (1979); *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981).[1] And today, we do so again. None

[1] Arguably, it has occurred four times because a federal district court judge found that our statutory proportionality review of death sentences violated due process. *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1288-91 (W.D. Wash. 1994), *aff'd sub nom. on other grounds*, *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995). But we considered and rejected the claim. *In Re Pers. Restraint of Benn*, 134 Wn.2d 868, 925-26, 952 P.2d 116.

of these prior decisions held that the death penalty is per se unconstitutional, nor do we. The death penalty is invalid because it is imposed in an arbitrary and racially biased manner. While this particular case provides an opportunity to specifically address racial disproportionality, the underlying issues that underpin our holding are rooted in the arbitrary manner in which the death penalty is generally administered. As noted by appellant, the use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant. The death penalty, as administered in our state, fails to serve any legitimate penological goal; thus, it violates article I, section 14 of our state constitution.

I. FACTS AND PROCEDURAL HISTORY

A. Factual background

In 1996, Allen Eugene Gregory raped, robbed, and murdered G.H. in her home.[2] In 1998, Gregory was investigated for a separate rape crime based on

[2] In Gregory's first appeal, we summarized the crime scene as follows:

> The evidence suggested that G.H. had been attacked in her kitchen. She was probably stabbed once in the neck and then dragged into her bedroom. G.H.'s work clothes had been cut off of her, and her hands were tied behind her back with apron strings. She was then stabbed three times in the back. In addition, she had three deep slicing wounds to the front of her throat. . . . The medical examiner concluded that G.H. suffered blunt force trauma to the head and she had several bruises, but the cause of death was multiple sharp force injuries to her back and neck. Semen was found in G.H.'s anal and vaginal swabs, on her thigh, and on the bedspread. The evidence suggested that she was still alive when she was raped. Missing from her home were a pair of diamond earrings, jewelry, and her cash tips from that evening.

allegations by R.S. In connection with that investigation, the Tacoma Police Department obtained a search warrant for Gregory's vehicle. In the vehicle, police located a knife that was later determined to be consistent with the murder weapon used to kill G.H. Police also obtained Gregory's blood sample during the rape investigation and used that sample to connect him to the deoxyribonucleic acid (DNA) found at G.H.'s crime scene. *State v. Gregory*, 158 Wn.2d 759, 812, 147 P.3d 1201 (2006) (*Gregory* I), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). After matching Gregory's DNA to that found at G.H.'s murder scene, the State charged Gregory with aggravated first degree murder. *Id.* Gregory was also charged and convicted of three counts of first degree rape stemming from R.S.'s allegations.

B. Procedural history

In 2001, a jury convicted Gregory of aggravated first degree murder. *Id.* at 777, 812. The same jury presided over the penalty phase of his trial. *Id.* at 812. The jury concluded there were not sufficient mitigating circumstances to merit leniency and sentenced Gregory to death. *Id.* When Gregory appealed his murder conviction and death sentence, we consolidated our direct review of those issues with Gregory's appeal of his separate rape convictions. *Id.* at 777. We reversed the rape convictions,

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State v. Gregory, 158 Wn.2d 759, 811-12, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

affirmed the aggravated first degree murder conviction, and reversed the death sentence. *Id.* at 777-78. We based our reversal of Gregory's death sentence on two grounds: (1) "the prosecutor engaged in misconduct during closing arguments in the penalty phase of the murder trial" and (2) "the rape convictions," which we reversed, "were relied upon in the penalty phase of the murder case." *Id.* at 777. We remanded the case for resentencing. On remand, the trial court impaneled a new jury to preside over a second special sentencing proceeding. Again the jury determined there were not sufficient mitigating circumstances to merit leniency and sentenced Gregory to death. Gregory appealed his sentence, raising numerous issues. In addition to any appeal, our court is statutorily required to review all death sentences. RCW 10.95.130(1). Pursuant to statute, we consolidate the direct appeal and death sentence review. *Id.*

Following remand, the State also prepared for a new rape trial. The State conducted interviews with R.S., but the interviews revealed that she had lied at the first trial. The State moved to dismiss the rape charges because R.S.'s inconsistent statements "ma[d]e it impossible for the State to proceed forward on [count I and count II]" and, given her statements, "the State d[id] not believe there [was] any reasonable probability of proving the defendant is guilty of [count III]." Clerk's Papers at 519. The trial court dismissed the rape charges with prejudice.

II. ISSUES[3]

A. Whether Washington's death penalty is imposed in an arbitrary and racially biased manner.

B. Whether statutory proportionality review of death sentences alleviates the alleged constitutional defects of the death penalty.

C. Whether the court should reconsider arguments pertaining to the guilt phase of Gregory's trial.

III. ANALYSIS

A. Historical background of the death penalty in Washington

A brief history of the various death penalty schemes in Washington serves to illustrate the complex constitutional requirements for capital punishment. *See also State v. Bartholomew*, 98 Wn.2d 173, 180-92, 654 P.2d 1170 (1982) (*Bartholomew* I), *vacated*, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983) (similar historical discussion). In 1972, the United States Supreme Court nullified capital punishment laws in 39 states, including Washington, and the District of Columbia. *Furman v. Georgia*, 408 U.S. 238, 305, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *Baker*, 81 Wn.2d at 282; *State v. Lord*, 117 Wn.2d 829, 908, 822 P.2d 177 (1991) ("*Furman* prohibits sentencing procedures which create a substantial risk that death

[3] Since we hold that the death penalty is unconstitutional, we decline to address Gregory's other challenges to the penalty imposed or alleged errors that occurred during the penalty phase of the trial.

will be imposed in an arbitrary and capricious manner. In other words, where the death penalty is imposed wantonly and freakishly, it is unconstitutional." (citation omitted)). Three years later, by way of a ballot initiative, Washington enacted a new capital punishment law that required mandatory imposition of the death penalty for specified offenses. Initiative 316, LAWS OF 1975 2d Ex. Sess., ch. 9, *repealed by* LAWS OF 1981, ch. 138, § 24. But this, too, proved problematic. In 1976, the United States Supreme Court held that mandatory imposition of death sentences for specified homicides is unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976). Consequently, we declared our capital punishment law unconstitutional. *Green*, 91 Wn.2d at 447. In contrast, Georgia's capital punishment law was upheld. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion). To be constitutionally valid, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189.

Our legislature enacted a new capital punishment law, allowing for the imposition of the death penalty where the jury, in a subsequent sentencing proceeding, found an aggravating circumstance, no mitigating factors sufficient to

merit leniency, guilt with clear certainty, and a probability of future criminal acts. LAWS OF 1977, 1st Ex. Sess., ch. 206 (codified in chapter 9A.32 RCW and former chapter 10.94 RCW, *repealed by* LAWS OF 1981, ch. 138, § 24). The statute was found unconstitutional because it allowed imposition of the death penalty for those who pleaded not guilty but did not impose the death penalty when there was a guilty plea. *Frampton*, 95 Wn.2d at 480. The legislature again refined our capital punishment law in an attempt to conform to various legal directives. Ch. 10.95 RCW. Our current statute is nearly identical to the Georgia statute. *State v. Harris*, 106 Wn.2d 784, 798, 725 P.2d 975 (1986) ("The language in our statute is identical to that used in the Georgia statute."); *cf. Bartholomew* I, 98 Wn.2d at 188 ("The statutory aggravating circumstances are similar but not identical to those of the approved Georgia statute.").

Chapter 10.95 RCW provides for a bifurcated proceeding—first the defendant is found guilty of aggravated first degree murder, and then a special sentencing proceeding is held before either a judge or a jury to determine whether there are sufficient mitigating circumstances to merit leniency. RCW 10.95.050, .060. If there are, the defendant shall be sentenced to life without parole. RCW 10.95.080. If the defendant is sentenced to death, the sentence is automatically reviewed by this court, in addition to any appeal the defendant seeks. RCW 10.95.100. Our statutorily mandated death sentence review proceeding requires this court to determine (a)

whether there was sufficient evidence to justify the judge's or jury's finding in the special sentencing proceeding, (b) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant, (c) whether the death sentence was brought about through passion or prejudice, and (d) whether the defendant had an intellectual disability. RCW 10.95.130(2).

Proportionality review "serves as an additional safeguard against arbitrary or capricious sentencing." *State v. Pirtle*, 127 Wn.2d 628, 685, 904 P.2d 245 (1995); *Harris*, 106 Wn.2d at 797. The goal is "to ensure that the death penalty's imposition is not 'freakish, wanton, or random[ ] and is not based on race or other suspect classifications.'" *State v. Davis*, 175 Wn.2d 287, 348, 290 P.3d 43 (2012) (alteration in original) (quoting *State v. Cross* 156 Wn.2d 580, 630, 132 P.3d 80 (2006)). The United States Supreme Court held that statutory proportionality review is not required by the federal constitution, *Pulley v. Harris*, 465 U.S. 37, 43-44, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), but the impetus for it nonetheless derives from constitutional principles. *Lord*, 117 Wn.2d at 908 (proportionality review "was undertaken in Washington in response to the United States Supreme Court decision in *Furman*").

B. Gregory's constitutional challenge to the death penalty is intertwined with our statutorily mandated proportionality review

Gregory challenged the constitutionality of the death penalty, supported with numerous reasons. He also presented a statutory argument, that his death sentence is excessive and disproportionate to the penalty imposed in similar cases. RCW 10.95.130(2)(b). Gregory claimed that his death sentence "is random and arbitrary, and, to the extent it is not, it is impermissibly based on his race and the county of conviction." Opening Br. of Appellant at 96 (underlining omitted). These assertions are precisely what proportionality review is designed to avoid. *See State v. Brown*, 132 Wn.2d 529, 554-55, 940 P.2d 546 (1997) ("In conducting proportionality review the court is principally concerned with avoiding two systemic problems . . . : random arbitrariness and imposition of the death sentence in a racially discriminatory manner.").

