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Implicit Bias in the Courtroom

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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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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]

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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]

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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.

THE ROLE OF STEREOTYPES IN JURY TRIALS

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What is a stereotype? Webster's dictionary defines stereotype as:

> Something repeated or reproduced without variation; something conforming to a fixed or general pattern and lacking individual distinguishing marks or qualities; especially a standardized mental picture held in common by members of a group and representing an oversimplified opinion, affective attitude or uncritical judgment (as of a person, a race, an issue, or an event).

It is the opposite of judging each individual in his or her own complexity. It is labeling someone, making assumptions based on preconceptions rather than on proven behavior. It is pre-judging – prejudice.

Stereotypes are alive and well in the United States. Jurors tend to view the strengths and weaknesses through the lens of their own stereotypes. In a recent study of mock jury research conducted by Sonia Chopra of National Jury Project/West the race and ethnicity of the plaintiff seemed to make a difference in win/loss rates, with the highest percentage of plaintiff verdicts occurring when the plaintiff was white.[1] This study was consistent with research examining actual jury verdicts in employment cases in California conducted by law professor David Oppenheimer at Golden Gate University Law School. For example, Professor Oppenheimer found that African American women who brought claims of either sex discrimination and/or race discrimination won just 17% of the time and that while 36% of men who filed an age discrimination claim prevailed, none of the women did.[2]

One way to counter the tendency of jurors to stereotype plaintiffs is to have more diverse juries. A recent study demonstrated that racially diverse juries spend more time deliberating and discuss more information as compared to homogeneous juries.[3] In addition, more diverse juries were more likely to share information and make fewer factual errors. Professor Samuel Sommers, the study's author concluded:

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[1] Chopra, *Mock Jurors' Real Attitudes*, paper presented at 2006 NELA National Convention, San Francisco, CA.
[2] Oppenheimer, *Verdicts Matter*, 37 U. Cal. Davis L. Rev. 511 (2003)
[3] Sommers, *On racial diversity and group decision-making: Informational and motivational effects of racial composition on jury deliberations*. 90(4) J. Personality & Social Psychol. 597 (2006).

> The argument could be made that in a homogeneous group, where everyone is like us, it's easy to be a little lazier, and take those cognitive shortcuts. Diversity seems to be one potential way to shake us out of that, and to attend more carefully to our surroundings."[4]

With the real potential for stereotyping to play a role in jury decision-making, fairer verdicts can be achieved by doing the hard work required to seat the most diverse jury possible and to minimize the effects of the stereotypes in telling the story of the case in order for the decisions to be made on the basis of a full understanding of the complexity of the human experience.

Every good trial lawyer knows that a key component in winning your case is to understand your audience. The client's story is at the heart of every trial, and it will be difficult to win if the story does not make sense to the decision-makers and relate to their lives. If a juror's background and experience prevents them from relating to the story, a plaintiff's verdict is difficult. Thus it is essential to have as full as possible of an understanding of the background and experience of the jurors and address the attitudes (including stereotypes) that flow from them.

Step 1 in addressing stereotypes is jury selection. There are two kinds of stereotypes relevant to jury selection – the stereotypes of the jurors and the stereotypes that infect your decision making during jury selection.

Jurors' Stereotypes

Let's start with the jurors' stereotypes. To prepare for jury selection you must identify the types of stereotypes that may be filters through which the jury evaluates the evidence in your case. Jurors may have stereotypes about your client, plaintiffs and the courts in general, the defendant, the kind of work place involved in the case, and let's not forget stereotypes about plaintiffs' lawyers. The stereotypes may revolve around race, age, gender, occupation, appearance, and/or behavior. They may be long standing stereotypes or they may have developed because of recent events in the news (e.g., changing attitudes about people of Arab descent) or because of events in the juror's own life (being the victim of a crime committed by a member of a particular racial or ethnic group).

Whatever the source, it is essential to identify those jurors who are cemented into a stereotyped view that will affect the way he or she processes the evidence in your case. The starting point is to explore what kind of contact each prospective juror has with members of the group that may be subject to a stereotype, the plaintiff's group. Less personal contact means a greater likelihood that stereotypes will be used; in the absence of real life experience, preconceptions from other sources such as TV or attitudes of friends or relatives become the only source of knowledge. Ask prospective jurors questions like: "What kind of contact do you have in your day-to-day life with [African-Americans, gay people, people with disabilities, etc.]?

[4] Reported in the April 17, 2006 issue of the New York Times.

Second, it is necessary to articulate to yourself how that stereotype might be expressed:

- Women who are victims of sexual harassment usually do something to invite it.
- Black people tend to use complaints of discrimination as an excuse for their own shortcomings.
- Older people are less productive than younger workers.

The third step is to articulate that stereotyped perspective to the potential jurors:

- Some people think that ……

Expressing the stereotype in that way gives prospective jurors permission to voice their true feelings because you are acknowledging that other people may share that view. It makes it clear that you don't agree with that perspective, but encourages the jury to be honest on this point. It is important to remember that just because the juror does not express his true feelings during voir dire, does not mean that he does not have those feelings. Better to invite and learn the real attitudes before the trial than after you have lost the case because some juror was completely resistant to your client because of stereotyped views.

Batson Motions

Too often defense attorneys use racial stereotypes to guide their decision-making in exercising peremptory challenges, thereby eliminating the possibility of more diverse juries. There is often great resistance by plaintiffs' lawyers to challenging this practice in the interest of "efficiency," the desire to finish jury selection quickly, and fear of angering the judge. This is a big mistake.

The one area of the law around jury selection that has received substantial attention from the courts, including the U.S. Supreme Court, is around the issue of the discriminatory use of peremptory challenges. The courts have established reasonable standards and a clear process to use in determining discrimination in jury selection.

When the defense uses its peremptory challenges to exclude members of a protected group, the process generally is to make a challenge under Batson v. Kentucky, 476 U.S. 79 (1986).[5]

The procedure is:

When the challenge is made counsel should be prepared to provide:

a) Race, gender or other cognizable category of parties;
b) Race of group being improperly challenged;
c) Number of that group in the panel and called to the box;

[5] In Edmonson v. Leesville, 500 U.S. 614 (1991)The U.S. Supreme Court held that Batson applies to civil cases.

d) Number of that group challenged;
e) Number of peremptories used;
f) Number of that group remaining;
g) Other reason bias is important to the case.

If the judge finds a prima facie case exists,[6] the burden shifts to the defense to provide non-discriminatory reasons for its challenges. The court then determines if the defense has met its burden. Many states have their own case law on this issue, including different options for remedies. See, Jurywork: Systematic Techniques, Chapter 4 for a full discussion about challenges to the discriminatory use of peremptory challenges.[7]

The lesson of Batson and its progeny is that there are avenues to challenge the infection of the jury process with stereotyped thinking and discriminatory decisions. The goal of every employment case should be to have a true cross section of the community evaluate the actions of the employer in light of the standards for fair and non-discriminatory treatment required by our civil rights laws.

Attorneys' Stereotypes

The stereotypes of plaintiff attorneys can be just as dangerous as the stereotypes of the jurors or the defense lawyers. People are complex human beings and must be evaluated on the totality of their life experience and resultant attitudes. Of course, the more superficial the voir dire, the more the lawyer is required to rely on stereotypes. However, assuming the judge allows at least minimal exploration of juror attitudes, it is essential that the attorney identify the most relevant biases that prospective jurors might bring to the story of the case and eliminate jurors on the basis of their ideas, not just their demographics.

Sometimes stereotypes have some validity – e.g., the experience of African Americans as a group in the job market is different (and more negative) than the experience of most Caucasians as a group; thus attitudes towards employers are often more critical. However, even if a stereotype has some validity, the person in front of you might be the exception to the stereotype. Thus, analysis of each individual in all of his or her complexity is essential during jury selection.

In the National Jury Project study cited above, it was revealed that one of the most important issues in determining case outcome was the juror's attitude toward the concept of damages for emotional distress. Other revealing topics include a juror's beliefs about employer rights vs. employee rights, their own work experience and workplace expectations and perceptions about the extent of discrimination in society and the workplace today.

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[6] See Johnson v. California, 125 S.Ct. 2410 (2005) which holds that a trial judge must only find whether there is a "reasonable inference of discrimination in determining whether an objector has met the prima facie burden.

[7] National Jury Project, *Jurywork: Systematic Techniques* (2005).

Stereotypes in Telling the Story

In telling the story of an injustice in the work place, it is important to counter possible stereotypes about the role of the plaintiff in the dispute and they are many. Many jurors believe that if someone is fired or demoted or harassed, they must have done something to invite the negative behavior. They often believe that people of color who claim discrimination are using discrimination as an excuse to cover their own shortcomings. Most jurors these days start off suspicious of plaintiffs, believing they (and their lawyers) are trying to get rich off the legal system.

The most effective way to counter these stereotypes is to tell the story of the case around the common view of the employment relationship:

> The employee brings to the job whatever skills, training and experience, puts in the time and produces something for the employer. In return, the employer must pay the employee and treat him or her with a certain level of fairness.

It is always helpful to keep the story focused on the employer – it did not do what it was supposed to do – it did not hold its end of the bargain. However, because of jurors' stereotypes about plaintiffs, it is always necessary to establish that the plaintiff upheld his or her end of the bargain – she did what she was supposed to do. The story must make clear that the plaintiff's motives are simply to work and do a good job and that at each turning point, the plaintiff made the right choices; it was the employer who made the wrong choices.

Relying on the heart of the story and repeating the themes it evokes will keep the jury's focus on the bad acts of the employer and help them to turn away from their own stereotypes or at least conclude that the plaintiff before them is the exception to the stereotype. It is not always possible to eliminate the jurors' stereotypes, but it is possible to tell a story that overcomes them, allowing the jury to feel comfortable with a large plaintiff's verdict.

JURY SELECTION IN CRIMINAL CASES

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EVALUATING JURORS:

Every piece of information about a juror is like a piece of a puzzle. The more information you get, the better your understanding of each prospective juror as a complex human being. Essential pieces of the puzzle include:

1. Background Information

Age, residence, occupation, education, family information, prior jury experience, spare time activities.

2. Attitudes About the Criminal Justice System

Which prospective jurors have the most punitive attitudes? Which jurors believe:

- If someone is charged with a crime, they must be guilty;
- Defendants should be required to testify;
- The system makes it too difficult for police and prosecutors to get convictions.

3. Experiences with Crime and Law Enforcement

People who are afraid or who feel vulnerable are often more reluctant to disagree with those in authority.

Victims of crime might see their jury service as an opportunity to punish someone for their own experience.

People who work with or who are related to law enforcement are likely to be more deferential to the police and prosecutors and often feel that it is inappropriate to "second-guess" them.

It is important to ask people about their experience with crime and law enforcement AND to ask them about how they felt about that experience.

4. Case-Specific Issues

Each case has its own particular set of facts that might elicit the biases of certain prospective jurors. It is always important to identify those potential biases, counteract them during the trial, and exercise challenges against those jurors who will be most resistant to seeing the case from the defendant's point of view.

An important rule-of-thumb to follow is: The closer the juror's personal experience is to the facts of the case, the more dangerous s/he is. S/he might be receptive to the prosecution, or s/he might be more receptive to the defendant; it is necessary to find out during jury selection, or you might find out after the trial has been lost.

Do not assume that someone with experiences similar to the defendant will be pro-defense. Remember the battered wife who served on a jury and led the jury to a conviction of a woman who killed her husband, saying, "I was a battered wife, but I didn't have to kill my husband."

5. Personality Characteristics

- **Satisfaction with Life vs. Bitterness:**

Sense of adequacy and satisfaction about one's life situation, future, and children's happiness, resulting in generosity;

versus

Insistence that each individual is basically responsible for her or his own fate, achievements and misfortunes.

- **Empathy vs. Detachment:**

Capacity to put oneself in another's shoes, to understand her viewpoint, and feel her pain;

versus

Inability to identify with others, due to disinterest, denial, or other reasons.

- **Shared vs. Personal Responsibility:**

View of responsibility for actions as complex and shared with others, society, and unforeseeable events;

versus

Insistence that each individual is basically responsible for her or his own fate, achievements and misfortunes.

- **Flexibility vs. Rigidity:**

Thoughtful, flexible, open to dealing with complexity and ambiguity;

versus

Personal need or tendency to rush to decisions, cramming complex realities into large, simple categories.

6. Role on the Jury

The following characteristics affect whether or not a juror will be a significant participant in the deliberations. **They may be good or bad for the defense.**

- **Analytic Ability:**

Capacity to think through distinctions made by attorneys and the judge's instructions.

- **Leadership Potential:**

Traits such as gender, ethnicity, age, experience, intellectual ability, articulateness, personal charm will affect who will be chosen foreperson or who will exert opinion leadership over the other jurors (not always the same person).

- **Social/Negotiating Skills:**

Ability to influence others, not by leadership, but by friendliness, gregarious quality and skill at bringing others along. Pay attention to salespeople, den mothers, and others who have lots of contact with people in their work and home lives.

RATING SCALE

1 Must go; leader for prosecution; will be able to convince others.

2 Leans towards the prosecution, but won't be influential. Might stick to guns [2-] or might be won over by a strong pro-defense argument [2+], but won't be able to convince others.

3 Can live with. Someone who has no emotional stake in the outcome. Receptive, but not leaning toward defense.

4 Leaning in favor of the defense, but won't be influential. Might stick to guns [4+], or might be won over by a strong pro-prosecution argument [4-], but won't be able to convince others.

5 Pro-defense, influential, able to advocate for the defendant's case.

SHIFTING GOALS

1. Getting Information

Open ended questions to explore both the prospective juror's experiences as well as attitudes about those experiences and case issues in general. (See "Probes" attached.)

2. Cause Challenges

Enough opened ended questions to be able to use the juror's own words to argue for cause, followed by closed ended questions designed to pin down the juror's position and resist rehabilitation. Avoid use of the phrase "fair and impartial" unless the judge requires that level of proof of bias. Alternatives include:

- The prosecution starts out a little ahead; with an advantage.
- You would not require proof beyond a reasonable doubt, but some lesser standard.
- Law enforcement officers would be held to a different standard than other witnesses. You would tend to believe them, just because they are officers.

3. Rehabilitation

Closed ended questions designed to get the juror to say they could put their (pro-defense or anti-prosecution) experiences and attitudes aside and judge this case based only on the evidence presented and the judge's instructions.

- You don't know any of the people involved in this case, do you?
- You don't know what happened here?
- You consider yourself a fair minded person, don't you?
- You're willing to listen to all the evidence and decide this case based only on what's presented and not on your negative experience with the police, aren't you?

4. Ignore/Move On

When voir dire time is limited, don't waste time on clear followers.

TIPS ON TECHNIQUES

- Concentrate as much as you can on the person in front of you.

- Ask yourself, what do I know about her/him, and what else am I curious about?

- Make sure that you **PAUSE** between jurors, take the time to collect yourself, and make a real transition from one person to the next.

- Timing is as critical during the questioning as at any other time. Take your time. **ASK YOUR QUESTIONS SLOWLY,** THOUGHTFULLY, AND WITH A CONVERSATIONAL TONE. DO NOT SPEED UP BECAUSE THE JUROR SPEEDS UP.

- **Pause between questions** long enough to:

    1. Be positive the juror is quite finished.

    2. Think a bit about the answer, what is left unanswered, and what your follow-up will be, if there should be a follow-up.

    3. Give the juror a second to relax and catch breath.

NEVER, NEVER INTERRUPT - NEVER

Look at the juror as you ask the question **AND** as they respond:

1. It will help you know when they're done, when they're in trouble, etc.

2. Don't get into a stare-down, but be attentive, polite. Remember, you're not talking to the floor or the lectern.

3. There is no better way to shut someone down and close them up than to ask a question, then look immediately away, as if you don't care what the answer is.

Use your voice and your facial expressions to convey the clear impression that you are very interested in the juror as an individual, and that you want to know what they really think and feel about this next question.