In *Davis*, our court grappled with proportionality review of the defendant's death sentence. "How to properly perform proportionality review, and upon what data, is a reoccurring, vexing problem in capital case jurisprudence across the nation." *Cross*, 156 Wn.2d at 636. The majority and dissenting opinions took different approaches disputing which factors were relevant and to what degree statistical evidence could be relied on. The majority saw "no evidence that racial discrimination pervades the imposition of capital punishment in Washington." *Davis*, 175 Wn.2d at 372. But the dissent believed that "[o]ne could better predict

whether the death penalty will be imposed on Washington's most brutal murderers by flipping a coin than by evaluating the crime and the defendant. Our system of imposing the death penalty defies rationality, and our proportionality review has become an 'empty ritual.'" *Id.* (Fairhurst, J., dissenting) (quoting *State v. Benn*, 120 Wn.2d 631, 709, 845 P.2d 289 (1993) (Utter, J., dissenting)). "We can, and must, evaluate the system as a whole." *Id.* at 388. Justice Wiggins specifically called on competent experts to present evidence on the "statistical significance of the racial patterns that emerge from the aggravated-murder trial reports." *Id.* at 401 (Wiggins, J., concurring in dissent).

In light of *Davis*, Gregory commissioned a study on the effect of race and county on the imposition of the death penalty. Opening Br. of Appellant, App. A (KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2012 (Jan. 27, 2014) [https://perma.cc/XPS2-7YTR]).[4] Subsequently, additional trial reports were filed. Beckett performed a new regression analysis and updated her report. KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014 (Oct. 13, 2014) (Updated Beckett Report) [https://perma.cc/3THJ-989W]. The Updated Beckett Report supported three main conclusions: (1) there is significant

[4] For readability, we refer to Katherine Beckett and Heather Evans collectively as "Beckett."

county-by-county variation in decisions to seek or impose the death penalty, and a portion of that variation is a function of the size of the black population but does *not* stem from differences in population density, political orientation, or fiscal capacity of the county, (2) case characteristics as documented in the trial reports explain a small portion of variance in decisions to seek or impose the death penalty, and (3) black defendants were four and a half times more likely to be sentenced to death than similarly situated white defendants. *Id.* at 31-33. Gregory filed a motion to admit the Updated Beckett Report, which we granted.

The State raised many concerns about the reliance on Beckett's statistical analysis, arguing that this was an inappropriate forum for litigating facts and adducing evidence. The State was also concerned because Beckett had not been subject to cross-examination about her involvement with Gregory's counsel, her statistical methodology, and her overall reliability. The State requested an opportunity to challenge the Updated Beckett Report. We granted the request and ordered that a hearing be held before then Supreme Court Commissioner Narda Pierce. No actual hearing was held since the parties agreed on the procedures and Commissioner Pierce was able to solicit additional information through interrogatories. The State filed the report of its expert, and Gregory filed Beckett's response. NICHOLAS SCURICH, EVALUATION OF "THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014" (July 7, 2016); KATHERINE BECKETT &

HEATHER EVANS, RESPONSE TO EVALUATION OF "THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014" BY NICHOLAS SCURICH (Aug. 25, 2016). Commissioner Pierce reviewed these filings and then posed follow-up questions in interrogatory form. After receiving answers, Commissioner Pierce filed her report. FINDINGS AND REPORT RELATING TO PARTIES' EXPERT REPORTS (Nov. 21, 2017) (Commissioner's Report). The Commissioner's Report did not make legal conclusions or recommend how this court should weigh the evidence before us. Rather, the Commissioner's Report provided us with an overview of the disagreements between the experts and the overall strength and weakness of Beckett's analysis, which may impact the weight that we accord to her conclusions. The parties (and amici) filed supplemental briefing that shed further light on the issues raised in the Commissioner's Report and the overall assessment of Beckett's analysis. In turn, the Updated Beckett Report and the subsequent rigorous evidentiary process provided this court with far more system-wide information concerning the death penalty, enabling Gregory to use that information to substantiate his constitutional challenge as well. In his supplemental brief, Gregory incorporates the analysis and conclusions from the Updated Beckett Report to support his constitutional claim, arguing that the death penalty is imposed in an arbitrary and racially biased manner.

Given the intertwined nature of Gregory's claims, we have discretion to resolve them on statutory grounds, by solely determining if *his* death sentence fails the statutorily mandated death sentence review and must be converted to life without parole, or on constitutional grounds, by assessing our state's death penalty scheme *as a whole*. "Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds." *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). Because Gregory challenges the process by which the death penalty is imposed, the issue cannot be adequately resolved on statutory grounds. Proportionality review is a statutory task that this court must perform on the specific death sentence before us, but it is not a substitute for the protections afforded to all persons under our constitution.

C. Washington's death penalty scheme is unconstitutional, as administered

1. *Standard of review*

We review constitutional claims de novo. However, conducting a constitutional analysis in death penalty cases is slightly different from our traditional constitutional review. "The death penalty differs qualitatively from all other punishments, and therefore requires a correspondingly high level of reliability." *Pirtle*, 127 Wn.2d at 663; *see also Lord*, 117 Wn.2d at 888 (The death penalty is "subjected to a correspondingly higher degree of scrutiny than sentencing in noncapital cases.").

Gregory brought challenges under both the state and federal constitutions. We have "'a duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law.'" *Collier v. City of Tacoma*, 121 Wn.2d 737, 745, 854 P.2d 1046 (1993) (quoting *O'Day v. King County*, 109 Wn.2d 796, 801-02, 749 P.2d 142 (1988)); *accord State v. Jorgenson*, 179 Wn.2d 145, 152, 312 P.3d 960 (2013) ("Where feasible, we resolve constitutional questions first under our own state constitution before turning to federal law."). If we neglect this duty, we "deprive[] the people of their 'double security.'" *Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wn.2d 230, 238, 635 P.2d 108 (1981) (quoting THE FEDERALIST NO. 51, at 339 (A. Hamilton or J. Madison) (Modern Library ed. 1937)). "It is by now well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution." *State v. Simpson*, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980) (plurality opinion).

Article I, section 14 of our state constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Our interpretation of article I, section 14 "is not constrained by the Supreme Court's interpretation of the [Eighth Amendment]." *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (*Bartholomew* II); U.S. CONST. amend. VIII. This court has "repeated[ly] recogni[zed] that the Washington State Constitution's cruel

punishment clause often provides greater protection than the Eighth Amendment." *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000); *State v. Ramos*, 187 Wn.2d 420, 453-54, 387 P.3d 650 (quoting same passage), *cert. denied*, 138 S. Ct. 467 (2017).

> Especially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation. The historical evidence reveals that the framers of [the Washington Constitution, article I, section 14] were of the view that the word "cruel" sufficiently expressed their intent, and refused to adopt an amendment inserting the word "unusual."

State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980). A formal *Gunwall*[5] analysis is not necessary when we apply established principles of state constitutional jurisprudence. *Roberts*, 142 Wn.2d at 506 n.11.[6]

For example, in *Bartholomew* II, we adhered to our decision invalidating portions of our capital punishment law on independent state constitutional grounds rather than conforming our analysis to a recent United States Supreme Court case affirming the death penalty against an Eighth Amendment challenge. 101 Wn.2d at 634 (referring to *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235

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[5] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

[6] We recognize that article I, section 14 is not per se broader than the Eighth Amendment. Under certain contexts, the court may have good reason to interpret the state and federal constitutions synonymously rather than independently. For example, in *State v. Dodd*, we found that article I, section 14 was not more protective than the Eighth Amendment when a capital defendant wanted to waive general appellate review in hopes of a speedier execution. 120 Wn.2d 1, 21, 838 P.2d 86 (1992). We later explained that the "ruling in *Dodd* is limited to the facts of that case." *State v. Thorne*, 129 Wn.2d 736, 772 n.10, 921 P.2d 514 (1996).

(1983)). Our decision rested "on an interpretation of both the state and federal constitutions," but the independent state constitutional grounds were "adequate, in and of themselves, to compel the result." *Id.* at 644 (relying on *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), so that any federal constitutional decision by the Supreme Court "will have no bearing on our decision"). However, in *State v. Yates*, we did not address the defendant's state constitutional argument because he could not "establish that chapter 10.95 RCW violates the Eighth Amendment, [so] his claim that the statute violates article I, section 14 of the Washington State Constitution is unavailing." 161 Wn.2d 714, 792, 168 P.3d 359 (2007). In contrast, the evidence here shows that Gregory *could* establish that Washington's death penalty violates both the federal and state constitutions. At the very least, article I, section 14 cannot provide for less protection than the Eighth Amendment, and in this case, we interpret it independently from the federal counterpart. Let there be no doubt—we adhere to our duty to resolve constitutional questions under our own constitution, and accordingly, we resolve this case on adequate and independent state constitutional principles. *See Long*, 463 U.S. at 1041-42.

2. *Our prior decisions upholding Washington's death penalty do not preclude Gregory's claim*

We have previously upheld the constitutionality of the death penalty under somewhat similar claims. In *Cross*, we rejected the defendant's argument that "the

death penalty in Washington is effectively standardless and that our proportionality review does not properly police the use of the penalty." 156 Wn.2d at 621; *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 731, 327 P.3d 660 (2014) (rejecting his constitutional claims again). We reaffirmed the holding in *Yates* under the federal and state constitutions. 161 Wn.2d at 792. Every decision of this court creates precedent that "[w]e do not lightly set aside." *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

However, "stability should not be confused with perpetuity," and major changes have taken place since our *Cross* opinion that support our decision to revisit the constitutionality of the death penalty. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). First, we have numerous additional trial reports for defendants convicted of aggravated murder that were not previously available to us or the defendants who made constitutional claims. Reply Br. of Appellant at 56 (judges have filed 120 additional trial reports since *Cross* was filed; 67 of those were filed after the *Cross* opinion was published and dozens were filed after Gregory's motion to complete process of compiling aggravated murder reports was filed). Second, Gregory commissioned a statistical study based on the information in the trial reports to demonstrate that the death penalty is imposed in an arbitrary and racially biased manner. Additionally, we allowed the State to challenge the Updated Beckett Report, subjected it to a thorough evaluation process

facilitated by our court commissioner, and accepted supplemental briefing from the parties and amici concerning the analysis and conclusions presented.

In *Davis,* this court saw "no evidence that racial discrimination pervades the imposition of capital punishment in Washington." 175 Wn.2d at 372. That is precisely what has now come to light and warrants our consideration. *See Roper v. Simmons*, 543 U.S. 551, 564-69, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (reconsidering precedent upholding the death penalty for juvenile offenders, supported by scientific and sociological studies about the differences between juveniles and adults, and objective indicia of society's view of juveniles); *Atkins v. Virginia*, 536 U.S. 304, 314, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (reconsidering precedent upholding the death penalty for intellectually disabled defendants, because "[m]uch has changed since then," including objective indicia that society's views on the execution of such defendants had changed and newly available clinical information about people with intellectual disabilities); *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015) (in light of "advances in the scientific literature" concerning cognitive and emotional development, while not overruling *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997), we concluded that youth is far more likely to diminish a defendant's culpability for sentencing purposes than we had implied in prior cases). In this case, we need not decide whether the prior cases were incorrect and harmful at the time they were decided.

Rather, the scope of article I, section 14, no less than that of the Eighth Amendment, "is not static." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion). Where new, objective information is presented for our consideration, we must account for it. Therefore, Gregory's constitutional claim must be examined in light of the newly available evidence presently before us.

3. *Washington's death penalty is imposed in an arbitrary and racially biased manner*

It is now apparent that Washington's death penalty is administered in an arbitrary and racially biased manner. Given the evidence before us, we strike down Washington's death penalty as unconstitutional under article I, section 14. "Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article I, section 14 of the state constitution." *Bartholomew* II, 101 Wn.2d at 640; *see also State v. Manussier*, 129 Wn.2d 652, 676, 921 P.2d 473 (1996) ("the state constitution, like the Eighth Amendment, proscribes disproportionate sentencing in addition to certain modes of punishment").

To reach our conclusion, we afford great weight to Beckett's analysis and conclusions. We refer to Beckett's analysis and conclusions rather than a specific report or model variation filed with this court because there have been numerous updates, corrections, and iterations of her analysis that were conducted since the Updated Beckett Report was first admitted. The State is correct that we cannot explicitly rely on the Updated Beckett Report because of these subsequent changes

in Beckett's data file and analysis. As a result of the State's challenge and Commissioner Pierce's fact-finding process, Beckett's analysis became only more refined, more accurate, and ultimately, more reliable.

After running various models, as requested by Commissioner Pierce, Beckett summarized her findings regarding race:

> [F]rom December 1981 through May of 2014, special sentencing proceedings in Washington State involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants after the impact of the other variables included in the model has been taken into account.

Resp. to Comm'r's Suppl. Interrogs. at 16 (Sept. 29, 2017). Though the Updated Beckett Report presented three main conclusions concerning the impact of race, county, and case characteristics on the death penalty, *supra* at Section III.B, Gregory's constitutional argument does not refer to the county variance, so we do not consider that conclusion in our analysis. Suppl. Br. of Appellant at 25 ("This new evidence [referring to the Updated Beckett Report] shows the death penalty is imposed in an arbitrary and racially biased manner."). With regard to the methodological issues raised by the State, we find that these concerns have no material negative impact on the weight accorded to Beckett's analysis and conclusions.[7]

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[7] The State argued that Beckett's analysis was based on too small of a data set because she used maximum likelihood estimate procedures, which generally require at least 100 cases to draw from. To the contrary, we agree with Gregory and amici that the concern is inapplicable because

The most important consideration is whether the evidence shows that race has a meaningful impact on imposition of the death penalty. We make this determination by way of legal analysis, not pure science. *Davis*, 175 Wn.2d at 372, 401 ("We acknowledge that 'we are not statisticians.'" (quoting Wiggins, J., concurring in dissent)). At the very most, there is an 11 percent chance that the observed association between race and the death penalty in Beckett's regression analysis is attributed to random chance rather than true association. Commissioner's Report at 56-68 (the p-values range from 0.048-0.111, which measures the probability that the observed association is the result of random chance rather than a true association).[8]

Beckett conducted an observational study in which her data set includes *all* trial reports filed for defendants who underwent a special sentencing procedure from 1981-2014. The data set reflects the population, not a sample.

Additionally, concerns regarding Beckett's coding protocol and data entry have largely been alleviated by the rigorous review process throughout this litigation. Since the coding and data entry are based on the trial judge's qualitative trial report, there will always be some degree of variance or subjectivity when those reports are translated into numerical values. Gregory highlights the more crucial point—the initial regression analysis in the Updated Beckett Report, the regression analysis conducted in response to Commissioner Pierce's interrogatories, and the final regression analysis conducted pursuant to the updated coding protocol all lead to the *same conclusion*. The subsequent analysis, with corrections, provides even stronger support for the statistical significance of race on the imposition of the death penalty. The State argues that the existence of errors "should give this Court pause." Suppl. Br. of Resp't at 4. Surely we have taken a pause by allowing the State to challenge the Updated Beckett Report and directing Commissioner Pierce to undergo a fact-finding process. We are unpersuaded that the existence of some errors should lead to the conclusion that the rest of the data set is rife with additional errors, especially when professors and social scientist researchers across the field characterize it as a "rigorous and thorough study." Br. of Soc. Scientists & Researchers, at 1.

[8] The most common p-value used for statistical significance is 0.05, but this is not a bright line rule. Commissioner's Report at 57-58. The American Statistical Association (ASA) explains that the "'mechanical "bright-line" rules (such as "$p<0.05$") for justifying scientific claims or conclusions can lead to erroneous beliefs and poor decision making.'" *Id.* at 58 (quoting SCURICH, *supra*, at 22) "'A conclusion does not immediately become 'true' on one side of the divide and "false" on the other.'" *Id.* (quoting Ronald L. Wasserstein & Nicole A. Lazar, *The ASA's Statement*

Just as we declined to require "precise uniformity" under our proportionality review, we decline to require indisputably true social science to prove that our death penalty is impermissibly imposed based on race. *Lord*, 117 Wn.2d at 910.

This is consistent with constitutional legal analysis. For example, in *Furman*, Justice Stewart explained that the death sentences before the court were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-10 (Stewart, J., concurring).[9] Justice Stewart did not need to compare the probability of being struck by lightning to the probability of being sentenced to death, nor did he need to rely on an expert's regression analysis to ensure that the petitioners were in fact randomly selected without any relation to other dependent variables. Similarly, Justice White explained what he believed to be "a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." *Id.* at 311 (White, J., concurring). He did not need to rely on an expert's calculation as to what point the rate at which the death penalty is imposed becomes low enough that

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on p-Values: Context, Process, and Purpose, 70 AM. STATISTICIAN 129, 131 (2016)), http://dx.doi.org/10.1080/00031305.2016.1154108.

[9] "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds—Mr. Justice Stewart and Mr. Justice White." *Gregg*, 428 U.S. at 169 n.15.

potential murderers are no longer deterred from committing their intended crimes. Similarly, under the Sixth Amendment to the United States Constitution, ineffective assistance of counsel claimants must show deficient performance and prejudice, where prejudice entails a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We do not expect the defendant to present statistical evidence of the outcome of hypothetical trials with a more effective attorney and compare it to the original trial, controlling for all other variables. Lastly, in *State v. Santiago*, when deciding that the death penalty was unconstitutional, the Connecticut Supreme Court took judicial notice of scientific and sociological studies that were "'not necessarily indisputably true'" but were "'more likely [true] than not true.'" 318 Conn. 1, 127-29, 122 A.3d 1 (2015) (emphasis omitted) (quoting 2 MCCORMICK ON EVIDENCE § 331, at 612-13 (Kenneth S. Broun ed., 7th ed. 2013)).

Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance. We need not go on a fishing expedition to find evidence external to Beckett's study as a means of validating the results. Our case law and history of racial discrimination

provide ample support. *See, e.g.*, *City of Seattle v. Erickson,* 188 Wn.2d 721, 734, 398 P.3d 1124 (2017) (peremptory challenge used to strike the only African-American on a jury panel); *State v. Walker*, 182 Wn.2d 463, 488, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring) (describing prosecutor's use of inflammatory, racially charged images "highlighting the defendant's race—his blackness—in a case where that had absolutely no relevance"); *In re Pers. Restraint of Gentry*, 179 Wn.2d 614, 632, 316 P.3d 1020 (2014) (prosecutor heckled black defense attorney in a death-penalty trial, asking, "'Where did you learn your ethics? In Harlem?'"); *State v. Saintcalle*, 178 Wn.2d 34, 45, 309 P.3d 326 (2013) (plurality opinion) ("'[T]he fact of racial and ethnic disproportionality in [Washington's] criminal justice system is indisputable.'" (second alteration in original) (quoting TASK FORCE ON RACE & CRIMINAL JUSTICE SYS., PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM 1 (2011), https://law.seattleu.edu/Documents/Korematsu/Defender%20Initiative/2014DefenderConference/2pm%20panel/preliminary_report_race_criminal_justice_030111.pdf) [https://perma.cc/6BV4-RBB8]); *State v. Monday*, 171 Wn.2d 667, 676-79, 257 P.3d 551 (2011) (reversing a case in which the prosecutor argued to the jury that "'black folk don't testify against black folk'" and referred to the police as "'po-leese'" in the examination of black witness); *State v. Rhone*, 168 Wn.2d 645, 648, 229 P.3d 752 (2010) (plurality opinion) (peremptory challenge used to strike the

"only African-American venire member in a trial of an African-American defendant"); *State v. Dhaliwal*, 150 Wn.2d 559, 582, 79 P.3d 432 (2003) (Chambers, J., concurring) (the prosecution's theory of the case relied on "impermissible stereotypes of the Sikh religious community"); *Turner v. Stime*, 153 Wn. App. 581, 594, 222 P.3d 1243 (2009) (requiring new trial based on jurors' racist remarks regarding Japanese-American attorney); OFFICE OF ATTY. GEN. OF WASH. STATE, CONSOLIDATING TRAFFIC-BASED FINANCIAL OBLIGATIONS IN WASHINGTON STATE 9 (Dec. 1, 2017), https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=SB%206360%20Report_12-01-7_0c338f90-d3b6-46e2-a87d-387eba9a0b46.pdf [https://perma.cc/TB4K-KAEF]; *see also* Amici Curiae Br. of 56 Former & Retired Wash. State Judges et al. at 8-13.

The arbitrary and race based imposition of the death penalty cannot withstand the "'evolving standards of decency that mark the progress of a maturing society.'" *Fain*, 94 Wn.2d at 397 (quoting *Trop*, 356 U.S. at 101). When considering a challenge under article I, section 14, we look to contemporary standards and experience in other states. *State v. Campbell*, 103 Wn.2d 1, 32, 691 P.2d 929 (1984). We recognize local, national, and international trends that disfavor capital punishment more broadly.[10] When the death penalty is imposed in an arbitrary and

[10] Governor Jay Inslee issued a moratorium on capital punishment in 2014. He explained that "[t]he use of the death penalty in this state is unequally applied . . . . There are too many flaws in the system. And when the ultimate decision is death there is too much at stake to accept an

racially biased manner, society's standards of decency are even more offended. Our capital punishment law lacks "fundamental fairness" and thus violates article I, section 14. *Bartholomew* II, 101 Wn.2d at 640.