Let your voice go up at the end of the sentence for questions that you really want the answer to, and down with closed-ended questions for cause.

List of Race-Neutral Reasons Held to Justify Use of Peremptory Challenge

- The fact that the person was the same age as the defendant. U.S. v. Garrison, 849 F.2d 103, 25 Fed. R. Evid. Serv. 1140 (4th Cir. 1988).
- The fact that the person chatted during voir dire, and gave signs of boredom and disdain for the process. U.S. v. Garrison, 849 F.2d 103, 25 Fed. R. Evid. Serv. 1140 (4th Cir. 1988).
- The fact that the person was unemployed. U.S. v. Garrison, 849 F.2d 103, 25 Fed. R. Evid. Serv. 1140 (4th Cir. 1988).
- The fact that they were young, not meaningfully employed, and had no children or family responsibilities. U.S. v. Lance, 853 F.2d 1177, 26 Fed. R. Evid. Serv. 633 (5th Cir. 1988).
- The fact that he was a relative of a police officer who had been laid off for misconduct. U.S. v. Rodrequez, 859 F.2d 1321, 27 Fed. R. Evid. Serv. 158 (8th Cir. 1988).
- The fact that she spoke softly and could barely be heard and was palsied. U.S. v. Rodrequez, 859 F.2d 1321, 27 Fed. R. Evid. Serv. 158 (8th Cir. 1988).
- The fact that he was not paying attention and was not understanding of what was being said. U.S. v. Rodrequez, 859 F.2d 1321, 27 Fed. R. Evid. Serv. 158 (8th Cir. 1988).
- The fact that she was a pharmacist and might form an independent opinion on the narcotics charges. U.S. v. Rodrequez, 859 F.2d 1321, 27 Fed. R. Evid. Serv. 158 (8th Cir. 1988).
- The fact that the person had served as a youth supervisor at a penal facility for young persons and would be likely to be overly sympathetic. U.S. v. Briscoe, 896 F.2d 1476, 30 Fed. R. Evid. Serv. 831 (7th Cir. 1990).
- The fact that the person had been accused of a crime and had been acquitted. U.S. v. Briscoe, 896 F.2d 1476, 30 Fed. R. Evid. Serv. 831 (7th Cir. 1990).
- The fact that the person was an unemployed student and had resided at three addresses close to addresses of scheduled witnesses. U.S. v. Briscoe, 896 F.2d 1476, 30 Fed. R. Evid. Serv. 831 (7th Cir. 1990).
- The fact that he had "been unjustly convicted" of a crime and had been denied employment by the federal government. U.S. v. Briscoe, 896 F.2d 1476, 30 Fed. R. Evid. Serv. 831 (7th Cir. 1990).
- The fact that he had been a victim of a crime and resented the fact that no one was charged with the crime. U.S. v. Briscoe, 896 F.2d 1476, 30 Fed. R. Evid. Serv. 831 (7th Cir. 1990).
- The fact that they were young unmarried people who would be inclined to have a liberal attitude toward drugs. U.S. v. Prine, 909 F.2d 1109 (8th Cir. 1990).
- The fact that the juror was employed by a church-affiliated agency making her more inclined to side with the defendant, and the defendant had relied on a church for financial assistance. U.S. v. De La Rosa, 911 F.2d 985 (5th Cir. 1990).
- The fact that she was disinterested and inattentive and was reluctant to serve because she worked nights and cared for her small grandchild during the day. U.S. v. Roberts, 913 F.2d 211 (5th Cir. 1990).
- The fact that he would not consider a tape recording as evidence. U.S. v. Roberts, 913 F.2d 211 (5th Cir. 1990).
- The fact that he was personally acquainted with the defendant and had heard her sing. U.S. v. Roberts, 913 F.2d 211 (5th Cir. 1990).
- The facts that the prosecution did not like her background and youthful age and generally preferred men to women on narcotics cases. U.S. v. Hoelscher, 914 F.2d 1527 (8th Cir. 1990).
- The fact that she had family members with drug problems, appeared bored and distressed, and didn't know whether she had served on a civil or criminal jury. U.S. v. Hoelscher, 914 F.2d 1527 (8th Cir. 1990).
- The fact that he has a prior family involvement with drug charges. U.S. v. Bennett, 928 F.2d 1548 (11th Cir. 1991).

- The fact that he lived in the area of the restaurant where the defendant worked. U.S. v. Bennett, 928 F.2d 1548 (11th Cir. 1991).
- The fact that there was uncertainty that the allegedly Latino potential juror would accept the interpreter's translation. Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).
- The fact that the defendant's counsel had represented her in a previous divorce. U.S. v. Williams, 936 F.2d 1243 (11th Cir. 1991).
- The fact that he worked at a hotel whose occupants and employees had been the focus of numerous criminal investigations. U.S. v. Day, 949 F.2d 973 (8th Cir. 1991).
- The fact that she was young, had a sporadic employment history, and did not own property and lacked community attachment. U.S. v. Day, 949 F.2d 973 (8th Cir. 1991).
- The fact that he was not fluent in English. U.S. v. Alvarado, 951 F.2d 22 (2d Cir. 1991).
- The fact that she was a social worker and might be too sympathetic. U.S. v. Alvarado, 951 F.2d 22 (2d Cir. 1991).
- The fact that she had children the age of the defendant and might be too sympathetic. U.S. v. Alvarado, 951 F.2d 22 (2d Cir. 1991).
- In a prosecution for possession of cocaine, the fact that his brother was addicted to cocaine. U.S. v. Todd, 963 F.2d 207 (8th Cir. 1992).
- The fact that she appeared attentive, impatient, and hostile to the prosecutor. U.S. v. Todd, 963 F.2d 207 (8th Cir. 1992).
- The fact that the juror's employer was being investigated by federal authorities so that his objectivity might be compromised. U.S. v. Collins, 972 F.2d 1385 (5th Cir. 1992).
- The fact that he could lose several weeks pay and blame prosecution. U.S. v. Lorenzo, 995 F.2d 1448 (9th Cir. 1993).
- The fact that he had long hair and a beard where defendants were similarly coiffed. U.S. v. Lorenzo, 995 F.2d 1448 (9th Cir. 1993).
- The fact that he was not proficient in English, provided the prosecution can convince the court that he in fact had difficulty with English and the challenge was not based on the assumption that a person with a particular name had trouble understanding English. U.S. v. Changco, 1 F.3d 837 (9th Cir. 1993).
- The fact that he had experience as a victim of police brutality. U.S. v. Brooks, 2 F.3d 838 (8th Cir. 1993).
- The fact that he had a relative in prison on drug charges. U.S. v. Brooks, 2 F.3d 838 (8th Cir. 1993).
- The fact that he supplied only the most sketchy information on the juror information form. U.S. v. Brooks, 2 F.3d 838 (8th Cir. 1993).
- The fact that the prosecutor was uncertain as to whether allegedly Latino potential jurors would accept the translator's translation. Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).
- She was a school teacher, where the prosecutor announced he would strike any teacher, and no teacher was seated. U.S. v. Brown, 289 F.3d 989 (7th Cir. 2002).
- Her husband had been convicted of a firearm crime. U.S. v. Brown, 289 F.3d 989 (7th Cir. 2002).
- She had testified for the defense at her mother's murder trial. U.S. v. Brown, 289 F.3d 989 (7th Cir. 2002).
- The juror appeared to be too "anxious to serve on the panel," and "anybody who really wants to serve on a panel, we're worried about." U.S. v. Singh, 518 F.3d 236 (4th Cir. 2008).

Selecting a Jury

Voir Dire Examination – General Process and Principles

The voir dire process is governed by Fed. R. Crim. P. 24. The scope of voir dire examination and the procedures to be used are matters within the sound discretion of the trial judge and will not be disturbed on appeal unless the procedures used or the questions propounded are so unreasonable or devoid of the constitutional purpose as to constitute an abuse of that discretion.

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Ross v. U.S., 374 F.2d 97, 104 (8th Cir. 1967)
U.S. v. Gerald, 624 F.2d 1291 (5th Cir. 1980)
U.S. v. McAnderson, 914 F.2d 934, 31 Fed. R. Evid. Serv. 341 (7th Cir. 1990)
U.S. v. Noone, 913 F.2d 20, 31 Fed. R. Evid. Serv. 229 (1st Cir. 1990)
U.S. v. Guy, 924 F.2d 702 (7th Cir. 1991)
U.S. v. Anzalone, 886 F.2d 229 (9th Cir. 1989)
Haith v. U.S., 342 F.2d 158 (3d Cir. 1965)
Stirone v. U.S., 341 F.2d 253 (3d Cir. 1965)
U.S. v. Woods, 364 F.2d 481 (3d Cir. 1966)
U.S. v. Rivera-Sola, 713 F.2d 866, 13 Fed. R. Evid. Serv. 1897 (1st Cir. 1983)
U.S. v. McDonald, 576 F.2d 1350 (9th Cir. 1978)
U.S. v. Myers, 626 F.2d 365 (4th Cir. 1980)
Darbin v. Nourse, 664 F.2d 1109, 33 Fed. R. Serv. 2d 154, 72 A.L.R. Fed. 627 (9th Cir. 1981)
Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986)
U.S. v. Flores, 63 F.3d 1342, 42 Fed. R. Evid. Serv. 1365 (5th Cir. 1995)
Reiger v. Christensen, 789 F.2d 1425 (9th Cir. 1986)
U.S. v. Guglielmi, 819 F.2d 451 (4th Cir. 1987)
U.S. v. Angiulo, 897 F.2d 1169, 29 Fed. R. Evid. Serv. 1011 (1st Cir. 1990)
Wicker v. McCotter, 783 F.2d 487, 20 Fed. R. Evid. Serv. 223 (5th Cir. 1986)
U.S. v. Peete, 919 F.2d 1168 (6th Cir. 1990)
U.S. v. Scarfo, 850 F.2d 1015, 26 Fed. R. Evid. Serv. 30, 93 A.L.R. Fed. 111 (3d Cir. 1988)

New Developments

Buck v. Davis, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017) (holding that "the District Court abused its discretion in denying Buck's Rule 60(b)(6) motion . . . Buck may have been sentenced to death in part because of his race. . . The statement that 'it is inappropriate to allow race to be considered as a factor in our criminal justice system' is equally applicable whether the prosecution or ineffective defense counsel initially injected race into the proceeding) (internal citations omitted)

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017) (holding that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee, abrogating *Commonwealth v. Steele,* 599 Pa. 341, 961 A.2d 786; *U.S. v. Benally,* 546 F.3d 1230; *Williams v. Price,* 343 F.3d 223)

Questioning Jurors

The examination by counsel of jurors as to their qualifications is conducted under the supervision of the trial court, and the nature and extent of the questions counsel may ask are discretionary with that court. While a wide latitude is allowed counsel in examining jurors on their voir dire, it is important that the trial courts, in the exercise of their discretion, be punctilious in restricting counsel's inquiries to questions which are pertinent and proper for testing the capacity and competency of the juror and which are neither designed nor likely to plant prejudicial matter in his or her mind. If special circumstances make certain questions relevant to show bias or other grounds for a challenge for cause, the court should be informed of the reason for asking such questions. Am. Jur. 2d, Jury § 205.

A criminal defendant has the right to a voir dire examination that is broad enough to allow the parties to ascertain the fairness and impartiality of the prospective jurors. **Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.** Am. Jur. 2d, Jury § 206.

* * * * *

Hilliard v. State of Ariz., 362 F.2d 908 (9th Cir. 1966)
U.S. v. Bowe, 360 F.2d 1 (2d Cir. 1966)
U.S. v. Davis, 583 F.2d 190 (5th Cir. 1978)
U.S. v. Jones, 722 F.2d 528 (9th Cir. 1983)

There is a conflict in the holdings as to whether it is proper to ask whether the jurors were inclined to give more weight to the testimony of one class of witnesses over another, such as police officers over others or medical doctors over osteopaths. Hinkle v. Hampton, 388 F.2d 141 (10th Cir. 1968); Sandidge v. Salen Offshore Drilling Co., 764 F.2d 252, 2 Fed. R. Serv. 3d 94 (5th Cir. 1985); Sellers v. U.S., 271 F.2d 475 (D.C. Cir. 1959); U.S. v. Jackson, 448 F.2d 539 (5th Cir. 1971); Chavez v. U.S., 258 F.2d 816 (10th Cir. 1958).
Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986)
Government of Virgin Islands v. Dowling, 814 F.2d 134, 22 Fed. R. Evid. Serv. 1240 (3d Cir. 1987)
U.S. v. Urian, 858 F.2d 124 (3d Cir. 1988)
U.S. v. Anzalone, 886 F.2d 229 (9th Cir. 1989)
Mu'Min v. Virginia, 500 U.S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)
U.S. v. Moore, 936 F.2d 1508, 33 Fed. R. Evid. Serv. 1345 (7th Cir. 1991)
U.S. v. Hirschberg, 988 F.2d 1509, 38 Fed. R. Evid. Serv. 542 (7th Cir. 1993)
Mu'Min v. Virginia, 500 U.S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)
U.S. v. Lawes, 292 F.3d 123 (2d Cir. 2002)
U.S. v. Summers, 539 Fed. Appx. 877 (10th Cir. 2013)

Questioning About Bias and Racial Prejudice
Ham v. South Carolina, 409 U.S. 524, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1973)
Ristaino v. Ross, 424 U.S. 589, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976)
U.S. v. Robinson, 466 F.2d 780 (7th Cir. 1972)
U.S. v. Bowles, 574 F.2d 970 (8th Cir. 1978)
U.S. v. Barnes, 604 F.2d 121 (2d Cir. 1979)
U.S. v. Rosales-Lopez, 617 F.2d 1349 (9th Cir. 1980), judgment aff'd, Rosales-Lopez v. U. S., 451 U.S. 182, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981)
U.S. v. Corey, 625 F.2d 704 (5th Cir. 1980)
U.S. v. Toomey, 764 F.2d 678 (9th Cir. 1985)
U.S. v. Groce, 682 F.2d 1359, 11 Fed. R. Evid. Serv. 467 (11th Cir. 1982)
It was within the trial judge's discretion to refuse to ask prospective jurors whether they believed that a black person was less likely than a white person to tell the truth and whether a black person was more likely than anyone else to commit a crime. U.S. v. Brooks, 957 F.2d 1138 (4th Cir. 1992).
U.S. v. Gonzalez, 214 F.3d 1109 (9th Cir. 2000)
Where racial or ethnic bias may be an issue in a case and the defendant requests voir dire on the subject, it is an abuse of discretion to refuse the request. U.S. v. Hosseini, 679 F.3d 544 (7th Cir. 2012), cert. denied, 133 S. Ct. 774, 184 L. Ed. 2d 512 (2012).

Peremptory Challenges – Generally
Challenges to the polls may be either: (1) peremptory; or (2) for cause. A peremptory challenge is a challenge to a prospective juror for which no reason need be given or cause assigned. Am. Jur. 2d, Jury § 234; Fed. R. Crim. P. 24.
* * * * *
There is a wide variety of procedures followed in the various states in the exercise of peremptory challenges. Even within the states, the practices vary from one community to the other. While the tendency is for the federal court to follow the state court practices in the community in which it sits, the federal court is not obligated to do so. Pointer v. U.S., 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894).
Hanson v. U.S., 271 F.2d 791, 60-2 U.S. Tax Cas. (CCH) P 9777, 6 A.F.T.R.2d 5997 (9th Cir. 1959)
Frazier v. U.S., 335 U.S. 497, 69 S. Ct. 201, 93 L. Ed. 187 (1948)
Pointer v. U.S., 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894)
Carr v. Watts, 597 F.2d 830, 50 A.L.R. Fed. 345 (2d Cir. 1979)
Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)
Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)
U.S. v. Morris, 623 F.2d 145 (10th Cir. 1980)
U.S. v. Severino, 800 F.2d 42 (2d Cir. 1986)
U.S. v. Broxton, 926 F.2d 1180 (D.C. Cir. 1991)
Knox v. Collins, 928 F.2d 657 (5th Cir. 1991)
U.S. v. Turner, 558 F.2d 535 (9th Cir. 1977)
U.S. v. Anderson, 562 F.2d 394 (6th Cir. 1977)
U.S. v. Durham, 587 F.2d 799 (5th Cir. 1979)
U.S. v. Claiborne, 765 F.2d 784, 85-2 U.S. Tax Cas. (CCH) P 9821, 18 Fed. R. Evid. Serv. 1131, 56 A.F.T.R.2d 85-6264 (9th Cir. 1985)

Johnson v. Finn, 665 F.3d 1063 (9th Cir. 2011)
U.S. v. Yepiz, 685 F.3d 840 (9th Cir. 2012), cert. denied, 133 S. Ct. 774, 184 L. Ed. 2d 512 (2012)
U.S. v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)

Use of Peremptory Challenge to Exclude Unwanted Juror

Federal Courts use a three-step process for evaluating whether the use of a peremptory challenge was based on purposeful discrimination, so as to violate a defendant's equal protection rights. First, the defendant must make a prima facie case of racial discrimination. Second, after such showing is made, the state must suggest a race-neutral explanation for the use of the strike. Third, after a race-neutral reason is offered, the trial court must decide whether the defendant has shown purposeful discrimination. Sanchez v. Roden, 2014 WL 2210574 (1st Cir. 2014); U.S. v. Pratt, 728 F.3d 463 (5th Cir. 2013); Cole v. Roper, 623 F.3d 1183 (8th Cir. 2010), cert. denied, 2011 WL 4530652 (U.S. 2011).

The prosecutor's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause of the Fourteenth Amendment. Although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason at all, so long as that reason is related to the prosecutor's view concerning the outcome of the case to be tried, the Equal Protection Clause of the Fourteenth Amendment forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the prosecution's case against a black defendant. Criminal defendants who claim that they have been denied equal protection of the laws through the prosecution's use of peremptory challenges to exclude members of their race from the petit jury may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendants' trial and need not show repeated instances of such conduct over a number of cases. To establish such a prima facie case, the defendants must first show that they are members of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendants' race. The defendants may rely on the fact that peremptory challenges are a jury-selection practice which allows those who are binded to discriminate to do so. Finally, the defendants must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (holding modified by, Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)).
U.S. v. Sgro, 816 F.2d 30 (1st Cir. 1987)
U.S. v. De Gross, 960 F.2d 1433 (9th Cir. 1992)
U.S. v. David, 803 F.2d 1567 (11th Cir. 1986)
U.S. v. Davis, 809 F.2d 1194, 22 Fed. R. Evid. Serv. 567 (6th Cir. 1987)
U.S. v. Cartlidge, 808 F.2d 1064 (5th Cir. 1987)
U.S. v. Clemons, 843 F.2d 741 (3d Cir. 1988)
U.S. v. Johnson, 873 F.2d 1137 (8th Cir. 1989)

The circuits differ as to the procedure to be followed when a defendant has made out a prima facie case of discriminatory use of peremptory challenges. Some approve the ex parte submission of explanations by the government. U.S. v. Davis, 809 F.2d 1194, 22 Fed. R. Evid. Serv. 567 (6th Cir. 1987). Others require the full protection of the adversarial process except where compelling reasons requiring secrecy are shown, but the government must make a substantial showing of necessity to justify excluding the defendant from this stage of the prosecution. U.S. v. Garrison, 849 F.2d 103, 25 Fed. R. Evid. Serv. 1140 (4th Cir. 1988).
U.S. v. Montgomery, 819 F.2d 847 (8th Cir. 1987).
U.S. v. Biaggi, 853 F.2d 89, 26 Fed. R. Evid. Serv. 414 (2d Cir. 1988)
U.S. v. Wilson, 884 F.2d 1121 (8th Cir. 1989)
U.S. v. Baker, 855 F.2d 1353, 26 Fed. R. Evid. Serv. 1069 (8th Cir. 1988)
U.S. v. Hughes, 864 F.2d 78 (8th Cir. 1988), on reh'g, 880 F.2d 101 (8th Cir. 1989)
U.S. v. Davis, 871 F.2d 71 (8th Cir. 1989)
U.S. v. Chinchilla, 874 F.2d 695 (9th Cir. 1989)

American Indians are a cognizable racial group for purposes of Batson analysis. U.S. v. Iron Moccasin, 878 F.2d 226, 28 Fed. R. Evid. Serv. 499 (8th Cir. 1989). Hispanics are members of a distinctive and identifiable group in the community. U.S. v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989).
U.S. v. Moreno, 878 F.2d 817, 28 Fed. R. Evid. Serv. 588 (5th Cir. 1989)
Holland v. Illinois, 493 U.S. 474, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990)
U.S. v. Wilson, 884 F.2d 1121 (8th Cir. 1989)
U.S. v. Dobynes, 905 F.2d 1192, 30 Fed. R. Evid. Serv. 658 (8th Cir. 1990)
U.S. v. Roberts, 913 F.2d 211 (5th Cir. 1990)

The fact that the person might identify too much with the defendant because they were of the same race is not a race-neutral reason. U.S. v. Alcantar, 897 F.2d 436 (9th Cir. 1990).
A defendant has no right to a petit jury composed in whole or in part of persons of his own race. Rather, he has a right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. U.S. v. Hatchett, 918 F.2d 631, 90-2 U.S. Tax Cas. (CCH) P 50566, 31 Fed. R. Evid. Serv. 1307, 71A A.F.T.R.2d 93-3994 (6th Cir. 1990).
Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)
U.S. v. Esparsen, 930 F.2d 1461, 32 Fed. R. Evid. Serv. 1191 (10th Cir. 1991)
Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)
U.S. v. Clemons, 941 F.2d 321 (5th Cir. 1991)
It is proper to exclude black and Hispanic jurors who are young, single, and without children, where other jurors are excluded on the same grounds. U.S. v. Mojica, 984 F.2d 1426 (7th Cir. 1993).
It was race neutral for the prosecutor to exercise a peremptory challenge when he perceived that the prospective juror had given him a hostile look, that being the sort of intuitive judgment that a court generally must rely on to exercise in good faith. U.S. v. Jackson, 50 F.3d 1335 (5th Cir. 1995).
In analyzing a prosecutor's explanation and race-neutral reasons following a Batson challenge, the district court should determine whether the reasons were legitimate or mere pretenses designed to mask purposeful, racial discrimination. A neutral explanation means an explanation of something other than the race of the juror. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. U.S. v. James, 113 F.3d 721 (7th Cir. 1997).
U.S. v. Bartholomew, 310 F.3d 912, 59 Fed. R. Evid. Serv. 1482, 2002 Fed. App. 0396P (6th Cir. 2002)
In reviewing the government's race-neutral explanation for using a peremptory challenge to strike a potential juror, for purposes of reviewing a Batson claim, the court need not find that the reason given is persuasive, or even plausible. All that is necessary is that the reason not be inherently discriminatory. U.S. v. Lucas, 357 F.3d 599, 63 Fed. R. Evid. Serv. 653, 2004 Fed. App. 0046P (6th Cir. 2004).
In deciding whether the neutral explanation offered by the prosecutor for a challenged peremptory strike is pretextual, the trial court will sometimes have to look beyond the facts of the defendant's case. Although some false reasons are shown up within the four corners of a given case, sometimes the court may not be sure unless it looks beyond the case at hand. When illegitimate grounds like race are an issue, a prosecutor simply has to state his reasons as best he can for exercising peremptory strikes and stand or fall on the plausibility of the reasons that he gives. Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).
Johnson v. California, 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129, 8 A.L.R. Fed. 2d 849 (2005)
Messiah v. Duncan, 435 F.3d 186 (2d Cir. 2006)
Lamon v. Boatwright, 467 F.3d 1097 (7th Cir. 2006)
U.S. v. Helmstetter, 479 F.3d 750 (10th Cir. 2007)
Cook v. LaMarque, 593 F.3d 810 (9th Cir. 2010).
Garraway v. Phillips, 591 F.3d 72 (2d Cir. 2010), cert. denied, 131 S. Ct. 278, 178 L. Ed. 2d 252 (2010).
U.S. v. Heron, 721 F.3d 896 (7th Cir. 2013), cert. denied, 134 S. Ct. 1044, 188 L. Ed. 2d 134 (2014); compare U.S. v. Brown, 352 F.3d 654 (2d Cir. 2003) (*Baston* extended to strikes based on juror's religious affiliation).

Making and Ruling on *Batson* Claims of Improper Use of Peremptory Challenge
When a Batson challenge is lodged, a three-step burden shifting analysis is used to determine whether peremptory strikes have been exercised in a racially discriminatory manner: (1) the party challenging the strikes must establish a prima facie case that the opposing party exercised peremptory challenges on the basis of race; (2) once a prima facie case is established, the burden shifts to the party exercising the strikes to provide a racially neutral explanation for removing the jurors in question; and (3) once a neutral explanation is presented, the complaining party must prove purposeful discrimination. Sanchez v. Roden, 2014 WL 2210574 (1st Cir. 2014); U.S. v. Pratt, 728 F.3d 463 (5th Cir. 2013).
U.S. v. Thomas, 303 F.3d 138 (2d Cir. 2002)
Williams v. Runnels, 432 F.3d 1102 (9th Cir. 2006).
A comparative juror analysis involves comparing the characteristics of a struck juror with the characteristics of other potential jurors, particularly those jurors whom the prosecutor did not strike. U.S. v. Collins, 551 F.3d 914 (9th Cir. 2009).
Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2009)
U.S. v. White, 552 F.3d 240 (2d Cir. 2009)
McGahee v. Alabama Dept. Of Corrections, 560 F.3d 1252 (11th Cir. 2009)
Puckett v. Epps, 641 F.3d 657 (5th Cir. 2011), cert. denied, 132 S. Ct. 1537, 182 L. Ed. 2d 174 (2012).
Avichail ex rel. T.A. v. St. John's Mercy Health System, 686 F.3d 548 (8th Cir. 2012)

Black v. Workman, 682 F.3d 880 (10th Cir. 2012), petition for cert. filed (U.S. Apr. 29, 2013)
Snyder v. Louisiana, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)
U.S. v. Cruse, 805 F.3d 795, 98 Fed. R. Evid. Serv. 1115 (7th Cir. 2015)
Shirley v. Yates, 807 F.3d 1090 (9th Cir. 2015)
Sifuentes v. Brazelton, 825 F.3d 506 (9th Cir. 2016)
Davis v. Ayala, 135 S. Ct. 2187, 192 L. Ed. 2d 323, reh'g denied, 136 S. Ct. 14, 192 L. Ed. 2d 983 (2015)
Foster v. Chatman, 136 S. Ct. 1737, 195 L. Ed. 2d 1 (2016)

Federal Trial Handbook: Criminal (4th ed.)

Voir Dire Video & Link

About two years ago long time Seattle lawyer Jeff Robinson, and now Deputy Legal Director for the national ACLU, came up with the idea of asking our judges to show jurors the video "What Would You Do? Bike Theft (White Guy, Black Guy, Pretty Girl.)". We met with Chief Judge Pechman and she created a committee chaired by Judge Coughenour,which included defense lawyers, representatives of the US Attorney's Office and civil practitioners.

In the meantime AFDs Kyana Givens and Jesse Cantor had a trial in which race played a role in the defense theory of the case. Judge Richard Jones denied their request to have the court introduce this video, but permitted the defense lawyers to show it and question jurors about it during voir dire. It was an eye opening experience and was a very useful tool in identifying jurors who they would not want on their jury. After the trial Judge Jones joined our committee, and we invited the jurors to attend one of our meetings. 5 or 6 jurors attended and they were of the opinion that it was important for the lawyers to discuss implicit bias openly in jury selection. Note, however that a number of the potential jurors during the selection process were openly hostile to the idea and some expressed hostility toward defense counsel. They did not make it on to the jury, and while this made for a challenging and stressful voir dire, it accomplished its purpose of identifying folks we would not want on this particular jury.

Eventually the Committee agreed that the Court would create its own video to show to jurors in the jury room before they get assigned out to a court room, and we created a set of criminal model instructions that would be available if the trial judge chose to use them.

The Court paid for the video and it stars Judge Coughenour, Jeff Robinson and Acting United States Attorney Annette Hayes. Both the video and the model instructions are now posted on the Western District of Washington court web site. Here is the link:

http://www.wawd.uscourts.gov/jury/unconscious-bias

If you are trying a jury case in the Western District of Washington be aware that this video will be shown to the jurors before they reach the court room. If it is not happening already it will begin very soon.

At some point in the near future we will want to do training on voir dire on the issues of race and uncouscious bias and how to use the fact that the video has been shown to further your questioning in this area. The video and the instructions are not designed to relieve us of the responsbility to address this in voir dire in cases where it is important to our clients. It is a tool that introduces the jury to the concept and asks them to consider in themselves and to not shy away from discussing it.

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www.waw.fd.org/

A "Searching & Candid" Voir Dire

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September 14, 2017

The 6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fed. R. Crim. P. 24

Rule 24. Trial Jurors

(a) Examination.

(1) *In General*. The court may examine prospective jurors or may permit the attorneys for the parties to do so.

(2) *Court Examination*. If the court examines the jurors, it must permit the attorneys for the parties to:

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) *Capital Case*. Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) *Other Felony Case*. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

create Discussion,
Deep Listening,
Detect,
De-Select

Discussion Time!

JURY DE-SECLECTION IS NOT...

- NOT TIME FOR YOU TO TALK
- NOT TIME FOR YOU TO CONNECT WITH THE JUDGE
- NOT TIME FOR YOU TO MIRROR YOUR CASE

VOIR DIRE IS NOT.....

WHAT ARE YOU AFRAID OF?

EXPOSING YOUR DARK SIDE DOESN'T FRIGHTEN ME, HIDING IT DOES.

now is the time for radical honesty

Create Discussion

OPEN ENDED QUESTIONS…WHO? WHAT? WHEN? WHERE? WHY? HOW?

Describe….describe a time you or someone close to you wasn't treated fair

Describe a time you or someone you know was justified in [lying, hitting, hiding]

COMBO PLATTER….Juror 8, what do you think about what Juror 30 said?

SPECTRUM…..Juror 4 considers himself gullible…..juror 60 is a sleuth for bull#$&%, raise your hand if you relate more to Juror number 4?...60?

I CAN RELATE…raise your hand if you can relate to feeling too ashamed to speak up for a loved one? DESCRIBE WHAT HAPPENED?

SWAP MEET….Exchange a Prior Answer….Now that we have been talking for awhile, has your feeling changed about a question I previously asked?

MYSTERY BOX…..is there anything I haven't asked but your think Mr./Ms. X should know in order to have a fair trial the next few days?

VOIR DIRE IS DEEP LISTENING

- **HAMILTON RULE**….. "talk less, smile more"…..don't let them know what you are against or for….
- LISTEN,LISTEN, LISTEN, LISTEN, LISTEN, LISTEN
- Observe, Stay Present, Stay Present, Observe
- LISTEN,LISTEN, LISTEN, LISTEN, LISTEN, LISTEN
- LISTEN,LISTEN, LISTEN, LISTEN, LISTEN, LISTEN
- LISTEN,LISTEN, LISTEN, LISTEN, LISTEN, LISTEN
- LISTEN,LISTEN, LISTEN, LISTEN, LISTEN, LISTEN
- LISTEN,LISTEN, LISTEN, LISTEN, LISTEN, LISTEN
- LISTEN,LISTEN, LISTEN, LISTEN, YES YOU…LISTEN

WHAT IS DEEP LISTENING?

Human Satellite

- Deep Listening is a way of hearing in which we are fully present with what is happening in the moment without trying to control it or judge it. We let go of our inner clamoring and our usual assumptions and listen with respect for precisely what is being said
- Open, fresh, alert, attentive, calm, AND RECEPTIVE
- "You might think of the difference between radar that goes out looking for something and satellite dish with wide rang eof pick up capacity that just sits ine the backyard, waiting. Be a satellite dish. Stay turned on, but just wait."