4. *The death penalty, as administered, fails to serve legitimate penological goals*

Given our conclusion that the death penalty is imposed in an arbitrary and racially biased manner, it logically follows that the death penalty fails to serve penological goals. The principal purposes of capital punishment are "retribution and deterrence of capital crimes by prospective offenders." *Gregg*, 428 U.S. at 183; *State v. Kwan Fai Mak*, 105 Wn.2d 692, 755 n.124, 718 P.2d 407 (1986) (quoting the same passage). Unless the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 458

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imperfect system. . . . When the majority of death penalty sentences lead to reversal, the entire system itself must be called into question." Governor Jay Inslee Remarks Announcing a Capital Punishment Moratorium (Feb. 11, 2014), https://www.governor.wa.gov/sites/default/files /documents/20140211_death_penalty_moratorium.pdf [https://perma.cc/U6VX-9FVH]. While a majority of states have capital punishment laws, the annual number of new death sentences has steadily decreased over the last 20 years, from 315 in 1996 to 39 in 2017. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2017: YEAR END REPORT 1 (Jan. 3, 2018), https://deathpenaltyinfo.org/documents/2017YrEnd.pdf [https://perma.cc/YGV4-XLHV]. Nine states have abolished the death penalty since *Gregg*, and three other governors issued moratoria. Suppl. Br. of Appellant at 31 (citing *States with and without the Death Penalty as of November 9, 2016*, DEATH PENALTY INFO. CTR., https://www.deathpenaltyinfo.org/states-and-without-death-penalty) [https://perma.cc/8DT6-H7DG]). Internationally, dozens of countries have abolished capital punishment, including all European Union nations. *Id.* (citing *Abolitionist and Retentionist Countries,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries [https://perma.cc/V3BE-9JQS]).

U.S. 782, 798, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977)). "If the policy of this state is retribution for capital crimes, then it must be evenhanded." *Campbell*, 103 Wn.2d at 48 (Utter, J., concurring in part, dissenting in part).

In *Davis,* this court was unable to address the defendant's state constitutional claim that the death penalty failed to serve the legislative goal of deterrence because of a "severe lack of information on the death penalty's implementation." 175 Wn.2d at 345. Now the information is plainly before us. Beckett's analysis and conclusions demonstrate that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring). To the extent that race distinguishes the cases, it is clearly impermissible and unconstitutional.

Our capital punishment law was intended to fix the problems identified in *Furman*, but after decades of experience, we now see the same fatal flaws emerge, despite the legislative attempt to avoid such deficiencies. Yet, the death penalty is not per se unconstitutional. *Campbell*, 103 Wn.2d at 31 ("the death penalty is not per se unconstitutional, since both the federal and state constitutions recognized capital punishment at the time of their adoption"). We leave open the possibility that the legislature may enact a "carefully drafted statute," *Gregg*, 428 U.S. at 195, to impose capital punishment in this state, but it cannot create a system that offends

constitutional rights. "[T]he death penalty is constitutional only if it is properly constrained to avoid freakish and wanton application." *Cross*, 156 Wn.2d at 622-23. The United States Supreme Court was "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), *overruled on other grounds Hurst v. Florida*, __ U.S. __, 136 S. Ct 616, 193 L. Ed. 2d 504 (2016). We agree. "[T]o hold that the death penalty is per se unconstitutional would be to substitute our moral judgment for that of the people of Washington." *State v. Rupe*, 101 Wn.2d 664, 698, 683 P.2d 571 (1984) (plurality opinion).

5. *Proportionality review fails to alleviate the constitutional defects in our capital punishment law, but it cannot be severed*

Imposing the death penalty in an arbitrary and racially biased manner cannot be alleviated through this court's statutory proportionality review. RCW 10.95.130(2)(b). Proportionality review serves as a safeguard against arbitrary sentencing, but it is conducted on an individual basis for each death sentence. "At its heart, proportionality review will always be a subjective judgment as to whether *a particular death sentence* fairly represents the values inherent in Washington's sentencing scheme for aggravated murder." *Pirtle*, 127 Wn.2d at 687 (emphasis added). It does not address our capital punishment law as a whole. Notwithstanding the broad goals of proportionality review, case-by-case review of death sentences cannot fix the constitutional deficiencies before us.

Despite this shortcoming, proportionality review cannot be severed. Our capital punishment law contains a severability clause, LAWS OF 1981, ch. 138, § 22, but such clauses are "'not an inexorable command'." *Hall v. Niemer*, 97 Wn.2d 574, 584, 649 P.2d 98 (1982) (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290, 44 S. Ct. 323, 68 L. Ed. 686 (1924)); *McGowan v. State*, 148 Wn.2d 278, 295, 60 P.3d 67 (2002) (severability clauses are "not necessarily dispositive"). The test for severability is

> "whether the constitutional and unconstitutional provisions are so connected . . . that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature."

Hall, 97 Wn.2d at 582 (alteration in original) (quoting *State ex rel. King County v. State Tax Comm'n*, 174 Wash. 336, 339-40, 24 P.2d 1094 (1933)). The disputed provision "must be grammatically, functionally, and volitionally severable." *McGowan*, 148 Wn.2d at 295.

At the time of enactment, the legislature likely assumed that a constitutional death penalty statute required proportionality review (a component of death sentence review) because the Georgia death penalty statute upheld in *Gregg* contained a mandatory proportionality review. 428 U.S. at 206. The United States Supreme Court later held that proportionality review is not required under the federal constitution, *Pulley*, 465 U.S. at 43-44, but the provisions remain intimately

connected. *Lord*, 117 Wn.2d at 908. This court has not opined on whether proportionality review is required under our state constitution. Regardless, proportionality review cannot be functionally severed because there is no authority to carry out capital punishment without proportionality review. *See Dodd*, 120 Wn.2d at 14 ("[T]his court must review a sentence of death, regardless of a defendant's wishes."). The trial court cannot issue a death warrant to order execution until our court affirms the death sentence and remands the case back to the trial court. RCW 10.95.160(1). The execution date is then dependent on the date of remand. *Id.* Proportionality review does not guarantee the constitutionality of the death penalty, but it is so intimately and functionally connected to the capital punishment law that it cannot be severed.

D. Review of arguments pertaining to the guilt phase of Gregory's trial is precluded

This case is an appeal of Gregory's death sentence, combined with our statutorily mandated death sentence review. Gregory's first degree murder conviction has already been appealed, reviewed by this court, and affirmed. *Gregory* I, 158 Wn.2d at 777-78. Despite this, Gregory continues to raise arguments pertaining to his conviction.

1. *We decline to review Gregory's arguments concerning the admissibility of evidence used at trial or the denied motion for a new trial*

Gregory argues that the trial court should have suppressed certain key evidence used at trial (blood samples, DNA, a knife) and should have granted his motion for a new trial. In Gregory's first appeal before this court, we upheld the validity of the blood samples and DNA evidence but reversed his rape conviction on other grounds and remanded the case for resentencing. *Gregory* I, 158 Wn.2d at 828-29, 867. In June 2011, following remand, Gregory brought a pretrial motion that again challenged the admissibility of the DNA evidence. Gregory moved to dismiss his death penalty proceeding and to order a new guilt phase trial. Gregory also moved to suppress evidence used to obtain his first degree murder conviction or, in the alternative, to order a *Franks*[11] hearing to determine the State's knowledge regarding potentially exculpatory evidence used as a basis to find probable cause for the warrant and orders in question. Gregory argued that despite our holding in *Gregory* I, law of the case did not bar his challenge. He also argued that the State had in its control *Brady*[12] information concerning R.S. that evidenced its lack of probable cause to prosecute Gregory for rape. The trial court ruled the information regarding R.S. was not *Brady* material and was not withheld by the prosecution. Regarding the DNA and blood samples, the trial court denied Gregory's motions because this court

[11] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).
[12] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

had "thoroughly analyzed and decided" those issues in *Gregory* I. 5 Verbatim Report of Proceedings (June 24, 2011) (VRP) at 284. Gregory filed a motion to reconsider, but the trial court denied the motion.

Gregory now attempts to reassert many of the same arguments from his first appeal. He claims the State withheld relevant information about R.S. when obtaining the orders to procure a sample of his DNA and a warrant to search his vehicle where the knife was found. Specifically, he asserts that the trial court would not have authorized the warrant or the orders if it was aware that R.S. had a history as a paid confidential informant. We decline to address this argument because reconsideration is barred by law of the case doctrine. Alternatively, review is not warranted under RAP 2.5, nor has Gregory shown grounds for overruling our precedent.[13]

[13] Normally, the trial court's rulings would be reviewed under abuse of discretion. A new trial is necessary only when the defendant "'has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.'" *State v. Hager*, 171 Wn.2d 151, 156, 248 P.3d 512 (2011) (internal quotation marks omitted) (quoting *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997)). The decision to grant or deny a new trial is primarily within the discretion of the trial court, and we will not disturb that decision absent a clear abuse of discretion. *Id.* Similarly, we grant the trial court wide discretion in granting or denying dismissals for discovery violations, and we will not disturb that decision absent a manifest abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001) (citing *State v. Hanna*, 123 Wn.2d 704, 715, 871 P.2d 135 (1994)). Manifest abuse of discretion requires a finding that no reasonable judge would have ruled the way the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007). On appeal, the defendant bears the burden of demonstrating that the trial court's refusal was an abuse of discretion. *State v. Robinson*, 38 Wn. App. 871, 881, 691 P.2d 213 (1984). Gregory fails to show that the trial court abused its discretion, let alone that it manifestly or clearly abused its discretion. *See Hager*, 171 Wn.2d at 156; *Woods*, 143 Wn.2d at 582.

a. *Law of the case doctrine bars review*

When we have already determined a legal issue in a prior appeal, the law of the case doctrine typically precludes us from redeciding the same legal issue on a subsequent appeal. *State v. Clark*, 143 Wn.2d 731, 745, 24 P.3d 1006 (2001). "'[Q]uestions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.'" *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)). We will reconsider a subsequent appellate argument raising the identical legal issue only when the holding of the prior appeal is clearly erroneous and the application of the law of the case doctrine will result in a manifest injustice. *Clark*, 143 Wn.2d at 745.

The primary justification Gregory asserts for revisiting this issue is the information surrounding R.S.'s history as a confidential informant. However, the trial court found that this information was either known or made available to Gregory's attorney prior to the first trial. Gregory does not challenge this finding on appeal. Thus, Gregory failed to timely raise the issue in the trial court either prior to or during his first appeal. *See State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (explaining that the general rule is that a failure to raise an issue before the trial court constitutes a waiver, unless the party can show a manifest error affecting

a constitutional right); *see also* RAP 2.5(a). The decision regarding the propriety of the warrant and orders to obtain physical evidence are therefore law of the case and not subject to review. Law of the case also precludes consideration of the *Franks* issue and the probable cause required to obtain the search warrant and blood draw orders. *Clark*, 143 Wn.2d at 745 (law of the case bars new arguments attacking the factual basis of our holding in the first appeal when the issue could have been determined had it been presented). Moreover, Gregory presents no new evidence that would merit authoritatively overruling *Gregory* I. *See id.*

b. *Review is not warranted under RAP 2.5(c)(1)*

In an attempt to overcome law of the case doctrine, Gregory argues that review is warranted under RAP 2.5(c)(1) because he raised new grounds in his 2011 motion to the trial court, other than those considered in *Gregory* I. RAP 2.5(c) provides:

> **Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:
>
> (1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

"This rule does not revive automatically every issue or decision which was not raised in an earlier appeal." *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). An issue that could have been appealed in an earlier proceeding is reviewable under RAP 2.5(c)(1) in a later appeal following remand of the case *only* if the trial court,

on remand and in the exercise of its own independent judgment, considered and ruled again on that issue. *Id.*

When the trial court ruled on the 2011 motions, the court considered Gregory's argument regarding the history of R.S. and how that may have impacted the validity of the warrant request and blood draw orders. The trial court found that the purported "new" evidence was made available to Gregory before the first trial. VRP at 283. The trial court explained that it was constrained by our analysis surrounding the same evidence in *Gregory* I and, thus, it did not exercise its "independent judgment" by ruling again on that issue as RAP 2.5(c)(1) requires. *See Barberio*, 121 Wn.2d at 50. Gregory fails to make the requisite showing under RAP 2.5(c)(1) to warrant review.

c. *Review is not warranted under RAP 2.5(c)(2)*

Gregory argues that intervening changes in the law compel our review of the blood draw orders under RAP 2.5(c)(2). RAP 2.5(c) states:

> **Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:
>
> . . . .
>
> (2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

This rule "allow[s] a prior appellate holding in the same case to be reconsidered where there has been an intervening change in the law." *State v. Schwab*, 163 Wn.2d

664, 673, 185 P.3d 1151 (2008) (citing *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005)). If there has been an intervening change in the law, we will consider whether "'corresponding injustice would result to the other party if the erroneous decision should be set aside.'" *Folsom*, 111 Wn.2d at 264 (quoting *Greene v. Rothschild*, 68 Wn.2d 1, 10, 402 P.2d 356, 414 P.2d 1013 (1965)).

Gregory relies on four different opinions, but none of them establish an intervening change in the law to warrant reconsideration of *Gregory* I. In *State v. Figeroa Martines*, we held that the State's warrant authorized the extraction of the defendant's blood sample, which indicated that probable cause existed to believe the blood contained evidence of driving under the influence (DUI). 184 Wn.2d 83, 93, 355 P.3d 1111 (2015). Gregory relied on the Court of Appeals' opinion in that case because he submitted his reply brief prior to our decision *reversing* the Court of Appeals. Gregory also argues that *State v. Garcia-Salgado* constitutes an intervening change in the law because it clarified the standards for biological samples under CrR 4.7. 170 Wn.2d 176, 240 P.3d 153 (2010). In that case, we held that a cheek swab for DNA constitutes a search and therefore requires a warrant or a warrant exception in order to be permissible. *Id.* at 184. Though we considered the requirements under CrR 4.7, this did not render our decision in *Gregory* I erroneous in any way, especially when we cited to *Gregory* I for the proposition that the blood draw orders were constitutionally valid. *Id.* at 186; *see Folsom*, 111 Wn.2d at 264.

Gregory next relies on *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). In that case, we held that there is no inevitable discovery exception[14] under article I, section 7 because "it is incompatible with the nearly categorical exclusionary rule under article I, section 7." *Id.* at 636. Gregory argues that we relied on the inevitable discovery doctrine to uphold the constitutionality of his 1998 blood draw. While we did cite to an inevitable discovery case in *Gregory* I, we declined to examine the validity of the 1998 blood draw, so no such reliance was placed on the doctrine. 158 Wn.2d at 825. Instead, we upheld the validity of the 2000 blood draw without the inevitable discovery citation. Lastly, Gregory relies on *Missouri v. McNeely*, which held that there is no per se exigency exception for taking blood samples following a DUI arrest. 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). He maintains that *McNeely* recognized an increased privacy in a suspect's blood, but this is nothing new. We have already recognized this proposition much in advance of *Gregory* I. *See, e.g.*, *State v. Olivas*, 122 Wn.2d 73, 93, 856 P.2d 1076 (1993). These cases do not evidence changes in the law necessitating our reconsideration of *Gregory* I. Gregory also attempts to use RAP 2.5(a)(3) to seek

[14]"[T]he federal [inevitable discovery] doctrine allows admission of illegally obtained evidence if the State can 'establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.'" *Winterstein*, 167 Wn.2d at 634 (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)).

review; however, he relies on the same cases discussed here, so the argument is subject to the same defects.[15]

d. Cheatam *remains good law*

Gregory argues that we should reconsider our ruling in *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003), which we relied on in *Gregory* I to uphold the constitutionality of the comparative DNA testing between the DNA from his rape case and the DNA found on G.H. In *Gregory* I, we held "that once a suspect's property is lawfully in the State's control, the State may perform forensic tests and use the resulting information to further unrelated criminal investigations, without violating the owner's Fourth Amendment rights" or article I, section 7. 158 Wn.2d at 826 (emphasis omitted) (citing *Cheatam*, 150 Wn.2d at 638).

Before we reconsider an established rule of law that is otherwise entitled to stare decisis, there must be a clear showing that the rule is incorrect and harmful. *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (citing *In re Rights to Waters of Stranger Creek*, 77 Wn.2d at 653). Gregory fails to make this showing. He relies on authority from other jurisdictions that is clearly distinguishable. Opening Br. of Appellant at 181-82 (citing *State v. Gerace*, 210 Ga. App. 874, 437 S.E.2d 862 (1993); *State v. Binner*, 131 Or. App. 677, 886 P.2d 1056 (1994)). "We

[15] RAP 2.5(a)(3) provides that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . manifest error affecting a constitutional right."

are not inclined to abandon our own directly binding precedent in favor of distinguishable, nonbinding authority." *Davis*, 175 Wn.2d at 337. And he fails to show that *Cheatam* is harmful, aside from the fact that it is detrimental to his own case. We may consider a decision "harmful" for any number of reasons, but the "common thread" is the "decision's detrimental impact on the public interest." *Barber*, 170 Wn.2d at 865.

2. *Law of the case doctrine bars review of challenges already rejected in* Gregory *I*

Lastly, Gregory raises several federal constitutional challenges[16] that were rejected in his first appeal. Opening Br. of Appellant at 278; *Gregory* I, 158 Wn.2d

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[16] Specifically, Gregory asks us to reconsider the following:

a. The trial court improperly excused prospective Juror No. 1 in violation of *Witherspoon v. Illinois*[, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)], *Wainwright v. Witt*[, 469 U.S. 412. 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)], *Morgan v. Illinois*[, 504 U.S. 719, 112 S. Ct. 2222, 19 L. Ed. 2d 492 (1992)], [and] the Eighth and Fourteenth Amendments.

b. There was insufficient evidence of premeditation to support a conviction under the Fourteenth Amendment and *Jackson v. Virginia*[, 443 U.S. 307, 99 S. Ct. 628, 61 L. Ed. 2d 560 (1970)].

c. The State's introduction of evidence that Mr. Gregory declined to be tape recorded during an interrogation and his failure to contact Det. [David] DeVault after DeVault left a message for his grandmother violated Mr. Gregory's right to remain silent and due process of law, protected by the Fifth and Fourteenth Amendments.

d. The trial court's exclusion of Mr. Gregory's aunt from the courtroom violated the right of an open and public trial protected by the First, Sixth and Fourteenth Amendments.

e. Prosecutorial misconduct in closing argument—improperly shifting the burden of proof regarding Mike Barth; denigrating defense counsel's cross-

at 813-18, 838-46. Gregory concedes that we addressed and rejected these arguments in his first appeal but nonetheless argues that we should reconsider these issues under RAP 2.5(c)(2). As explained in Section III.D.1.c, *supra*, RAP 2.5(c)(2) restricts the law of the case doctrine by providing us the discretion to reconsider issues from a prior appeal when there has been an intervening change in the law and "justice would best be served" by our reconsideration. *Schwab*, 163 Wn.2d at 673, 668 (citing *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005)). Gregory failed to assert any intervening changes in the law or mistakes in the record that would render our rulings in *Gregory* I erroneous. We decline to exercise our discretion to revisit these issues.

IV. CONCLUSION

Under article I, section 14, we hold that Washington's death penalty is unconstitutional, as administered, because it is imposed in an arbitrary and racially biased manner. Given the manner in which it is imposed, the death penalty also fails to serve any legitimate penological goals. Pursuant to RCW 10.95.090, "if the death

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> examination of John Brown; commenting on Mr. Gregory's right to remain silent for not returning Det. DeVault's calls; and by arguing facts not in evidence and misstating the facts regarding the DNA evidence—deprived Mr. Gregory of due process protected by the Fourteenth Amendment.
>
> f. Cumulative error at the guilt phase violated Mr. Gregory's rights under the Eighth and Fourteenth Amendments.

Opening Br. of Appellant at 278-79 (some citations omitted).

penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder . . . shall be life imprisonment." All death sentences are hereby converted to life imprisonment.

We decline to reconsider Gregory's arguments pertaining to the guilt phase of his trial. His conviction for aggravated first degree murder has already been appealed and affirmed by this court.

Fairhurst, CJ.

WE CONCUR:

Wiggins, J.

González, J.
in result only

Yu, J.