-Sylvia Boorstein

Contemplativemind.org

Functional Group

- Decide if you think the group will function...
  Note, then Rate jurors that:

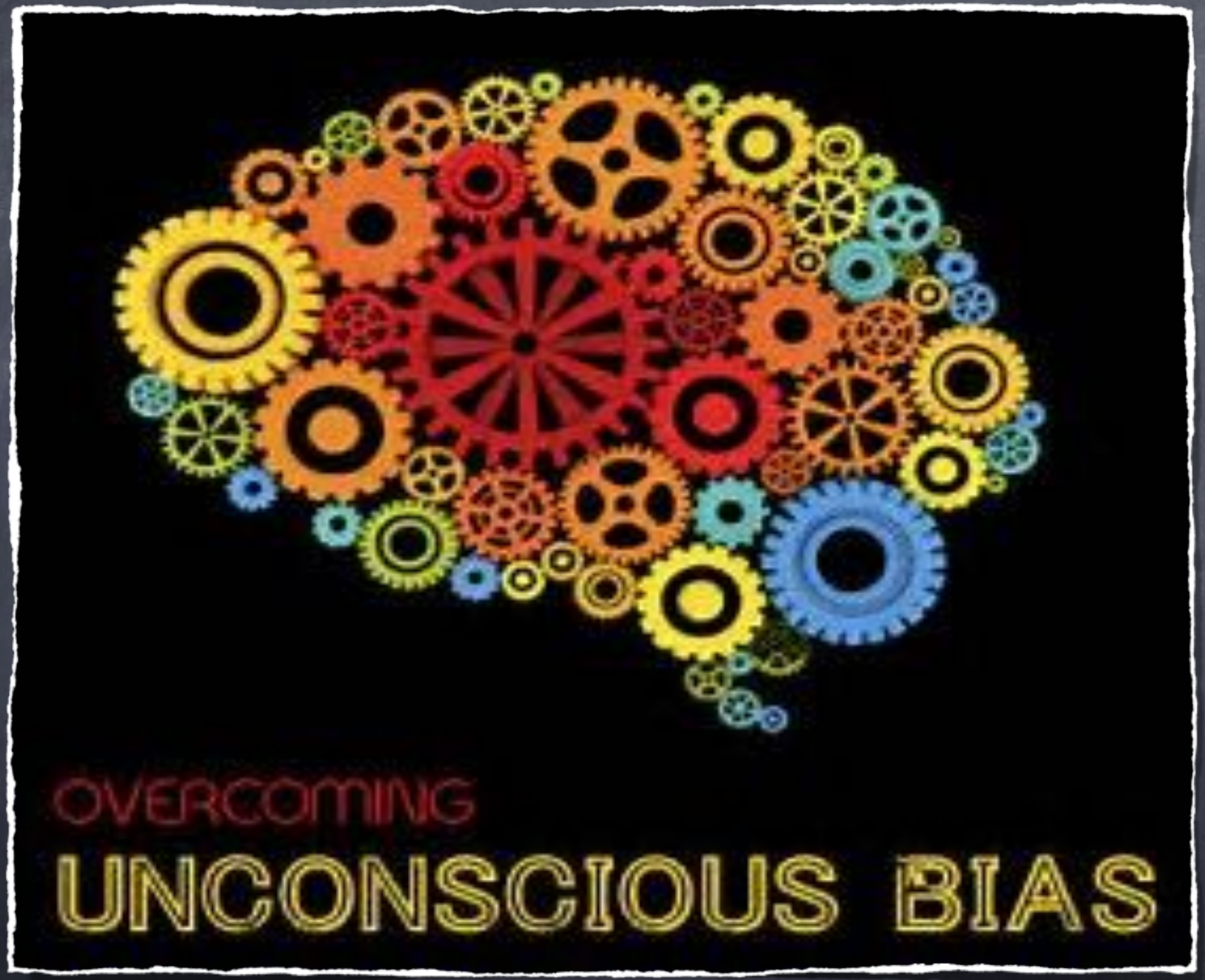
1. may not get along
2. may isolate (loners)
3. may be opinion leaders
4. swing with the majority
5. counterbalances to strong personalities

ONLY ONE OF THESE TWO HAS A FEDERAL FELONY CONVICTION [brilliance of Kristin Henning]

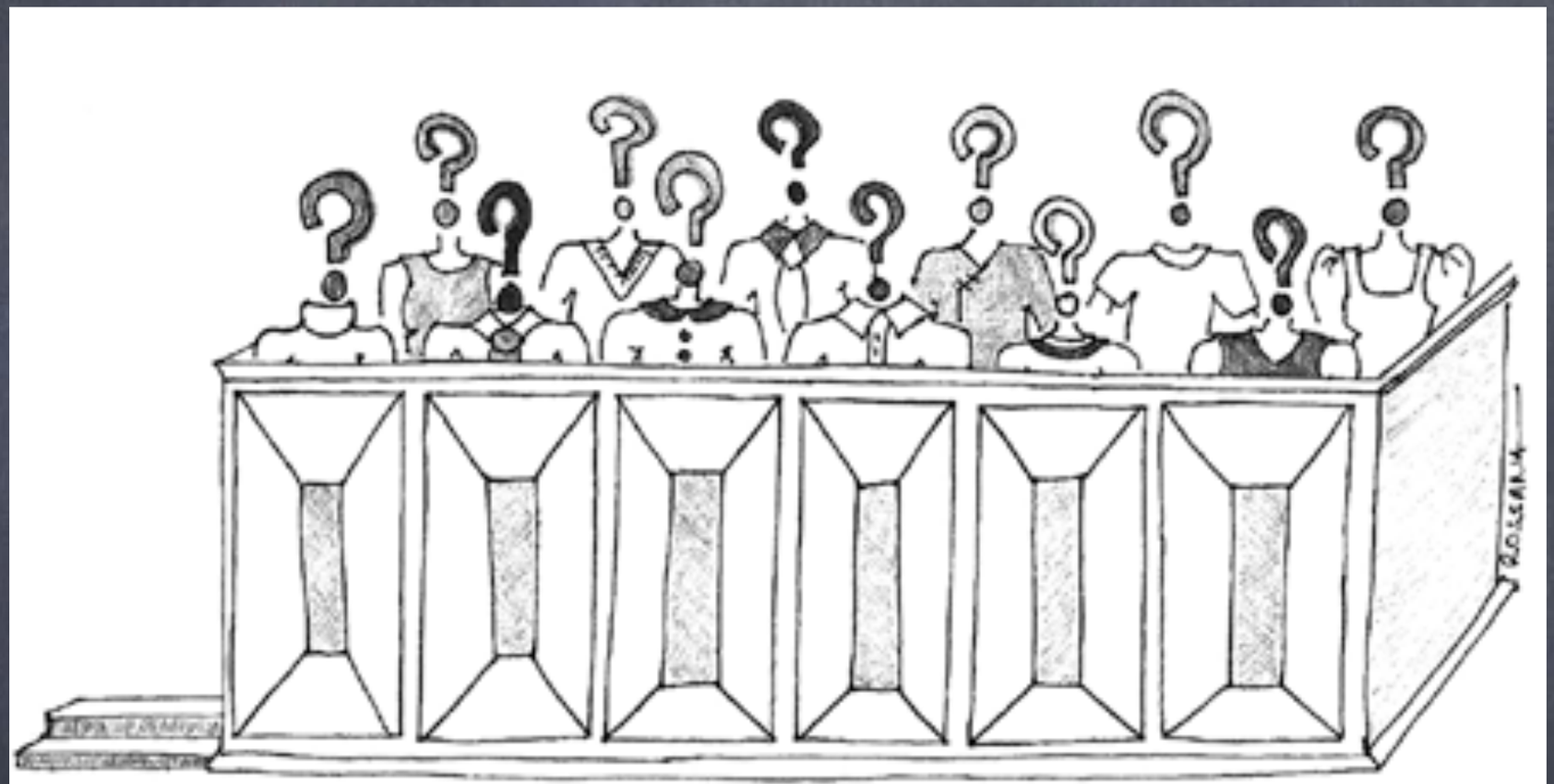
EVERY PERSON HAS BIAS
EVERY JURY IS BIASED

- YOU DON'T HAVE TIME TO CURE

- YOU HAVE TIME TO DETECT & DESELECT


OVERCOMING
UNCONSCIOUS BIAS

VOIR DIRE IS TIME TO DESELECT JURORS THAT CAN'T CONTROL THEIR HIDDEN BIAS



Will a Juror's Bias Overwhelm Your Theory?

Reward the truth... VALIDATION & AFFIRMATION

- When you walked into the courtroom and you saw and were introduced to this defense counsel table, how many of you looked over here and thought: Gosh, Mr. X looks good cloaked in the presumption of innocence? Anybody have that thought? How many of you looked over here and thought: I wonder what he did? Juror Number 45,

- Juror Number 12, Juror Number 33, Juror Number 17, Juror Number 42, Juror Number 18, Juror Number 20. This is a natural response, and I appreciate all those numbers that I just called out. I appreciate your honesty. Because to walk into a courtroom for jury service and be introduced to somebody, it is a very natural response to wonder what they did.

The Bicycle Thief

Nuts and Bolts if You try the Video....

- First ask questions about unconscious bias... their knowledge and definition
- Show the video
- What Did you think of the Video?
- After playing the video simply say: Juror #__, What was your response to the video?
- Who did you find yourself relating to ? Pp. 94

FIRST ALLOW JURORS TO DEFINE IMPLICIT BIAS

some of our what we call implicit bias. Who has ever heard of that before? Juror Number 1, 6, 7, 14, 10, 19, 18, 27, 25, 41, and 21.

What does it mean to you, Juror Number 1?

VENTREPRRSON: Implicit bias?

MS. GIVENS: Yes.

VENIREPERSON: It's bias that's not necessarily expressed outwardly but one still holds, and it's expressed through their -- perhaps their actions or reactions.

MS. GIVENS: Do you agree? Anybody else who knows the definition?

Number 44?

VENTREPRRSON: I would add that it's often not known to the person who holds the bias. It's unconscious or subconscious, often.

MS. GIVENS: Now, I'm about to reveal one of my secrets. When you start nodding your head, I'm probably going to come talk to you.

So Juror Number 18, you did a good head nod. Do you agree with that definition?

Common Responses...

- Jurors were disgusted
- Denial... "nothing to do with race"....pp. 98
- Juror #33.... "offended" I even showed the video...and 13 others agreed..pp. 99 ln. 11

NOT SCIENTIFIC...Tx. pp. 100 ln 11

- VENIREPERSON: I guess I would say that in some
- respects it seemed like that the study wasn't really a random
- scientific study. So to that extent, it could be misleading.
- But at the same time, the results of it seem to be: This is
- what's expected. But I think I can see, possibly, what you
- mean, but there's something sort of inherently misleading about
- the presentation of the show.
- MS. GIVENS: Juror Number 3?
- VENIREPERSON: Yeah, I mean, it was a popular
- television show used to prove a point -- a potentially
- scientific point about implicit bias and behavior in
- individuals. I don't think that either the anchor or whatever
- you want to call that guy or -- you know, where was that park?
- You know, like, there was so many outlying factors involved
- with that that I don't think a popular television show is a
- really good indicator of -- I understand what it was doing to
- illustrate, you know, implied [sic] bias. But at the same
- time, I don't think it was the right approach.
- MS. GIVENS: Thank you.
- Juror Number 22?

Uncomfortable Seeing it...

USA v. Harris, 7/20/15 (Voir Dire)

Anybody else want to make a comment before I move on? Number 27?

VENIREPERSON: To me it was really prejudicial, and there was no really foundation. I wasn't quite sure why we were seeing it. And the editing was horrible. I mean, it took us right to what we needed to see. But, you know, obviously, I don't think we would see that further along in the trial, so I was uncomfortable seeing it here at this stage.

MS. GIVENS: Number 29?

VENIREPERSON: I'd just like to share that I was thinking the whole time, thank you for bringing this reminder into the courtroom. Clearly, this is something we all need to be reminded of.

Person of Color was "Glad" we Addressed It

MS. GIVENS: Juror Number 26?

VENIREPERSON: Yes.

MS. GIVENS: Tell me what you're thinking about this discussion.

VENIREPERSON: I'm glad we're having this discussion. I think it shows the human behavior and our society's way of thinking and viewing things. And I'm glad someone brought up the fact that no one brought up the female character and the fact that she was not wearing the same kind of attire that the gentlemen were also wearing.

But I'm a person of color myself, and I have had my own experiences with prejudice and discrimination. And I'm glad we're having this discussion.

MS. GIVENS: As you can probably tell, our point is not to say you're glad we were having it or we shouldn't have had it. The point is that we need to bring this type of bias to the surface, right now, today, because it can't wait.

The race card

"We Know What We are Dealing With"

just [illegible]. And it's good to talk about it.

THE COURT: Could you [illegible] your [illegible]?

VENIREPERSON: I think it makes sense to bring it up, and it's good to talk about it.

MS. GIVENS: Juror Number 35, you said that you felt

[illegible] Juror Number 33 [illegible]

[illegible]. Tell me more about what you're thinking.

VENIREPERSON: I just didn't think it was necessary. I'm trying to think of the right words here. But I don't think I gained anything out of it. We know what we're dealing with, at least I think I do. And I guess I think it was a really good point that Juror 33 brought up. I'm glad that he did it [illegible] sides of the video. And I agree.

MS. GIVENS: Thank you. Thank you for sharing your perspective.

I'm SCARED...DON'T GIVE UP...GO BACK

I wanted to ask a couple of questions about the general voir dire. There was a question about if you had family or friends who were involved working -- you, yourself, or your family or friends were working in law enforcement.

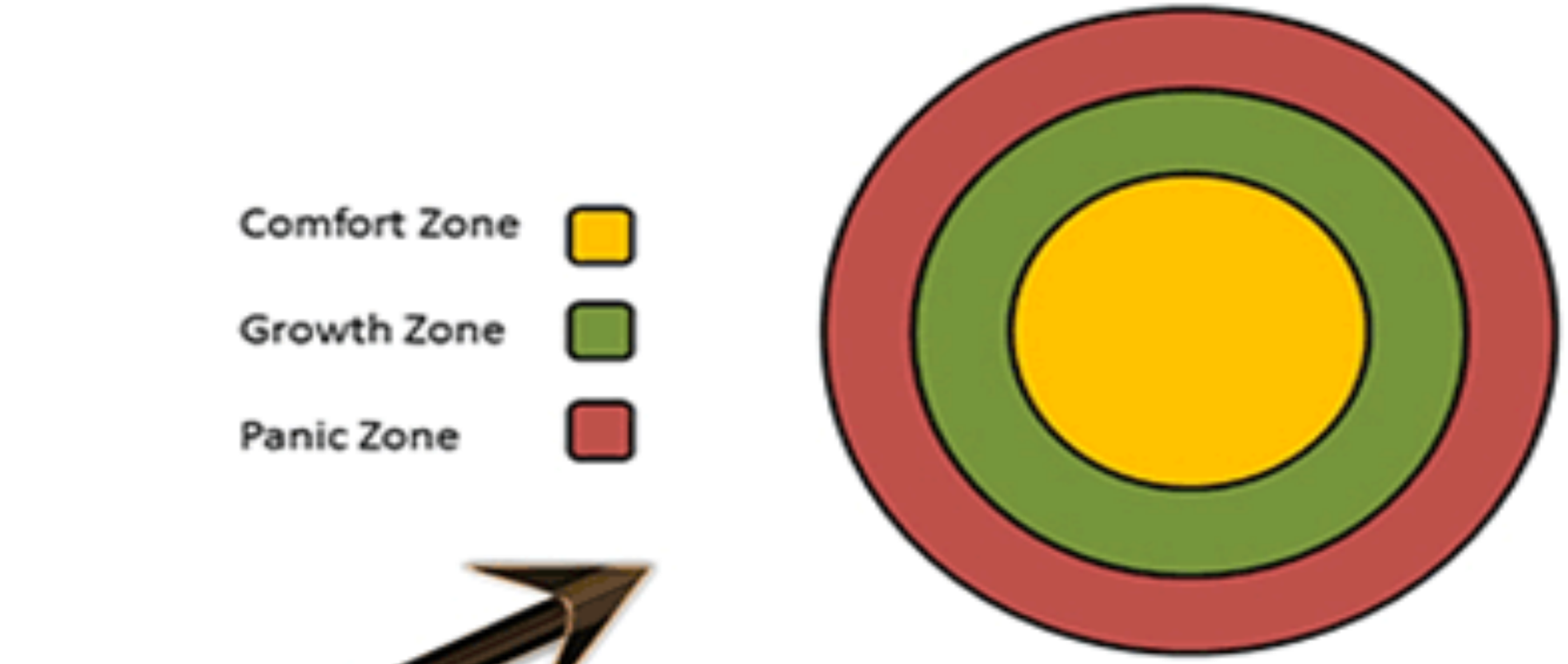
Can you please raise your cards again if you answered affirmatively to that question? Juror Number 3, 4, 9, 10, 30, 27, and 26.