No. 88086-7

JOHNSON, J. (concurring)—While I generally concur with the majority's conclusions and its holding invalidating the death penalty, additional state constitutional principles compel this result. While the conclusions contained in the Beckett report[1] disclosing racial bias in the overall administration of capital punishment raise significant concerns, other additional constitutional factors have become more apparent, supporting the conclusion that the death penalty, as administered, is unconstitutional.

Article I, section 14[2] of our state constitution is the counterpart to the Eighth Amendment[3] to the United States Constitution. We have recognized, in limited situations, that this provision may provide greater constitutional protections than

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[1] KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014 (Oct. 13, 2014) [https://perma.cc/XPS2-74TR].

[2] "**EXCESSIVE BAIL, FINES AND PUNISHMENTS.** Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

[3] "**BAILS, FINES, AND PUNISHMENTS.** Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

established under the Eighth Amendment. It is unnecessary to explore whether greater protections exist in this situation because, at the very least, our state constitution cannot provide for fewer protections than exist under the Eighth Amendment. What that means is that article I, section 14, at a minimum, embraces the same principles and concerns existing under the Eighth Amendment and, importantly, the same standard of review.

In *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006), and *State v. Davis*, 175 Wn.2d 287, 290 P.3d 43 (2012), constitutional concerns were voiced in the dissenting opinions that centered on the randomness, unpredictability, and arbitrariness of the statewide administration of the death penalty system. Since the time those cases were decided, experience shows that the systemic constitutional concerns have deepened and continued moving toward increased rarity, randomness, arbitrariness, and overall statewide abandonment.

Based on a current review of the administration and processing of capital cases in this state, what is proved is obvious. A death sentence has become more randomly and arbitrarily sought and imposed, and fraught with uncertainty and unreliability, and it fails state constitutional examination.

Before analyzing the experiences evident in the administration of capital sentencing in this state, it is necessary to establish the required constitutional

standard of review. Constitutional analysis is determined de novo. Conducting a constitutional interpretation, as is done in death penalty cases, is slightly different than more traditional constitutional review. As explained more specifically, constitutional analysis in death penalty review requires a broad, comparative approach. What this means is that we engage in a systemic view through a broader lens. In death penalty cases, while our statutory proportionality review includes a comparability component, the statutory focus is more case specific as it relates to the defendant, his or her crime, and case specific circumstances, and under the statute it directs us to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[4]

Importantly, under constitutional comparative review, the analysis incorporates an inspection of the entire system of capital sentencing to ensure constitutional requirements are satisfied. Cases from the United States Supreme Court not only establish the required constitutional review but also identify those minimum Eighth Amendment principles that must be satisfied. As noted previously, article I, section 14 can provide no less protection.

[4] RCW 10.95.130(2)(b).

Reviewing some of the United States Supreme Court Eighth Amendment cases is helpful in emphasizing constitutional requirements. To begin, the Eighth Amendment case most often cited as establishing a "comparability analysis," i.e., reviewing a specific sentence and comparing that sentence with sentences imposed in other cases, is *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910). In that case, the Court invalidated a sentence by essentially holding that the sentence so far exceeded what the Court found was proportionate for the crime, and compared the sentence in that case with those imposed in other situations. We have embraced similar reasoning under article I, section 14. *See State v. Fain*, 94 Wn.2d 387, 400, 617 P.2d 720 (1980). This comparability principle continues to guide United States Supreme Court Eighth Amendment review in death penalty and other sentencing situations.

An important aspect of Eighth Amendment comparative constitutional review requires this systemic-type analysis. *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion), is often cited as establishing the principle that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." What this means is that in conducting any constitutional analysis, the inquiry takes into consideration what is actually and currently taking place in the administration of

the entire system—a much broader view than just the facts and circumstances of the case on review. What the Court looks to, in part, can be characterized as the "frequency" a death sentence or other sentences are sought or imposed in specific circumstances. This inquiry plays a significant role in determining the "evolving standards of decency" principle.

A brief review of how the United States Supreme Court cases have evolved best evidences this standard of review and the factors the Court has identified in its decisions.

In *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion), the Court, in affirming a death sentence, upheld a reenacted state statute that authorized capital punishment for six categories of crime: murder, kidnapping for ransom where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking. The statute at issue also provided for an appellate inquiry on "'[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.'" *Gregg*, 428 U.S. at 167 (quoting former GA. CODE ANN. § 27-2537(c)(3) (1973)). While the Court upheld the statute and found that the penalty of death was not unconstitutional in all cases, it cited favorably to the principles established in *Trop*. *Gregg*, 428 U.S. at 173. The Court in *Gregg* found the statute sufficiently

narrowed the type of death penalty eligible crimes, added objectiveness to guide and narrow the fact finder's decision, and contained sufficient other procedural safeguards to survive constitutional scrutiny.

Since *Gregg* was decided, the United States Supreme Court, in a steady progression of cases, has narrowed its holding and limited the permissible constitutional authority of states to seek the death penalty for specific crimes and for specific defendants. An extensive review is unnecessary; however, several cases highlight the reasoning and constitutional requirements.

In *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct 1759, 64 L. Ed. 2d 398 (1980), the United States Supreme Court reversed a death penalty. In doing so, the Court, quoting *Furman*,[5] stated, "[T]he penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia, supra*, reaffirmed this holding." *Godfrey*, 446 U.S. at 427. "A capital sentencing scheme must, in short, provide a '"meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."'" *Godfrey*,

[5] *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

446 U.S. at 427 (alteration in original) (quoting *Gregg*, 428 U.S. at 188 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring))).

In *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), the United States Supreme Court invalidated state statutes authorizing the death penalty for defendants who aided and abetted a felony where a murder is committed by others and where the defendant does not kill or intend that a killing occur. Key to the Court's analysis was the determination that, nationally, few states authorized the death penalty under these circumstances, which under its view, reflected society's rejection of the death penalty for accomplice liability in felony murders. The Court observed:

> In *Gregg v. Georgia* the [Supreme Court] observed that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." 428 U. S., at 183 (footnote omitted). Unless the death penalty [in a specific case] measurably contributes to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment. *Coker v. Georgia*, [433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977)].

Enmund, 458 U.S. at 798 (second alteration in original).

The United States Supreme Court's constitutional concerns continued to evolve and incorporate this type of inquiry, looking not only to "frequency" among the states' practices but also to identifiable trends.

In *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), the Court invalidated the death penalty for mentally retarded criminals. Significant to its holding was a statistical-type analysis that looked at not only the number of states (and Congress) that prohibited the execution of mentally retarded offenders but also the trend among the states. The Court reasoned, "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 315. The Court also expressed its view that

> [o]ur independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.

Atkins, 536 U.S. at 321. This concern surfaces in later cases.

In *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), the Court invalidated the death penalty for juveniles under age 18, overruling its previous ruling in *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989). In doing so, the Court relied not only on the analysis employed in *Atkins* in determining a national consensus and the consistency of the direction of change but also on a growing awareness of a lack of maturity for juveniles. The

Court reasoned that this factor resulted in a diminished culpability of juveniles, which undermined the penological justifications of """retribution and deterrence of capital crimes by prospective offenders."""" *Roper*, 543 U.S. at 571 (quoting *Atkins*, 536 U.S. at 319 (quoting *Gregg*, 428 U.S. at 183)).

Similar reasoning had supported the Supreme Court's invalidation of the death penalty for rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584, and, later, for aggravated rape of a child, *Kennedy v. Louisiana*, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008).

More recently, in analyzing mandatory life without possibility of parole sentences for juvenile offenders, the United States Supreme Court declared unconstitutional any such mandatory sentencing scheme for juveniles. In *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), the Court analyzed the "evolving standards of decency" factor and found that although many state statutes authorized a *life without parole* sentence for juveniles convicted of nonhomicide crimes, since statistical surveys showed few states actually imposed such mandatory sentences, those statutes were unconstitutional. In *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the Court, applying much of the analysis from *Graham*, invalidated sentencing statutes requiring a life without parole sentence for certain juvenile homicide convictions.

The lessons these cases teach us is that review of the constitutionality of the death penalty system must analyze the issue in contemporary terms and practices, and the constitutional analysis, at a minimum, must include a systemic determination of randomness, consensus, arbitrariness, frequency, reliability, trends, and penological justifications.

As indicated earlier, the United States Supreme Court cases interpreting the Eighth Amendment guide our state constitutional analysis and cannot be disregarded. Analysis under article I, section 14 must, at a minimum, proceed and apply those same principles. A significant difference when analyzing our state constitution is that we are not constrained by those principles of federalism that limit and guide United States Supreme Court analysis, where the Court considers national trends and practices. An analysis under article I, section 14 focuses on practices, trends, and experiences within our state.

Frequency, Arbitrariness, and Randomness

In order to conduct the article I, section 14 analysis under a similar analytical framework as employed by the United States Supreme Court, it is necessary to review what we know about the administration of our state capital sentencing system.

As referenced earlier in *Cross*, the dissent raised the concerns in constitutional terms over random, arbitrary, or capricious imposition of a death sentence emphasized in *Furman* and *Cross*. In addition to what was analyzed in that opinion, it is important to review what our state's experiences reflected at that time.

Shortly after *Cross* was decided, the Washington State Bar Association issued a final report of the death penalty subcommittee. *See* WASH. STATE BAR ASS'N, FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE (Dec. 2006)[6] (Final Report). Our current death penalty statute was enacted in 1981. As of 2006, the report discloses that a total of 254 death eligible aggravated murder cases were charged arising in 25 counties. The report observes the "data shows that most of the death penalty cases occur in a small number of counties. . . . Thus, death penalty cases have been brought in 17 of the 39 counties during the last 25 years and the death sentence has been imposed in 10 of those counties." Final Report at 12. A total of 30 death sentences were imposed from the 10 counties.

[6] https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/death-penalty-report.pdf?sfvrsn=120301f1_14 [https://perma.cc/S6C2-MUJK].

The report continues, revealing that of the 30 death sentence cases, 19 were reversed on appellate review and "nearly all have resulted in a sentence of life without the possibility of parole." Final Report at 8. Death sentences, including executions, at that time had arisen in 8 counties out of the 25 counties where death eligible crimes were charged.

In *Davis*, 175 Wn.2d 287, then Justice Fairhurst raised a similar concern, pointing out that since 2000, the only counties where death sentences had been imposed were King and Pierce, accounting for 5 death sentences in that 12-year span. *Davis*, 175 Wn.2d at 388 (Fairhurst, J, dissenting).[7]

Since 2006, about 131 additional death eligible aggravated murder cases have been brought. Executions themselves are extremely rare. Since 1987, five executions have occurred, three of which occurred when the defendants waived their right to challenge their convictions and sentences. No executions will take place in the near or foreseeable future based on Governor Jay Inslee's issuance of a reprieve against executions during his tenure.

No death penalties have been imposed since 2011. Currently, no pending prosecutions seeking the death penalty exist. During that same time, dozens, if not

[7] Report of Trial Judge (TR) 194 (Covell Thomas); TR 216 (Allen Gregory); TR 220 (Dayva Cross); TR 251 (Robert Yates Jr.); TR 303 (Conner Schierman).

tens of dozens, of aggravated murder prosecutions have occurred. Since 2000, only three county prosecutors have filed death notices, and in two counties, death was imposed: Snohomish County in *State v. Scherf* (No. 95-1-02242-2) and King County in *State v. Schierman* (No. 06-1-06563-4). Apparently, based on many reasons, seeking the death penalty is not an option in the other 36 counties. *Where* a crime is committed is the deciding factor, and not the facts or the defendant.

The phrase often used where such infrequency is concerned is "the odds are similar to lightning striking an individual." This presents constitutional problems.

As is also revealed in the Final Report of 2006, approximately 300 aggravated murder convictions have been entered since 1981. Of this group, about 270 were death eligible. In about 80 cases, the prosecutor filed the death notice, and in about 30 cases, the jury imposed death. Five executions have taken place. Of the remaining cases, 19 were reversed on appeal and, on remand, the defendants were sentenced to life without parole (leaving 6 out of approximately 300).

Based on this report and what additional information we now have, it cannot be said that trials resulting in death sentences are reliable. Where the vast majority of death sentences are reversed on appeal and ultimately result in life without parole, reliability and confidence in the process evaporates.

What this systemic analysis discloses is clear. Since the opinions in *Cross*, and again in *Davis*, were filed, we know more about the administration of capital cases today. Importantly, a much more complete set of trial court reports exists. We also have death penalty prosecutions where the penalty was not imposed and others where the notice was withdrawn or never filed. We also have the governor's "reprieve," effectively halting executions for the foreseeable future. In the majority of our 39 counties, no death penalty has ever been sought. The current death row population arose from just 6 counties.

The trend is apparent and the indication clear that fewer county prosecutors elect to file a death notice. The death penalty simply does not exist as an option in the majority of the state's counties.

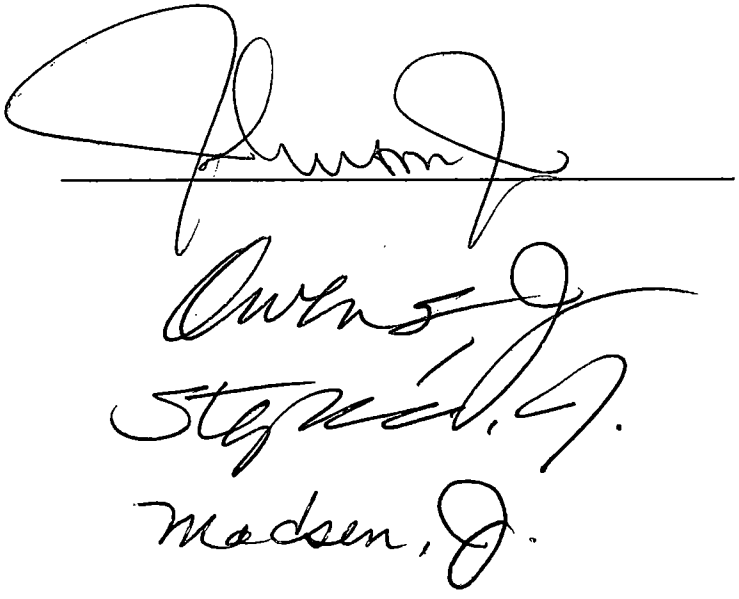
The concerns expressed in the dissents in *Cross* and *Davis* have grown and expanded. The number of counties where a death penalty prosecution is an option has been narrowed to, at most, three and may have currently been abandoned altogether by all counties.

The delay inherent in death sentence cases raises additional concerns, although much of the delay is a result of court review procedures. For example, Cal Brown, the most recent execution in 2010, committed his crime in 1991. Excepting the cases involving Schierman and Scherf, all other death row crimes

arose in the 1990s. The governor's action means no executions will occur in the foreseeable future. Where such delay exists, penological purposes in a death sentence are diminished. We often say, "Justice delayed is justice denied," especially for the victims' surviving family. The unfortunate result of delay diminishes whatever sense of justice is provided through an execution. As quoted earlier, the United States Supreme Court has recognized that where penological purposes cease to be promoted, the constitutional concerns expand.

Based on a review of the administration of death penalty cases, constitutional flaws have now become obvious. Under article I, section 14 of our state constitution, where a system exists permeated with arbitrary decision-making, random imposition of the death penalty, unreliability, geographic rarity, and excessive delays, such a system cannot constitutionally stand. The combination of these flaws in the system support our conclusion that the death penalty is unconstitutional. Although this analysis applies the constitutional principles analysis and requirements established by the United States Supreme Court, as it must, this analysis and conclusion rests on adequate and independent state constitutional principles. *See Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77

L. Ed. 2d 1201 (1983).



The New York Times

At 98, the Army Just Made Him an Officer: A Tale of Racial Bias in World War II

By Rachel L. Swarns

June 29, 2018

[For more coverage of race, sign up here to have our Race/Related newsletter delivered weekly to your inbox.]

PHILADELPHIA — Marion Lane discovered the faded photograph after her stepmother died, crammed in a closet with her stepmother's Sunday dresses. She unrolled it and there was her father, young, handsome and grinning amid a phalanx of soldiers.

She was stunned: "It looked like a graduating class of Army men."

Her father was a longtime mail carrier who loved his family, fishing and his beloved, gleaming Cadillacs. He never spoke about his service in World War II. On the day she found the photo, he finally told her why.

Her father, John E. James Jr., graduated from the Army's Officer Candidate School in Fort Benning, Ga., in 1942, but was never allowed to serve as a commissioned officer. Instead, he was shipped overseas as a corporal with an all-black battalion at a time when racial discrimination in the military derailed the dreams and careers of a generation of African-American soldiers.

On Friday, the Army will finally make amends, promoting Mr. James to the rank of second lieutenant, two weeks after his 98th birthday. The ceremony at the Museum of the American Revolution will be attended by a deputy assistant secretary from the Army, a retired four-star general and Senator Bob Casey Jr., the Pennsylvania Democrat who championed the case.

“It’s unbelievable,” said Mr. James, who descends from a long line of military men dating to the Revolutionary War. “I thought it would never happen.”

It almost didn’t. Although she discovered the photo in 2001, Ms. Lane, a retired public school administrator, only learned in 2015 that her father could request a correction to his military record from the Army Review Boards Agency. She enlisted the aid of Senator Casey and his staff.

The campaign took nearly three years. They sent more than a dozen emails and letters, made two appeals and encountered so many dead ends and disappointments that Ms. Lane half-jokingly wondered whether the Army was hoping her father would “kick the bucket” so that no one would have to acknowledge wrongdoing.

“I was ready to throw in the towel,” Mr. James admitted.

Mr. James (far right, bottom row) expected to receive his commission upon graduating from officer candidate school. Instead, he was shipped overseas as a corporal and became a typist.

But after decades of silence, Mr. James was ready to tell his story. As a young man, he had never met any black officers and he had never seen any either.

But after he was drafted in 1941, he heard that the Army wanted to recruit black officers. He applied and was accepted in 1942 to a class at Fort Benning that included 21 men of color.

He slept in segregated barracks, but for the first time in his life he also ate, trained and studied alongside his white counterparts.

He still remembers joining the jubilant black and white officers-to-be in their march, after they had completed their training in December of that year. They all expected to be promoted the next morning.

The African-American graduates would join the military's tiny, black elite: Fewer than one percent of black soldiers in the Army were officers in 1942, according to a book published by the Army's Center of Military History in 2001.

But later that day, Mr. James said, a white officer pulled him aside. Instead of receiving his commission, he was going to be shipped to another post. “I wasn’t going to be getting my bars,” Mr. James said.

John E. James Jr. as a corporal in the Army.

Ms. Lane suspects that her father was denied his commission because he would outrank some white officers in the battalion he would be assigned to, and black officers were not supposed to supervise whites. Meanwhile, military records show that options for newly graduated black officers were becoming increasingly scarce.

By the end of 1942, the number of black officers had begun to exceed the number of available assignments, according to a book published by the Army’s Center of Military History in 1963.

Some commanders said they could not house African-Americans who were barred from sharing barracks or mess halls with white officers. Others were more explicit. The Mississippi congressional delegation requested that “no Negro officers be stationed in Mississippi at all,” the study shows.

Mr. James didn’t know why he was denied his promotion, but he said he knew better than to complain.

So he swallowed that injustice and the indignities of racial discrimination and segregation that dogged the rest of his service, including three years as a typist with the 242nd Quartermaster Battalion, which supplied the front lines in some of the fiercest battles in Italy and northern Africa.

Mr. James said he didn’t pray about it, didn’t dream about it and didn’t talk about it, not even to his wife after he returned home from the war in 1945.

A young Mr. James, center, with other photos of family members. Mark Makela for The New York Times

Instead, he spent 30 years working at the post office in Philadelphia and sent his three children to college. He remarried after his first wife died. In retirement, he fished and hunted, tended his garden and read his favorite mysteries. He buried his wartime memories until his daughter found the photograph of his class at Fort Benning.

“Throw it in the trash,” Mr. James told her. What was the point, he asked, of reviving old history?

Ms. Lane wanted to prove him wrong, but it wasn’t easy.

In October 2016, the Army review board denied Mr. James’s request, saying they could not confirm his attendance at the Officer Candidate School. His personnel records had been destroyed in a fire in 1973.

Ms. Lane resubmitted the application, this time sending in the photograph of her father with his graduating class and another of him in uniform. In the meantime, Senator Casey’s office contacted the National Archives, which found Mr. James’s records.

But in January, the review board denied the request again, saying that the undated photos did not prove that he had attended the school. This time, Mr. Casey’s staff contacted senior Army officials to ensure that they knew that the National Archives had located proof of Mr. James’s graduation.

Ms. Lane, who is 69, urged the senator’s office not to give up.