Juror Number 4, we haven't heard from you very much, so I'm going to open the floor to you. I want to know about the person, if it's yourself or someone you know who's in law enforcement.

VENIREPERSON: It's my brother, over on the east side of the state. He worked as a deputy sheriff for probably ten years, and he's currently working as a 911 dispatcher.

MS. GIVENS: And how close are you and your brother?

Get comfortable with being uncomfortable



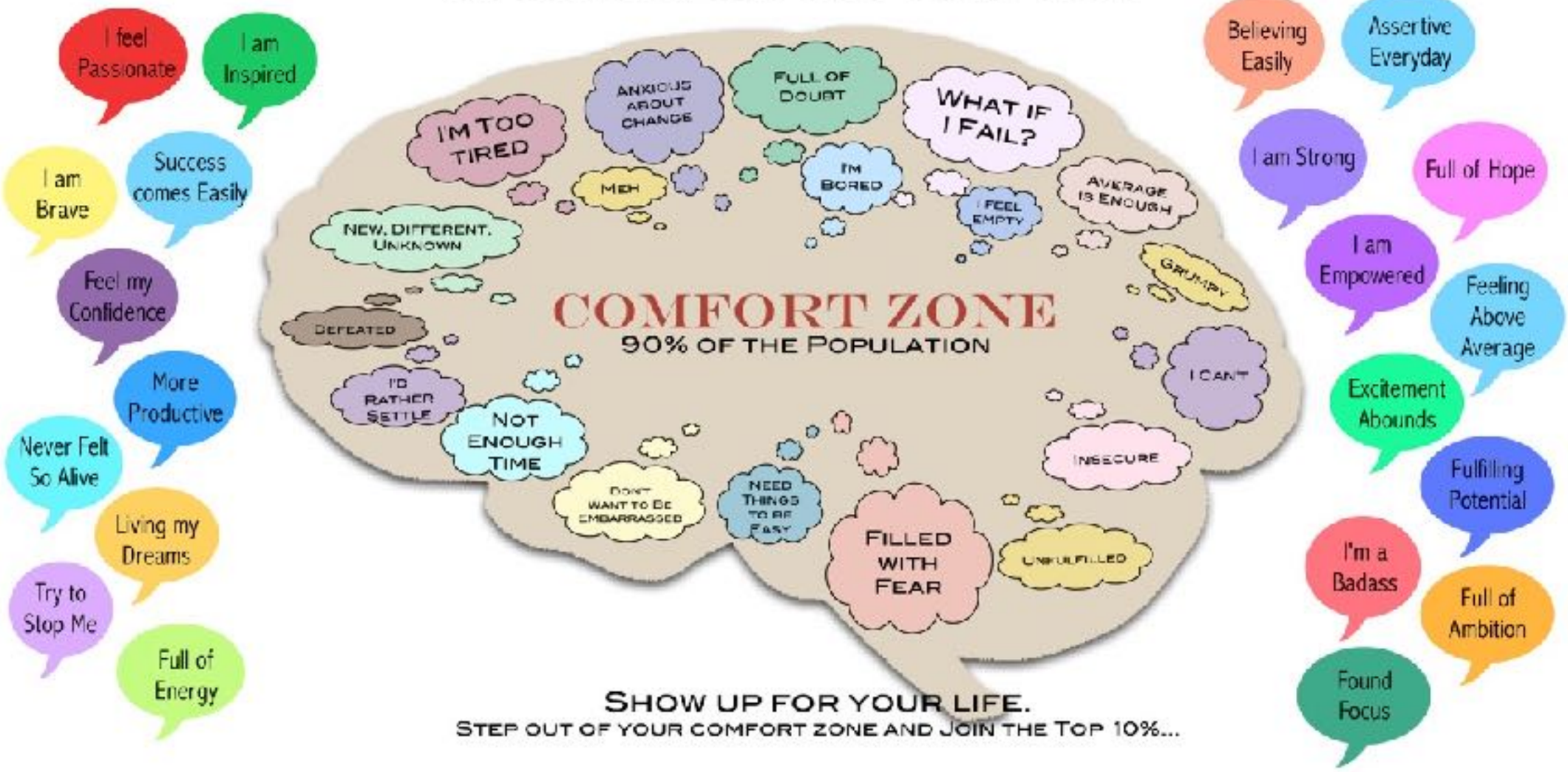
Take Regular Small Steps into Your Growth Zone,

but don't make the steps so big that they trigger your panic zone.

You will survive

Get Comfortable with Being Uncomfortable

YOUR COMFORT ZONE IS ALL IN YOUR MIND.
YOU CAN DO WAY MORE THAN YOU THINK YOU CAN.
AND ONCE YOU DO, GREAT THINGS OPEN UP FOR YOU.



SHOW UP FOR YOUR LIFE.
STEP OUT OF YOUR COMFORT ZONE AND JOIN THE TOP 10%...

Power Pose

- Amy Cuddy-social psychologist gave a TED talk in 2012 "Your body language shapes who you are"
- "adopting expansive postures *may cause people to feel more powerful"
- Adam Galinsky and colleagues wrote in a 2016 review of postural feeback effect (power pose), "a person's sense of power...produces a range of cognitive, behavioral, and physiological consequences," incliding improved executive functioning, optimism, creativity, authenticity, the ability to self-regulate and performance in various domains...."

GOT SCARED AND CAME BACK TO JUROR 35....

And that is, Juror Number 35, you said something interesting to me. You said you feel like you know what we're dealing with here. Is that -- am I correct?

VENIREPERSON: Yes, you did.

MS. GIVENS: What did you mean by that?

VENIREPERSON: Well, we have a defendant that's black.

THE COURT REPORTER: I'm sorry. I couldn't hear the answer.

VENIREPERSON: Do you want to restate the question?

MS. GIVENS: Sure. During your last response, you said that you feel like you know what we're dealing with here. And my question is you was, what did you mean by that?

VENIREPERSON: And my response was that the defendant is a black person.

MS. GIVENS: And will it help me that you -- to you know what you're dealing with here?

VENIREPERSON: Well, we know what we're -- the judge has already described how we're supposed to -- treat our guidelines and that? And do we need further explanation about pleas and video and all that? For me, I don't think so.

MS. GIVENS: Thank you. I appreciate your answer. I can't see your number. I think it's Juror Number 29.

JURORS WILL GET MAD AT YOU!

I want to know, based on the discussion we had, if by playing the video and trying to have this discussion, is there anyone who just feels like this is not the case for me? I cannot sit through this case any longer. I do not like the approach that, Ryana, the defense attorney, took in leading this discussion.

Juror Number 249

VENIREPERSON: Well, I kind of feel like -- that it was the opposite; that with you showing that, you're pushing us to look at, because the defendant is black, that we'll go out of our way the other direction and not find him guilty, even if we think he is, because if we do that, now we're prejudiced. And so I feel like you're showing us that to make us feel guilty if we even try to find him guilty. And I think that was your real purpose for doing this.

MS. GIVENS: Thank you. I appreciate you saying so. Getting your honest response is exactly what we need.

Is there anyone else who shares the same view as Juror

MS. GIVENS: Okay.

VENIREPERSON: I just -- I just had a negative response, because I felt like you assumed that we were prejudiced; therefore, you needed to remind us not to be prejudiced, when, in fact, I was more upset that nobody was saying anything about this guy stealing a bike, either of them, all three of them. So I felt a little disturbed about your approach, and I don't think it was very effective. That was my response.

THE COURT: Two minutes, Counsel.

MS. GIVENS: Thank you.

Juror Number 13, you raised your card as well.

VENIREPERSON: Yes. I feel the same way as Number 5 has said, that you know, that -- I was most disturbed by the first part but that no one was stopping the gentleman who was white, and not, you know, that they were stopping the gentleman who was black, because I felt that that was the appropriate response, and that -- I do feel as though your


Perseveran
ranc

and then this happened....that time I didn't give up (or die)

Western District of WA
Unconscious Bias Video

http://www.wawd.uscourts.gov/jury/unconscious-bias

https://www.youtube.com/watch?v=hdjBbfdRLkA&feature=youtu.be

YOU ARE PLUCKIN G THEM OUT NOT PUTTING THEM IN

DETECT, RATE, DE-SELECT,

- 1. +, -, 0 (Robinson)
- 2. Highlighter Method -(Sanders)
- 3. Folder + Sticky Notes (Givens)
- 4. iJuror app

- Peremptory Challenges
- Batson Challenges

De-select

Juror Colloquy

1. Restate what Juror said (recommit)
2. Long -several examples of long held belief
3. Strong (not easily dissuade, you aren't a push over)
4. Confront—Those strong feelings and long held ideas would make it too difficult fo ryou to follow the judge's instructions?

Argument

1. Show Prima Facie case of discriminatory use of peremptories (skip if prosecutor gives a reason for the strike)
2. Prosecutor must provide race-neutral reason for challenged strike(s)

Make the prosecutor say more than race was not a factor

See race neutral reason cheat sheet

3. Defense has burden of demonstrating intentional discrimination

   use evidence in Step 1

FACT BUSTING BUILDS THEORY
THEORY DRIVES VOIR DIRE

- The People, Props, Predicaments help form the Theory...
- you may need to Voir Dire to get a special perspective or special aversion excluded

PRESCHOOL RULES OF DESELECTION

- 1. LISTENING EARS

- 2. SHARE
- 3. DON'T PANIC UNDER THE TENSION

April 2017 Bar Bulletin

U.S. District Court Produces Video, Drafts Jury Instructions on Implicit Bias

By Judge Theresa Doyle

We all have biases. These unconscious, instantaneous, almost automatic judgments can help us get through the day. However, when those unconscious biases stereotype a person because of race, gender, national origin, sexual orientation, age or other qualities, they are no longer helpful but harmful to the right to a fair trial.

Results of the widely taken Implicit Association Test (IAT) and other research show a high and nearly universal preference of whites over blacks.1 Even with African-American test-takers, 40 percent showed a pro-white preference. Jurors bring these biases to court when they report for jury service.

A recent U.S. Supreme Court case, Colorado v. Pena-Rodriguez,2 shows the damage inflicted by jurors who harbor racial bias. In Pena-Rodriguez, during deliberations a juror revealed his opinion that the defendant "did it because he's Mexican" and that an alibi witness was not credible because the witness "was an illegal" (the witness was a legal resident).

The Supreme Court reversed the conviction despite the federal no-impeachment rule for jury verdicts. Regarding voir dire about race, the Court stated:


HATERS
GONNA HATE


HATERS GONNA HATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

04-Cr.-00186(S9)(SCR)

UNITED STATES OF AMERICA,

Plaintiff,

– versus –

KHALID BARNES

Defendant.

Before: Hon. Stephen C. Robinson, U.S.D.J.

DEFENDANT KHALID BARNES' SUPPLEMENTAL MEMORANDUM CONCERNING JURY *VOIR DIRE*

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– Attorneys for Khalid Barnes –

STATEMENT OF THE CASE

This supplemental memorandum is submitted on behalf of the defendant, Khalid Barnes, outlining proposed *voir dire* in the areas of general follow-up questions, as well as proposed questions dealing with race, police credibility, the presumption of innocence and lawyers.

FOR THE REASONS WHICH FOLLOW, DEFENDANT KHALID BARNES RESPECTFULLY REQUESTS THAT THE COURT POSE THE FOLLOWING QUESTIONS TO JURORS APPEARING FOR INDIVIDUAL *VOIR DIRE*.

A. Introduction – general questions to individual jurors

1. Since you were here last, have you read, seen, or heard anything at all about this case?

2. Have you done any kind of research, internet or otherwise, about this case or the people involved?

3. Since you were here last, has anyone spoken to you about this case? Including anything said to you by your fellow prospective jurors?

4. Have you spoken with anyone about the case? Including anything said by you to any of your fellow prospective jurors?

5. Have you overheard any discussions about this case? Including any discussions about the case among your fellow prospective jurors?

6. Are there any answers you provided on the questionnaire which, thinking about it, you wish to change?

7. Regarding your ability to serve as a fair and impartial juror in this case, do you have any doubts whatsoever about that? If so, now is the time to let us know.

B. Questions regarding race

On the draft defense jury questionnaire, Mr. Barnes had proposed several questions dealing with race and racial bias. The government did not object to the questions. Nonetheless, the Court removed all questions on the issue of race from the questionnaire. Mr. Barnes is African-American. One of the alleged victims in this case, Demond Vaughn, was also African-American. The second victim, Sergio Santana, was Hispanic. Specifically, the defense had proposed the following questions:

70. Would the fact that the defendants are African-American cause you to doubt your ability to serve fairly in this case?

❑ YES ❑ NO

71. Do you believe that African-Americans are more likely to be involved in criminal activity, including drug-dealing, than other racial groups?

❑ YES ❑ NO

72. Is your neighborhood pretty much made up of all one racial group?

❑ YES ❑ NO

If yes, what is the predominant group? _____

If no, what is the approximate racial make-up of your neighborhood?

_____

73. Have you ever had an unpleasant encounter with someone from a racial group different from your own?

❑ YES ❑ NO If yes, please explain:

_____

(Document 304-2, filed 11/19/2007, at p. 15.) After receiving the Court's proposed questionnaire, Mr. Barnes requested that the race questions be restored to the questionnaire. (A copy of that e-mail request is appended as Attachment A.)

In prior submissions, the defense has attempted to describe in some detail the historic correlation between capital punishment and racial prejudice.[1] The defense also brought a

[1]The defense cited, among others, the following scholarly sources: R. K. Little, "What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh," 53 DEPAUL L. REV. 1591 (2004); K. McNally, "Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse," 53 DEPAUL L. REV. 1615 (2004); C. J. Ogeltree, "Black Man's Burden: Race and the Death Penalty in America," 81 OREGON L.REV. 15 (2002); G. L. Pierce, M. L. Radlet, "Race, Region, and

challenge to the under-representation of minority groups on the jury panels that are selected for trials at the White Plains courthouse. We are now at the point where the issue becomes particularly meaningful and intensely practical, *i.e.*, are there potential jurors among those who will be appearing for *voir dire* who harbor racial animus towards African-Americans.[2] The problem is compounded by the reality that racial prejudice is not a character trait that a potential juror would be particularly anxious to reveal, thus generalized "can-you-be-fair" inquires are too easily deflected to get at underlying racial bias.