“I just felt that my father deserved it,” she said. “We live in a country where, yes, there are injustices that can happen. We are blessed to be in a country where injustice can also be rectified.”

In April, Mr. James got the call. His daughter was overseas, but she heard as soon as she landed. “I was hollering on the plane,” she said.

Army officials declined to comment on the case.

Mr. James will don a dress uniform and take the oath to become a second lieutenant in the Army, two weeks after his 98th birthday. “I thought it would never happen,” he said.
Mark Makela for The New York Times

“Decades have gone by and there hadn’t been a measure of basic fairness, of basic justice that was brought to bear,” Mr. Casey said. “We owe him this commission.”

On Friday, Mr. James will don a dress officer’s uniform. His two daughters will pin epaulets on his shoulders, and John Jumper, a retired Air Force general and chairman of the Museum of the American Revolution, will administer the officer’s oath.

Mr. James has given up fishing and hunting and Cadillacs. But he’s still young enough to drive, mow the lawn and to celebrate a victory he never believed was possible.

He has already printed up return-address labels with his new rank. And when he bumps into his neighbors, he bubbles over with the news. “Just call me second lieutenant,” he said.

A version of this article appears in print on June 30, 2018, on Page A10 of the New York edition with the headline: A Black Soldier Achieves a Dream That the Army Denied, Until Now

The email below that I received from a juror who voted to convict albiet on lesser included charges, demonstrated to me that the benefit of a long ago point has developed and has made a difference in a dynamic way. Although the email is flattering to me, that's not the point. The point is that we must strive to educate and empower jurors. I was particularly moved by the juror being concerned about whether she and her fellow jurors "did right" by us. Very moving. I will also say this: in this case the Judge permitted extended voir dire on implicit bias. There was an open, engaging and receptive conversation with the jurors about the concept of how implicit bias impacts the perception of witnesses, the lowering of the burden of proof, and overall fairness. So, here is the email:

"Mr. Ricco,

Hello, my name is Sadia Butt and I was one of the jurors in the trial for Mr. Harkless. I'm sure you're a busy man, but I just wanted to say a few things to you. It was a pleasure to watch you work. I feel you are a phenomenal attorney and it was great to see you do what you do. I also was fascinated about your background given you are a defense attorney. My interest peaked when the witness you had brought up spoke out against you. So after our verdict, I "googled you", I apologize for how tactless that sounds. I really admire your experiences and all that you have done for the community. In this political and judicial climate, it's really important to have individuals who value fairness and equal opportunity for all. I'm sure it hasn't been easy to represent some clients, but from what I have

witnessed, you make it look effortless. You give me hope that there are people out there that advocate and give voice to individuals that may not be given that opportunity.

I hope as jurors we did right by you. I can say with certain that we definitely went through with a fine tooth comb with this case. Arguments were brought up that made us really think about things. I personally feel there was more to the story of what happened and why it happened. The video of the victims friend walking calmly away after the shooting and the fact that he didn't testify, the blue jacket not being tested, and a few other things were just off and made me question what really happened. I don't know the logistics of the law so maybe that's why I don't understand why some people testify and some don't, and I don't know if I'll ever find out what the full story was, but I just wanted to share my thoughts with you.

Thank you for taking the time to read this and for being a voice for individuals who may not have the opportunity to be heard.

Sincerely,

Sadia Butt"

Perhaps the email will help to inspire others on the importance of developing a rapport with jurors, and what happens when we invest in the education and empowerment of jurors. I found the email inspiring.

Speaker Biographies

JANINE M. GILBERT, ESQ.
BIOGRAPHY

Janine Gilbert is Assistant Deputy Commissioner, Office of Equity and Inclusion, Chief EEO Officer and Coordinator for the New York City Police Department. Prior to this she was Assistant Commissioner, Risk Management. Earlier in her career, she served as an Assistant District Attorney in the Manhattan DA's Office, prosecuting sex crimes, homicides and other major offenses. She is a graduate of Harvard University, Harvard Law School and the University's Kennedy School of Government.

PROFESSOR RACHEL D. GODSIL
BIOGRAPHY

Rachel D. Godsil is the Director of Research and Co-Founder of Perception Institute and Professor of Law and Chancellor's Scholar at Rutgers Law School. Professor Godsil collaborates with social scientists on empirical research to assess the efficacy of interventions to reduce the impact of our unconscious brains on our decision-making and interpersonal relationships. She regularly conducts workshops on the role of implicit bias, racial anxiety, and stereotype threat in everyday dynamics and in key fields, such as education, criminal justice, and healthcare.

Professor Godsil has co-authored numerous reports, including the first two volumes of Perception Institute's *Science of Equality* series: ***The Science of Equality, Volume 1*: Addressing Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Healthcare** (2014) and ***The Science of Equality, Volume 2*: The Effects of Gender Roles, Implicit Bias, and Stereotype Threat on the Lives of Women and Girls** (2016), as well as articles and book chapters such as **Why Race Matters in Physics Class**, 64 U.C.L.A. L. Rev. Disc. 40 (2016); **Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems**, 37 Hawaii L. Rev. 313 (2015); **Implicit Bias in the Courtroom**, 59 U.C.L.A. L. Rev. 1184 (2012).

Previously, Professor Godsil was the Eleanor Bontecou Professor of Law at Seton Hall University Law School, an Assistant United States Attorney for the Southern District of New York, an Associate Counsel at the NAACP Legal Defense and Educational Fund, as well as an associate with Berle, Kass & Case and Arnold & Porter in New York City. She earned her law degree from the University of Michigan.

ANTHONY L. RICCO, ESQ.
ADJUNCT PROFESSOR OF LAW, FORDHAM UNIVERSITY

Over the past 19 years, Anthony L. Ricco served as learned counsel on approximately 45 federal death penalty cases across the country. Those cases include : (1) *United States v. Andre Cooper*, et. al., Eastern District of Pennsylvania to penalty verdict. Litigated to verdict to life verdict May 2006; (2) *United States v. Jelani Solomon*, et ano., Western District of Pennsylvania. Litigated to life verdict November 2007; (3) *United States v. Deondre Byrd*, et al., appointed in 2007. Eastern District of Michigan, case dismissed in 2012 by the government; and (4) *United States v. Jarvis Brown*, et al., 2008. Western District of Indiana, defendant entered a post authorization plea to life in March of 2009.

Before the New York State Death Penalty was declared unconstitutional in 2004, Anthony L. Ricco served as capital counsel on over a dozen death eligible cases: (1) *People v. Corey Arthur*, defendant charged with murder in the first degree in death of Jonathan Levin, son of then Time Warner C.E.O. Gerald Levin in 1998; (2) *People v. Michael Whiten*, et al. In 2003 six young men charged with the double murder of two N.Y.C. undercover police officers. State death penalty declared unconstitutional in 2004. Federal Government indicted in 2005, death not authorized against Michael Whiten. Co-defendant Ronell Wilson, represented by other counsel, sentenced to death by jury verdict; life verdict; life verdict subsequently reversed by the 2d Circuit.

Anthony L. Ricco also served as counsel in several controversial cases: including, *inter alia*, the World Trade Bombing conspiracy case, *United States v. Omar Abdel Rahman*; the Embassy Bombing case in 1998, *United States v. Usama Bin Laden* in 2001; as counsel for Detective Gescard Insnora in the *Sean Bell* case, *People v. Michael Oliver*, et al, in 2008.

Teaching Assignments

1. Since 2007, Anthony L. Ricco has served on the faculty at the Bryan R. Schechmeister Death Penalty College, hosted during the summer by the University of Santa Clara School of Law. The courses Anthony L. Ricco have taught have been on the subject of Future Dangerousness and other substantive issues related to death penalty litigation.

2. February 12 through February 25, 2010, Anthony L. Ricco served as an instructor at the Capital Case Defense Seminar, hosted by the California Attorneys for Criminal Justice and the California Public Defenders Association in Monterey, California in February 2010. The subjects include litigating the impact of gang evidence and future dangerousness in capital cases.

3. Over the years, Anthony L. Ricco has also been an instructor at CLE courses hosted by the New York State Appellate Division, First Department, Indigent Assigned Counsel Plan. The courses of instruction have primarily been on jury selection issues, opening and closing arguments, cross racial identification, effective cross examination, *inter alia*.

Professional Experience

Private practice of law, since December 1982. Law practice involves federal, state criminal defense and capital defense litigation.

Professional Awards and Recognition

- In 2004, New York County Lawyers Association, Criminal Defense Division. Outstanding Contribution to the Profession.
- May 14, 2008, Mr. Ricco was named The Attorney of the Year by the Metropolitan Black Bar Association.
- On September 24, 2008, the United States Court of Appeals for the Second Circuit and the American Inns of Court awarded Mr. Ricco its Professionalism Award for 2008. Presentation of the award both at the Second Circuit Court of Appeals and the United States Supreme Court, hosted by Justice Samuel Alito.
- On October 20, 2009, Mr. Ricco was appointed as a National Resource Counsel to the Federal Death Penalty Resource Counsel Project in Frankfort, Kentucky. The Federal Death Penalty Resource Counsel Project, established in 1992, is a program funded by the Office of Defender Services of the Administrative Office of the United States Courts designed to assist federal judges, federal defenders, and appointed counsel in connection with matters relating to the defense function in federal capital cases.
- From 2002 through 2012, Mr. Ricco also served as a member of the Defender Services Advisory Group, Death Penalty Working Group subcommittee. This subcommittee is under the auspices of the Office of the Defender Services of the Administrative Offenses of the United States Courts. This subcommittee makes recommendations to the United States Judicial Conference, Subcommittee on Defender Services for the administration and implementation of policies for the provisions of services of court appointed counsel and federal defenders in federal capital cases.
- Past President of the New York Criminal Bar Association serving from, 2007 to 2009.
- In 2010 Mr. Ricco was inducted as a Fellow in the American College of Trial Lawyers.
- In 2012 the New York State Bar Association honored Mr. Ricco with its Outstanding Criminal Defense Attorney Award.

Admitted

State of New York, January 1982.
United States District Court for the Southern, Eastern and Northern Districts of New York.
The Supreme Court of the United States and Second and Fourth Circuit Court of Appeals.

Panel Membership

C.J.A. Panels and Capital Panels for both the Southern and Eastern Districts of New York.
New York State Homicide, Felony and Appellate Panels.

Education

Northeastern University School of Law, JD, May 1981
Adelphi University, BA, Political Science, May 1978