In *Ristaino v. Ross*, 424 U.S. 589, 597 n. 9, 598 n. 10 (1976), the Court noted that "some cases may present circumstances in which an impermissible threat to the fair trial guaranteed by due process is posed by a trial court's refusal to question jurors specifically about racial prejudice during *voir dire*." *Id*., at 595, *citing Ham v. South Carolina*, 409 U.S. 524 (1973). In *United States v. Barnes*, 604 F.2d 121, 137 (2d Cir. 1979), the Court quoted

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Death Sentencing in Illinois," 81 OREGON L.REV. 39 (2002); S. Bright, "Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty," 35 SANTA CLARA L.REV. 433 (1995); D. Baldus, "Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention, Detection and Correction," 51 WASH. & LEE L.REV. 359 (1994); Bienen, Weiner, Denno, Allison and Mills, "The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion," 41 RUTGERS L.REV. 27, 100-57 (1988).

[2]The jury-consultant retained by the defense in this case, Julie Howe, Ph.D., recently concluded jury-selection in a federal capital case in Brooklyn, *United Stats v. McTier*. Of the 218 jurors interviewed, five stated on their jury questionnaire that they held "personal views towards any racial or ethnic group that wold affect their ability to judge a member of that group fairly and impartially." Among the same 218 jurors, 29 believed that "persons of a particular ethnic group or race tend to be more violent." These are not theoretical issues or concerns.

from *United States v. Robinson*, 475 F.2d 376, 380-81 (D.C. Cir. 1973), with respect to the sensitivity trial courts must exercise during voir dire regarding areas of potential prejudice:

> [t]he defense must be given a full and fair opportunity to expose bias or prejudice on the part of the veniremen. . . . The possibility of prejudice is real, and there is consequent need for a searching voir dire examination, in situations where, for example, the case carries racial overtones, or involves other matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact. In a case involving such sentiment, the trial court must take it into account and govern the *voir dire* accordingly.

604 F.2d at 139 (emphasis added) (footnotes and citations omitted).

In addition to the Sixth Amendment, federal courts can exercise their supervisory power to ensure that voir dire is sufficient to impanel an impartial jury. *See Aldridge v. United States*, 283 U.S. 308, 313 (1931) (citations omitted) ("[t]he right to examine jurors on the voir dire as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character"). In *Aldridge*, the Court was faced with an argument by the government that allowing *voir dire* questions about race and racial prejudice would be "detrimental" to the federal criminal justice system. The Court answered that argument as follows:

> We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the process of justice into disrepute.

283 U.S. at 315.

In capital cases, the capacity for racial prejudice to creep into the process is great. In *Turner v. Murray*, 476 U.S. 28 (1986),[3] the Court underscored this potential for bias as follows:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

476 U.S. at 35-36.

Mr. Barnes, through his counsel, proposes the following with regard to ferreting out racial bias: (1) the Court should administer a one-page supplemental questionnaire to jurors appearing for individual *voir dire*.[4] (A proposed supplemental questionnaire is set forth as Attachment B to this memo.) It is highly realistic to assume that some members of the potential jury panel harbor racial prejudice directed at African-Americans. There is, of

---

[3]The precise holding of *Turner v. Murray* was that in a capital case alleging inter-racial murder a defendant is constitutionally entitled to a *voir dire* that is sufficient to root out racial bias. This is a case of inter-racial murder.

[4]If the Court denies the application for a supplemental questionnaire, Mr. Barnes requests that the questions set forth in the proposed supplemental questionnaire be posed to the prospective jurors by the Court during individual *voir dire*.

course, no guarantee that any such juror will be honest in revealing that prejudice. However, having the opportunity to express such views in the relative "privacy" of a questionnaire (as distinct from an inquiry made in open court) will maximize the possibility of such prejudice being revealed. Mr. Barnes is entitled to such a question asked in a questionnaire format. In addition, the Court itself should inquire of jurors regarding racial bias. That inquiry should be undertaken in a manner that allows a juror to reveal racial bias openly. A question such as the following is proposed:

> I want to ask you a question that may be difficult and uncomfortable. Specifically, I want to ask about race and the potential for racial bias in this case. Mr. Barnes is African-American. Understanding that there are no right or wrong answers to my questions, is there anything at all about Mr. Barnes' race that might affect how you think about this case if selected as a juror?

If the Court does not follow the proposal for a supplemental questionnaire, it is also requested that the Court inquire as follows of jurors in open court:

> The defendant in this case is African-American. People have varying opinions based on their backgrounds and different experiences. And that's normal. With that in mind, I'd like you to answer the following questions:
>
> 1. Have you had any positive or negative experience with anyone of African-American descent?
>
> 2. Do you hold any beliefs that African Americans are more likely to be involved in criminal activity than other racial groups?
>
> 3. Does the fact that the defendant is African American create any concerns for you or cause you to doubt your ability to serve?

The above measures are reasonable and necessary to avoid having Mr. Barnes' jury consist of one or more members who harbor racial prejudice.

B. **Law enforcement bias**

In the course of jury-selection, it is not uncommon to encounter jurors who tend to believe that police officers – simply because of that status – are more likely to be credible than other categories of witnesses. The defense had proposed placing a question on the questionnaire designed to identify jurors who potentially had a disqualifying bias in favor of law enforcement witnesses. That question was removed by the Court and efforts to have it restored were not successful. The government had not objected to the question. The defense requests that the Court inquire of all potential jurors as follows:

> As a general proposition, do you tend to believe that a member of law enforcement, such as a police officer or federal agent, who testifies in court is: (1) More likely to tell the truth than other witnesses; (2) about as likely to tell the truth as other witnesses; or (3) less likely to tell the truth than other witnesses?

The 3500 material provided by the government suggests that the government's case will be dominated by the testimony of law-enforcement officials. Mr. Barnes is entitled to know whether, going in, those witnesses have an unfair and improper credibility edge.

C. Opinion of lawyers

Many people do not like or trust lawyers. Experience from having a question regarding lawyers on the questionnaire from other cases teaches that a juror's views about lawyers can sometimes be toxic and extreme. Moreover, jurors tend to denigrate defense

lawyers ("I don't know how they can do that job" or "Someone's got to do it") and venerate prosecutors ("They protect the people" "The good guys"). While none of this is universally so, there is enough anti-lawyer bias out there – especially anti-*defense* lawyer bias – that inquiry should be made. Mr. Barnes had proposed one or two simple open-ended questions on the questionnaire, but those were removed. He now proposes that those questions be posed to jurors during their individual *voir dire,* as follows:

> What is your opinion of lawyers? What is your opinion of lawyers who prosecute criminal cases? What is your opinion of lawyers who defend criminal cases?

D. The presumption of innocence

Several jurors have volunteered answers on the questionnaire to the effect that they believe Mr. Barnes is guilty. There was, however, no question on the questionnaire that asked that question in a direct way and nothing on the questionnaire that assured Mr. Barnes that the jury would accord him the presumption of innocence. Questions proposed by Mr. Barnes on those issues were deleted from the proposed questionnaire. Mr. Barnes requests that the Court inquire of jurors, during *voir dire*, as follows:

> Mr. Barnes, the man on trial, is presumed innocent and cannot be convicted unless the jury, unanimously and based solely on the evidence presented in court, decides that guilt has been proven beyond a reasonable doubt. The burden of proving guilt beyond a reasonable doubt rests entirely with the government. The defendant is not required to prove his innocence. Do you agree or disagree with this rule of law?
>
> As you sit here today, do you have an opinion about whether the defendant is guilty of the crimes charged?

Failing to inquire on this issue runs the risk that jurors may be selected who do not accept the most fundamental premises of American criminal law.

CONCLUSION

For the reasons set forth above, the supplemental procedures proposed in this memorandum should be followed.

Respectfully submitted,

JOSHUA L. DRATEL, ESQUIRE
DAVID A. RUHNKE, ESQUIRE
Co-counsel to Khalid Barnes

By: /s/ David A. Ruhnke
DAVID A. RUHNKE

Filed via ECF: White Plains, New York
February 6, 2008

CERTIFICATE OF SERVICE

The undersigned counsel to Khalid Barnes hereby certifies that, on this date, this motion was served and filed on all parties via ECF.

/s/ David A. Ruhnke
DAVID A. RUHNKE
Attorney for Khalid Barnes

Dated: White Plains, New York
February 6, 2008

David A. Ruhnke

From: "David A. Ruhnke" <davidruhnke@ruhnkeandbarrett.com>
To: <Joanna_D'Avella@nysd.uscourts.gov>
Cc: "Harbach, David (USANYS)" <David.Harbach@usdoj.gov>; "Dember, Andrew (USANYS)" <Andrew.Dember@usdoj.gov>; "Nelson Lassalle" <pilassalle@verizon.net>; "Jim Dowd" <is2000jbd@aol.com>; "Hanna Antonsson" <hannaantonsson@earthlink.net>; "Erik Levin" <elevin@joshuadratel.com>; "David A. Ruhnke" <davidruhnke@ruhnkeandbarrett.com>; "Alex Eisemann" <aee@eisemannlaw.com>; "Joshua Dratel" <jdratel@joshuadratel.com>
Sent: Friday, January 25, 2008 2:00 PM
Subject: Questionnaire

Ms. D'Avella--

Re the questionnaire

1. At question 38 there is a reference to "the defendants" that should be revised to reflect the fact that the other defendants have been severed out of the case.

2. I have received the government's comments and request that the court maintain its position on the alternative sentence to death.

3. The same is true with regard to question 59.

4. In the initial proposed questionnaire, the defense had suggested a question regarding the credibility of law enforcement witnesses at question 40:

As a general proposition, do you tend to believe that a member of law enforcement, such as a police officer or federal agent, who testifies in court is (check one):

More likely to tell the truth than other witnesses.

About as likely to tell the truth as other witnesses.

Less likely to tell the truth than other witnesses.

It is requested that the question be included.

5. In the initial proposed questionnaire, at question 61-63 regarding attitude towards lawyers. We request that those be included:

What is your opinion of lawyers?

What is your opinion of lawyers who prosecute criminal cases?

ATTACHMENT A-1

What is your opinion of lawyers who defend criminal cases?

6. There are no questions relating to race on the proposed questionnaire. We had asked several race-related questions at 71-73 and ask that they be included.

Would the fact that the defendants are African-American cause you to doubt your ability to serve fairly in this case?

YES NO

Do you believe that African-Americans are more likely to be involved in criminal activity, including drug-dealing, than other racial groups.

YES NO

Is your neighborhood pretty much made up of all one racial group?

YES NO

If yes, what is the predominant group?

If no, what is the approximate racial make-up of your neighborhood?

Have you ever had an unpleasant encounter with someone from a racial group different from your own?

YES NO If yes, please explain:

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SUPPLEMENTAL QUESTIONNAIRE
UNITED STATES v. KHALID BARNES

Prospective jurors: Please complete the following supplemental questionnaire prior to any further questioning. As with the initial questionnaire, you are sworn to give truthful answers.

1. Would the fact that the defendant is African-American cause you to doubt your ability to serve fairly in this case?

   ❑ YES ❑ NO

2. Do you believe that African-Americans are more likely to be involved in criminal activity, including drug-dealing, than other racial groups?

   ❑ YES ❑ NO

3. Is your neighborhood pretty much made up of all one racial group?

   ❑ YES ❑ NO

   If yes, what is the predominant group? _____

   If no, what is the approximate racial make-up of your neighborhood?

   _____

4. Have you ever had an unpleasant encounter with someone from a racial group different from your own?

   ❑ YES ❑ NO If yes, please explain:

   _____

I HEREBY DECLARE UNDER PENALTIES OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT:

_____
(SIGNATURE) (JUROR NUMBER)

_____
(PRINT YOUR NAME)

ATTACHMENT B

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COLUMBUS ALLEN

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF STANISLAUS

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

COLUMBUS ALLEN,

Defendant.

Case No.: 1222451

COLUMBUS ALLEN'S MOTION FOR CONSTITUTIONALLY-EFFECTIVE VOIR DIRE RE RACE, PRE-TRIAL PUBLICITY AND DEATH QUALIFICATION AND REQUEST FOR EVIDENTIARY HEARING IN SUPPORT OF MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

Dept: 19
Time: TBD
Hearing: TBD

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4. Eberhardt, *Looking Deathworthy* (2006) Psychological Science at pp. 89-92.

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6. July 23, 2006 Transcript, Defendant's Motion for Change of Venue (Second Day of Hearing)

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Attorneys for Defendant
COLUMBUS ALLEN

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF STANISLAUS

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. COLUMBUS ALLEN, Defendant.	Case No.: 1222451 **COLUMBUS ALLEN'S MOTION FOR CONSTITUTIONALLY-EFFECTIVE VOIR DIRE RE RACE, PRE-TRIAL PUBLICITY AND DEATH QUALIFICATION AND REQUEST FOR EVIDENTIARY HEARING IN SUPPORT OF MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE** Dept: 19 Time: TBD Hearing: TBD

Columbus Allen respectfully moves this Court to allow counsel for Mr. Allen to voir dire prospective jurors on the issues of racial prejudice, pre-trial publicity, and, if death qualification is to be undertaken, death qualification. Each of these issues threatens to undermine the integrity of the fact-finding process given the nature of the offense alleged, the racial overtones, the nature and extent of the attention of the media to this case, and the inherently prejudicial effect of qualifying a jury for application of

the death penalty. In addition, Mr. Allen moves for an evidentiary hearing with respect to his request for individual sequestered voir dire in this case.

Mr. Allen makes these motions pursuant to the Due Process, Effective Assistance, and Reliability Clauses of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding principles of the Constitution of the State of California and applicable state law. Mr. Allen submits the following memorandum of points and authorities supporting his request for a constitutionally-effective voir dire -- including individual, sequestered voir dire -- regarding race, pretrial publicity, and death qualification.

I. General Principles

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." (*Rosales- Lopez v. United States* (1981) 451 U.S. 182, 188.)[1] Because jury impartiality goes to "the fundamental integrity of all that is embraced in the constitutional concept of trial by jury" (*Turner v. Louisiana* (1965) 379 U.S. 466, 472), whenever impartiality is threatened, "the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." (*Estelle v. Williams* (1976) 425 U.S. 501, 504.) "'[A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried." (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 422.)

The Due Process Clause mandates "an assessment of whether under all of the circumstances presented there [is] a constitutionally significant likelihood that, absent questioning about [the source of prejudice]," the jurors will not be impartial. (*Ristaino v. Ross* (1976) 424 U.S. 589, 596.)

[1] The United States Supreme Court has long recognized that "[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182,188 (citations omitted).)

The "right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial." (*Ham v. South Carolina* (1973) 409 U.S. 524, 532 (Marshall, J., concurring in part and dissenting in part).) The oldest, most common, and most important of the steps that may be taken to insure jury impartiality are the challenge for cause and the peremptory challenge. (*Id*. at 532; *see also Johnson v. Louisiana* (1972) 406 U.S. 356, 379; *Swain v. Alabama* (1965) 380 U.S. 202, 209-222.) The rights to challenge for cause and peremptory challenge are meaningless, however, if they are unaccompanied by the right to a full and adequate voir dire. (*Ham v. South Carolina*, *supra*, 409 U.S. at 532; *Swain v. Alabama*, *supra*, 380 U.S. at 221; *Turner v. Murray* (1986) 476 U.S. 28, 40.)

The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution dictate that, in capital cases in which there is a significant possibility of prejudice due to racial bias or pre-trial publicity, or a generalized "skewing effect" due to death qualification, the defendant must be granted special procedures -- including specialized voir dire -- adequate to discover deep-seated and hidden prejudice. Voir dire processes adequate for lesser cases, even serious felonies, do not serve the constitutional, moral, and human purposes of voir dire in capital cases.

II. <u>The Potential for Racial Prejudice in this Case Requires Thorough, Searching and Individual Sequestered Voir Dire on Race</u>

A. The Facts of this Case Create a Heightened Danger of Racial Prejudice

Columbus Allen, who is African-American, is accused of the homicide of a CHP Officer, Earl Scott, who was white. The type of offense alleged by the state – the murder of a law enforcement officer during a traffic stop – is likely to inflame the emotions of the community and, in Mr. Allen's case, the offense includes the stereotypical and highly-inflammatory elements of interracial crime including black on white violence, firearms, narcotics, and the allegation that the motive was to avoid arrest

(pursuant to a warrant for his arrest for a violent incident and for being a felon in possession of a firearm and possessing distribution amounts of marijuana).[2]

Mr. Allen's coloring and facial features, furthermore, are "deathworthy" as that concept has been developed in numerous studies and research.[3] That is, Mr. Allen's features are the type of features often associated in the media with crime and therefore likely to trigger racially-motivated reactions particularly in light of the intense emotion associated with the murder of a peace officer. As a result, there is a heightened risk that racial prejudice will undermine the integrity of this trial.

The net effect of these factors is to maximize the potential for racial prejudice in jury deliberations -- a fact which would render invalid and per se reversible any verdict of guilt. As summarized by expert Edward Bronson:

> Columbus Allen fits the portrait of the racial stereotype of an African-American who is dangerous. His appearance, including the way he wears his hair…including his extensive involvement with rap music and drugs, the fact that he is married but has a girlfriend, the nature of the crime itself -- a cop-killing (of a white cop) -- all play into that fearsome racial stereotype.

---

[2] Exhibit 2 at p. 6 (evidence "that capital punishment may be more than another *domain* of racial disparities; it may actually be a *cause*."); Eberhardt, *Looking Deathworthy* (2006) Psychological Science at pp. 89-92, attached hereto as Exhibit 4 at p. 91 ("…the interracial character of cases involving a black defendant and a white victim renders race especially salient.").

[3] *See*, Eberhardt, *Looking Deathworthy* (2006) Psychological Science; Glaser, *Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants* (2009) Goldman School of Public Policy, attached hereto as Exhibit 2 at p.4; Banks, *Discrimination and Implicit Bias in a Racially Unequal Society* (2006) 94 Cal. L. Rev. 1169, attached hereto as Exhibit 3 at p.1176 ("…those defendants who possessed the most stereotypically black facial features (relative to other members of their racial group) received, on average, sentences nearly eight months longer than those who possessed the least stereotypically black features.")

(See Declaration of Edward Bronson, attached hereto as Exhibit 1 at p.16, para. 42.)[4]

For these reasons, potential jurors who bear any degree of racial prejudice -- as the vast majority of people do -- will experience heightened difficulties in being fair and impartial in this case.[5] In fact, the venire in this case is likely to be racially imbalanced given that the jury selection system tends to maximize the participation of those who respond to inquiry, that the hardship process eliminates those with lesser incomes who are disproportionately minority, and that the death-qualification process disproportionately eliminates minorities. These difficulties are compounded by the extensive victim impact being offered by white officers and family members, and the likely presence of officers in the courtroom and hallways. Such jurors will encounter difficulty setting aside their assumptions, biases, and prejudice and fulfilling the constitutional duties to presume Mr. Allen innocent, apply the correct standard of proof, and to sentence Mr. Allen without consideration of his race. They are, moreover, unlikely to publicly acknowledge racial biases. Mr. Allen, therefore, must be permitted to question potential jurors thoroughly on the issue of racial prejudice and must be permitted to do so in an environment which permits openness and honesty by each prospective juror. This requires individual, sequestered voir dire. Mr. Allen is prepared to present testimony at an evidentiary hearing to support this assertion and hereby requests an opportunity to do so.

Individual sequestered voir dire is constitutionally necessary, moreover, because many if not most African-American jurors are likely to be removed for cause related to (1) lower likelihood of being death-qualified and (2) hardships associated with

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[4] Exhibit 3 at p. 1175 ("The most common finding of the capital sentencing research is that killers of White victims are more likely to be sentenced to death than are killers of Black victims."); Exhibit 4 at pp.89- 90.

[5] See Peffley, *Persuasion and Resistance: Race and the Death Penalty in America* (October 2007) American Journal of Political Science at pp. 996-1012, attached hereto as Exhibit 5 at p. 997 ("Whites in the United States often conflate issues of race and crime, drawing on their racial stereotypes of African Americans when thinking about punishment (Citation omitted).")

economic factors. This phenomenon will further undermine Mr. Allen's right to a fair trial because juries with few African-American jurors (in particular, with one or none) are more prone to base their decisions on unconstitutional racial animus. For example, a racially imbalanced jury may limit its consideration of relevant facts and attach greater significance to incorrect assumptions and biases. (Exhibit 1 at p. 14, para. 38 ("Of course, the fact that the victim in this case is white adds an additional layer of potential prejudice, since most members of the jury pool will also be white, creating the problem that they will be more likely to identify with the victim."); Exhibit 5 at p. 999 ("There seems to be little doubt that, at least for whites, racial attitudes often affect their support for capital punishment."); Exhibit 5 at p. 1001.)

B. Constitutional Principles Require Thorough, Searching Voir Dire

Mr. Allen must be allowed individual, sequestered voir dire as to issues of racial bias. In *Turner v. Murray* (1986) 476 U.S. 28 the Supreme Court reversed a capital conviction because the trial court failed to allow counsel to question potential jurors adequately on the issue of racial bias. In *Turner*, the Supreme Court declared that a black defendant in a white-victim case has a constitutional right to question jury venire members on their racial prejudices:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence-prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent acts of petitioner's crime, might incline a juror to favor the death penalty.

(*Id.* at 35.)

The *Turner* Court held that the trial judge's refusal to permit voir dire on racial attitudes created an unacceptable risk that "racial prejudice may have infected petitioner's capital sentencing." (*Id.* at 36.) The Court concluded that "a capital defendant accused of an interracial crime is entitled to have jurors informed of the race of the victim and questioned on the issue of racial bias." (*Id.* at 36-37.)[6]

In California, a defendant may invoke his rights under *Turner* by requesting jury voir dire as to racial bias. In a case involving an interracial killing, such as this one, a trial court is required to question prospective jurors about racial bias on request. (*People v. Bolden* (2002) 29 Cal.4th 515, 539 citing *Turner v. Murray*, *supra*, 476 U.S. at 36-37.) This inquiry, must be as searching and thorough as possible given the dynamic of this trial in this venue, the likelihood that jurors will seek to disguise racist attitudes, and the great potential for jurors to alter their response so as to sit on this jury to have an opportunity to participate in a high-profile case or, in some cases, to sentence Mr. Allen to death.

There has already been testimony, in the context of extensive hearings on the motion for change of venue, regarding the extreme unlikelihood of racist attitudes being determined in open, group voir dire generally and *in this case*. The great and overwhelming body of social science studies on this topic (disguised biases) is profoundly important. The studies have demonstrated over and over again, that race is a factor in jury decision-making, particularly in death penalty cases involving a black defendant and white victim. It is also clear that determining bias is not possible by merely asking if one harbors such sentiments, or if one could base one's decision merely on the facts without regard to bias. Finally, it is equally clear that responses to

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[6] It is axiomatic that the constitutional guarantees of a fair trial by an impartial jury and equal protection of the law require that jurors not come into the trial proceedings with opinions about the defendant and his guilt that have been improperly shaped by racial prejudice. First, it is unacceptable for racial prejudice to infect any capital trial. (*Turner, supra*.) Second, a capital jury must render a verdict based solely on the evidence presented in court. (*Irvin v. Dowd* (1961) 366 U.S. 717, 723; *Spies v. Illinois* (1887) 123 U.S. 131; *Holt v. United States* (1910) 218 U.S. 245; *Reynolds v. United States* (1878) 98 U.S. 145.)

questions about race in open settings in court are very unlikely to provide any reliable information about potential biases. (Exhibit 6 at pp. 1762, 3-9 & pp. 1763, 5-12).

For all of these reasons, Mr. Allen requests an opportunity to question the prospective jurors individually and privately concerning racial bias.

III. The Inflammatory Nature of the Pre-Trial Publicity in this Case Requires Extensive Voir Dire to Eliminate Taint and Bias of the Venire

In this case, it is not only racial prejudice which threatens jury impartiality, but also persistent prejudicial pretrial publicity resulting from the nature of the crime and its effect on the law enforcement community and the community generally. (Exhibit 1 at pp. 22-23, para. 62-67.) The change of venue to Sacramento, moreover, failed to address the issue fully because the receiving county is contiguous to, and shares the same media market as, the transferring county. Recently, the defense uncovered television media broadcasts not previously disclosed by the stations. They total nearly 300 broadcasts about this case, many using the "deathworthy" mugshot that previous testimony established inflamed racial attitudes towards Mr. Allen.[7]

For these reasons, the pool of prospective jurors in this case has been tainted by the extensive pre-trial publicity concerning the charges against Mr. Allen. It is crucial that counsel be permitted individual sequestered voir dire of the prospective jurors concerning that issue. (*See Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 733 citing *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706.)

The prospective jurors must be questioned to ascertain whether they have any bias, opinion, or prejudice that would affect or control the fair determination of the issues to be tried. (*Mu'Min, supra,* 500 U.S. at 422.) After *Mu'Min,* many courts have required content questions in high publicity cases, explaining that the court must inquire into the source and content of the exposure and the potential juror's attitudes towards

[7] In a recent motion to reconsider transfer, incorporated herein, it was described how the television media had every financial incentive to without this information until after the decision to transfer was made, and did withhold that information. In that fashion, they can cover the trial without expenditures to relocate crews and reporters.

what they have heard or read in order to discover potential bias. *United States v. Davis* (5th Cir. 1978) 583 F.2d 190, explained:

> ". . .it is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed by any prejudicial publicity they have been exposed to. Therefore, when there has been publicity that would possibly prejudice the defendant's case if it reached the jurors, the court should first ask the jurors what information they have received. Then it should ask about the prejudicial effect and it should make an independent determination whether the juror's impartiality was destroyed."

(Id. at 197.)

Likewise, *Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 638, held that the trial court's "voir dire examination did not adequately dispel the probability of prejudice accruing from the pre-trial publicity and the jury panel members' knowledge of the case." In *Silverthorne*, the trial court erred by allowing questioning that called upon the jurors to assess their own impartiality and by restricting the voir dire to a general examination of potential prejudice. (*Id.*)

Other state supreme courts have held that trial courts should conduct voir dire to eliminate bias and prejudice stemming from pretrial publicity. (*State v. Tyburski* (Mic. 1994) 518 N.W. 2d 441 (murder conviction reversed due to inadequate voir dire regarding pre-trial publicity); *State v. James* (Utah 1991) 819 P.2d 781, 787-789; *State v. Everett* (Minn. 1991) 472 N.W.2d 864, 866, n. 1.)

Accordingly, Mr. Allen should be allowed to ask probing questions of each prospective juror regarding his or her exposure to media reports concerning this case. That is because merely going through the form of obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]. **(***Silverthore, supra*, 400 F. 2d at 638 quoting *Bloeth v. Denno* (2nd Cir. 1963) 313 F.2d 364 (cert. denied, 372 U.S. 978 (1963)); See also, *Tyburski*, *supra*, 518 N.W. 2d at 451. ("Courts have long recognized that juror self-assessment of bias is inherently untrustworthy.").)

For all of these reasons, the self-assessment of prospective jurors is not sufficient to ensure their fairness. (See also *Irvin, supra*, 366 U.S. at 728; *People v. Hillhouse* (2002) 27 Cal.4th 469, 488 ("Indeed, a juror ... who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so.").) Mr. Allen must be allowed an opportunity to thoroughly question each prospective juror in a private setting that will promote juror candor as to these sensitive subjects.

IV. The Process of Death Qualification Will Potentially Skew the Venire and, Therefore, Requires Thorough Voir Dire to Ensure that the Jury Does Not Have a Prejudice for Death or Against Mitigation

The first question here is whether the Court should engage in death qualification. Although previous courts have permitted this inquiry, the recent trends offer new evidence that such a process skews the jury to the point that it is no longer reflective of the community, thereby denying a capital defendant the right to a fair trial, due process, an impartial jury, a jury drawn from the relevant cross-section of the community, and a right to have fair, impartial sentencing proceeding that truly and honestly reflects the sentiments of the community, under the Fifth, Sixth, Eighth and Fourteenth Amendments. Over the past few years, support for the death penalty has waned. When previous courts examined the issue, support was high and strong such that those excluded by the process were relatively few. Now, that is no longer the case – the process is likely to eliminate a much higher percentage of prospective jurors, and a much broader spectrum of the community.

Assuming death-qualification is even permitted, in *Wainwright v. Witt*, 469 U.S. 412 (1985), the United States Supreme Court clarified the standard for determining whether prospective jurors must be excluded from capital cases for cause based on their views of capital punishment. The relevant inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Id*. at 424 (emphasis added) (quoting *Adams v.*

Texas, 448 U.S. 38, 45 (1980)) (modifying standard announced in *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).)

In determining whether the juror's views would prevent or impair the juror's performance of his or her duties as to a potential capital sentencing, "[r]elevant voir dire questions ... need not be framed exclusively in the language" of the *Witt* standard:

> It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception.

(Morgan, supra, 504 U.S. at 735-36 (footnote omitted).)

Further, the Court need not find that a juror's bias on that subject has been shown with "unmistakable clarity" in order to exclude the juror for cause. (*Witt, supra*, 469 U.S. at 424.)

In *People v. Bittaker* (1989) 48 Cal.3d 1046, the trial court limited the death qualification voir dire to a few death penalty questions in the jury questionnaire. That process was inadequate because it did not allow counsel to ask follow up questions or to adequately litigate challenges for cause. (*Id*. at 1084.)

Here, individual sequestered voir dire as to the jurors biases will ensure that only qualified jurors are permitted to serve on this capital jury. (*See People v. Brasure* (2008) 42 Cal.4th 1037, 1051 ("Each prospective juror was then examined on his or her attitudes and ability to fairly judge the case. . . Counsel thus had full opportunity, through questioning, to discover a prospective juror's biases, if any, regarding the death penalty and its application.").)

In this case, the concern is not that a juror will be impaneled who will refuse to vote for death because of opposition to the death penalty. Rather, it is the fear that a juror will be impaneled whose support of the death penalty is such that they will vote for death without regard to mitigation, or based on the community pressure that is likely

to result from heavy law enforcement presence and participation in the process and media coverage. That juror is likely to endorse crude and result-driven questioning such as whether they can be fair and impartial, and whether they can set aside their beliefs and base their verdict on the evidence provided. Asking whether they can "consider" mitigation is equally unlikely to find such problematic jurors as they believe that they can and will consider anything, and that they are being fair and impartial by voting for death.

A. Prospective Juror Whose Views Favoring the Death Penalty Would Actually Preclude, "Or Appreciably Impede," the Juror from Engaging In the Weighing Process and Returning a Life Verdict Must Be Excused For Cause

Trial courts presiding over capital cases must proceed with great care, clarity, and patience in the examination of potential jurors. (*People v. Heard* (2003) 31 Cal.4th 946, 968.) A juror whose views concerning capital punishment would appreciably impede him or her from engaging in the weighing process must be excused for cause. (*People v. Mickey* (1991) 54 Cal.3d 612, 681.) The same standard applies to jurors who oppose or favor capital punishment. (*People v.Coleman* (1988) 46 Cal.3d 749, 765.)

Here, the Court must take particular care to ensure that qualified jurors who express personal opposition to the death penalty are allowed to serve if their views would not appreciably impede them from engaging in the weighing process. Likewise, jurors whose views favor capital punishment must be excused if their predispositions would appreciably impede the weighing process.

In *People v. Kaurish* (1990) 52 Cal.3d 648, the Supreme Court held that jurors personally opposed to the death penalty are nonetheless eligible to serve if that would not prevent the juror from engaging in the weighing process. (*Id*. at 699 citing *Wainwright, supra,* 469 U.S. at 424; *accord Mickey, supra,* 54 Cal.3d at 681.)

In *Mickey,* the Court held that such jurors may not be excused unless his or her predilection "would *actually preclude him* from engaging in the weighing process and returning a capital verdict." (*Id*. at 681, n. 14 (emphasis added).)

In *Morgan v. Illinois* (1992) 504 U.S. 719, the Court overturned a death sentence on the sole ground that defense counsel had been impermissibly prohibited from asking the prospective jurors: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" (*Id.* at 721.) In that context general fairness and "follow the law" questions were insufficient to insure against a death-biased jury. (*Id.* at 732-36.)

In sum, a prospective juror who favors the death penalty must be excused for cause if the juror's views would actually preclude, or appreciably impede, the juror from engaging in the weighing process and returning a life verdict. (*Morgan, supra,* 504 U.S. at 732-36.) Likewise, jurors who are personally opposed to capital punishment must be allowed to serve if their views would not preclude them from engaging in the requisite weighing of aggravating and mitigating factors.

B. The Defendant's Right to Voir Dire As to Case-Specific Mitigation

Mr. Allen's counsel must be allowed an opportunity to question each prospective juror concerning his or her attitudes and potential biases toward case-specific mitigating evidence. The foremost concern of the Eighth Amendment and its California counterpart is that "capital sentencing must have guarantees of reliability, and must be carried out by jurors who would view all of the relevant characteristics of the crime and the criminal, and take their task as a serious one." (*Sawyer v. Smith* (1990) 497 U.S. 227, 236.) The required reliability and individualization is attained only when "the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228.)

In *Morgan v. Illinois, supra*, the Court defined a broad class of jurors subject to a challenge for cause because they are biased against consideration of case specific mitigation. (See, e.g., *Id.* at 2233 ("(S)uch jurors obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty: they not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it"); *Id.* at 2235 ("Any juror to

whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial."); See also, *McQueen v. Scroggy* (6th Cir. 1996) 99 F.3d 1302, 1329 (affirming that defendant could properly question jurors to obtain helpful information about their attitudes toward drug and alcohol intoxication as a mitigating circumstance).)

Under *Morgan* and its progeny, Mr. Allen is constitutionally entitled to ask voir dire questions identifying, and asking for the juror's views on, specific areas of mitigation at issue in this case. (See also, John Blume, Sheri Lynn Johnson, and Brian Threlkeld, *Reforming a Process Fraught With Error: Probing "Life Qualification" Through Expanded Voir Dire* (2001) 29 Hofstra L. Rev. 1209, Hofstra Law Review Summer 2001 Symposium on the Death Penalty, ("Indeed, *Morgan* holds as much, clarifying that, in a capital case, questioning of potential capital jurors as to whether they would automatically vote for the death penalty on the facts of the particular case, or could consider and give effect to the relevant mitigating factors in the case, is not only suitable, but constitutionally required, if a capital defendant is to receive a voir dire adequate to protect her right to a trial before an impartial tribunal.").)

C. The Defendant's Right to Voir Dire as to Case Specific Aggravation

The California Supreme Court has long held that the parties in a capital case are entitled to ask prospective jurors case-specific hypothetical questions which generally incorporate the aggravating facts of a particular case as a means of identifying cause-excludable jurors.

Thus, in *People v. Rich* (1988) 45 Cal.3d 1036, both the prosecutor and the defense agreed that prospective jurors could be asked, "If the facts in this case disclose that [defendant] is guilty of four separate murders and multiple rapes, including the murder of an eleven-year-old girl who was sexually abused and was killed by being thrown off a high bridge, would those facts trigger emotional responses in you that would make it hard to consider life imprisonment without possibility of parole, or would

you under those circumstances vote for the death penalty?" (*Id*. at 1104-1105.) In a unanimous opinion the Court approved that question as proper voir dire.

In *People v. Clark* (1990) 50 Cal.3d 583, the Court recognized that a defendant must be permitted to make inquiries of prospective jurors about case specific aggravating circumstances that could lead to cause challenges. (*Id*. at 596.) The court pointed out that "the general voir dire conducted after the death qualification of the prospective jurors reveal[ed] no attempt to restrict questioning on the jurors' attitudes about arson and burn injuries." (*Id.* at 596, n. 3.)

In *People v. Pinholster* (1992) 1 Cal.4th 865, the Court held that a trial court "must permit questioning about legal doctrines that are material to the trial and controversial in the sense that they are likely to invoke strong feelings and resistance to their application." (*Id*. at 915 quoting *People v. Johnson, supra,* 47 Cal.3d at 1224-1225.) In *Pinholster,* the court approved a question which precisely mirrored the facts in that case, was "directed primarily at determining the jurors' attitudes toward the felony-murder special circumstance." (*Id*.[2/]; See also *People v. Mendosa* (2000) 24 Cal. 4th 130, 168 (no error where prosecutor asked jurors whether they thought it would be possible for a young man to rape an elderly woman and not be mentally ill.).)

Moreover, the scope of voir dire as to potential aggravating circumstances is not limited to matters alleged in the charging document. In *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1004-1005, the trial court erroneously ruled that voir dire on facts not pleaded could be used only to assist the parties in exercising peremptory challenges, and not to establish grounds for cause challenges.

Moreover, it is proper for the parties to inform the prospective jurors about the general facts of the case during their voir dire questioning, even if the characterization of those facts is one-sided: :

[2/] The court also noted the important presence of the trial court's pre-voir dire instruction to the jury that they were the sole judges of the facts and could only consider the evidence presented in court. (*Pinholster, supra,* 1 Cal.4th at 916.)

> A prosecutor may therefore inquire whether a juror will be able to impose the death penalty on a defendant who commits felony murder or on a defendant who did not personally kill the victim. The trial court properly exercised its broad discretion in allowing the prosecutor's voir dire. To the extent a more accurate characterization of the case was possible, defendant had the opportunity to provide it.

(*Id*. at 431.)

In sum, the court should allow counsel considerable latitude in conducting voir dire as to potential aggravating circumstances. (See *People v. Champion* (1995) 9 Cal.4th 879, 908-909 ("We agree with defendants that trial courts should be evenhanded in their questions to prospective jurors during the 'death qualification' portion of the voir dire, and should inquire into the jurors' attitudes *both for and against* the death penalty to determine whether these views will impair their ability to serve as jurors.").)

As set forth above, the defense must be permitted to ask case specific questions in order to inquire into actual bias --"... the existence of a state of mind ... which will prevent the juror from acting with entire impartiality ...." (Code of Civil Procedure §225; See also *People v. Chapman* (1993) 15 Cal.App.4th 136, 141-42 (in a noncapital case, it was reversible error for the trial court to refuse to undertake any examination concerning bias jurors might feel toward defendant due to a prior felony conviction.).) Case specific questions are the indispensable means by which such actual bias is uncovered.

V. This Court Should Allow Individual Sequestered Voir Dire So That Counsel May Adequately Explore the Sensitive and Crucial Subjects Discussed In This Motion

In a capital case, the risk that a biased juror may be empanelled is unacceptable in light of the ease with which that risk could be minimized by allowing counsel to conduct a probing voir dire of each prospective juror. (*Morgan*, *supra*, 504 U.S. at 734-35.) Under Code of Civil Procedure section 223, this Court has discretion to allow

individual, sequestered voir dire. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 632, fn. 3, 21; *People v. Waidla* (2000) 22 Cal.4th 690, 713.)

Here, the Court should allow individual sequestered voir dire because the courtroom atmosphere is likely to be charged and stressful due to the nature of the charges against Mr. Allen and the sensitive issues that must be explored with the prospective jurors. The courtroom is an intimidating place, and jurors are aware that they are being "judged" by their fellow jurors, the lawyers, and the judge. The Supreme Court recognized the undesirable pressures inherent in group voir dire in *People v. Williams* (1981) 29 Cal.3d 392:

> Moreover, little psychological insight is needed to realize that the setting in which the voir dire is conducted creates additional pressures for the veniremen to answer questions as he believes the judge would have him answer, or in conformity with the answer of the preceding panelist.

(Id. at 403.)

In addition, because jurors can be intimidated, many adopt a behavior pattern which can be characterized as presenting the "least exposure." When faced with the choice of providing information that could lead to further questions or a challenge, or remaining silent, they choose the latter. The conditions in an unsequestered courtroom thus inhibit the free flow of information and create an unacceptable risk that a biased juror will remain undetected.For these reasons, a process of individual sequestered voir dire is often employed in selecting a jury in capital cases. (See, e.g., *People v. Solomon* (2010) --- Cal.Rptr.3d ----, 2010 WL 2773392 at * 25; *People v. Tafoya* (2010) 42 Cal.4th 147, 168.)

Although individual sequestered voir dire is not required in every case (e.g. *People v. Taylor* (2010) 48 Cal.4th 574, 606), it is necessary where group voir dire is impractical or could result in actual bias. (*Id*.)

In this case, the racial issues and extensive pre-trial publicity discussed above must be discussed during voir dire and could result in actual bias if facts known to some

prospective jurors are disclosed to all of them. Moreover, group voir dire is impractical because it will be difficult if not impossible for all of the jurors to be completely candid about sensitive subjects when they are surrounded by a roomful of their peers. For these reasons, the ordinary group voir dire process is inadequate in this case. Counsel therefore respectfully request that this Court permit individual, sequestered voir dire regarding race, publicity, and death qualification.

CONCLUSION

This is a case of the alleged murder of a white police officer by an African-American during a traffic stop who is further alleged to have done so to avoid a warrant for his arrest and to avoid punishment for being a felon in possession of a firearm and trafficking in marijuana. This case occurred in a county very near Sacramento County which happens to share the same media – which thoroughly tainted the transferring county with extensive, highly negative pretrial publicity. It would be difficult to conceive of circumstances that would be more likely to trigger deep-seated fears, biases, and prejudice on the part of venire members. Being as "real" as we can, this case cries out for the most thorough, searching type of voir dire available -- individual, sequestered voir dire.

If the death penalty is to applied "fairly" in any context, courts – like this one – must subordinate considerations of time and resources to the shared objective of ensuring a fair and impartial fact finder.

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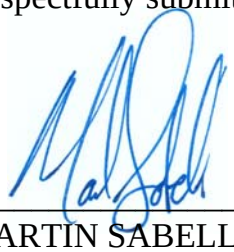
The right tool for this job is individual, sequestered voir dire and if it isn't right for a case like this then it isn't right for any case. Large group voir dire, in contrast, would be ideally-suited to conceal racial fears, biases, and prejudice and, further, to maximize the potential for tainting the entire venire with impermissible opinions or "knowledge" regarding this case gained from the media.

DATED: July 23, 2010

Respectfully submitted,



MARTIN SABELLI
Attorney for Defendant

EXHIBIT 1

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
v.	)
COLUMBUS ALLEN, Defendant.	)

AFFIDAVIT OF EDWARD J. BRONSON

I, EDWARD J. BRONSON, affirm as follows:

1. I am a Professor Emeritus of Political Science at California State University, Chico.

2. I make this affidavit for the purpose of recommending what I believe to be appropriate voir dire conditions required by counsels' need to assure a fair and impartial jury in the case of People v. Columbus Allen.

3. Conclusions and Recommendations. Before laying out my qualifications and discussing the reasons why I believe my proposals are appropriate, I will first very briefly summarize my concerns and my recommendations:

(1) I am concerned that given that this is a death penalty case, that the charges are particularly severe, involving the murder of a California Highway Patrolman, and because the defendant is black, certain special voir dire procedures will be necessary.

(2) The voir dire procedures that I believe are necessary include the following:

(1) Providing individualized and sequestered voir dire, particularly for sensitive issues like race. In the alternative, voir dire could be individual within small groups of six or so, but out of the presence of the rest of the panel.

(2) Allow most of the non-routine questioning to be done by the attorneys, including the use of open-ended questions.

(3) A reasonable time should be provided for the voir dire, avoiding rigid and artificially low time limits.

(4) An extended questionnaire should be used with reasonable time provided for counsel to review the questionnaires.

(5) Avoid relying on relying the answers to leading questions such as, can you be fair and impartial? or can you put aside your opinion and any racial attitudes you may have and decide this case fairly on the evidence you hear in court? etc. Such questions yield answers of very little value.

(6) Avoid instructing the jury about such matters as the need for a fair and impartial jury, the presumption of innocence, etc. until after the questionnaires are administered and the voir dire completed.

4. Qualifications. My complete curriculum vitae is attached to this affidavit as Exhibit A, and I have summarized a few of the highlights of my background and experience in ¶¶ 5-10.

5. Education and Teaching. After my undergraduate work, I received a J.D. from the University of Denver; an L.L.M. from New York University; and a Ph.D. in Political Science, emphasizing Public Law, from the University of Colorado. As part of the study for my doctorate, I received training in basic social scientific techniques. I have been employed since 1969 at California State University, Chico, where I am an Emeritus Professor of Political Science and Public Law in the College of Behavioral and Social Sciences. I have taught courses in Constitutional Law, Legal Analysis, and Administration of Justice. In addition, I have been a Visiting Professor at the University of Colorado and taught in summer programs at several law schools, including the University of San Francisco; the University of Santa Clara; the University of California at Hastings, Berkeley, and Los Angeles; the University of San Diego; California Western; and the University of Puget Sound (now Seattle). I have been a Visiting Scholar at the University of Alaska and at the College of Micronesia, and I served as a Fulbright Teaching and Research Scholar at the Center of Judiciary Studies, Ministry of Justice, Lisbon, Portugal, where judges and public prosecutors are trained. My role there was to explain the use of juries and social science in the American courts to policy makers, practitioners, and students.

6. Research and Testifying. General. In my research, I have studied the attitudes of jurors toward relevant issues of criminal justice, the effects of those attitudes on verdicts, and the way that various processes, including voir dire, affect jury behavior. Included among the cases on which I have testified or consulted have been the Oklahoma City bombing, the Unabomber case, the Elizabeth Smart case, the Richard Allen Davis (Polly Klaas) case, the Skilling/Enron case, the BART case in Oakland, the Night Stalker case in Los Angeles, and many more. I have testified or consulted on over 30 jury-issue cases in Sacramento County, most of which have been capital.

7. Voir Dire. I have acted as a consultant to attorneys on ways to improve the fairness of voir dire and jury selection. I have testified and submitted pretrial affidavits on these matters in many cases, have reviewed several transcripts of capital case voir dire as part of the preparation for drafting affidavits submitted for post-conviction relief, and I have lectured on jury selection issues at various academic and professional organizations. I have testified on the issue of juror

attitudes in death penalty cases over 100 times, and have been qualified in those cases as an expert witness. I have also lectured, done research, and published work in this area.

8. My experience has also included lecturing to professional and academic groups (including two CEB programs at McGeorge), testimony, and consultation on the necessity of special voir dire procedures with respect to certain sensitive issues, some of which are present in this case.

9. I was fairly recently appointed in San Joaquin County Superior Court in California in a capital trial (People v. Choyce) at the court's request as the court's private consultant as an advisor to the court on voir dire conditions, including the questionnaire, jury selection procedures, death qualification, and related matters, and met with the judge privately at some length.

10. Death Qualification and Other Capital Case Issues. Since 1968 I have studied the process of qualifying juries in capital cases. I have published several studies on this subject, which have been cited many times by appellate courts, including the California Supreme Court and the United States Supreme Court. My experience has included testifying on jury issues in capital cases in Alabama, Arizona, Colorado (state and federal courts), Georgia, Illinois, Nebraska, New Mexico (state and federal courts), Oregon, Texas, California (including the case of Hovey v. Alameda County Superior Court (1980) 168 Cal. Rptr. 128), Arkansas (in federal court in the case of Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), aff'd, 758 F.2d 226, (8th Cir. 1985), rev'd, sub nom. Lockhart v. McCree (1986) 460 U.S. 1088, and in Oklahoma (state and federal) (United States v. McVeigh and Nichols). I have previously qualified in capital cases as an expert witness in the Sacramento County Superior Courts.

11. Introduction. Based on my understanding of courtroom conditions, my research, and my knowledge of the relevant social science research, it is my opinion that the conditions that prevail during standard voir dire seriously jeopardize the Court's ability to impanel a fair and impartial jury in the Allen case. That is particularly true in this case because of the race of the defendant, the status of the victim as a California Highway Police Officer, and the need to death qualify the jury. I will present an analysis of why I believe standard voir

dire tends to be inadequate in many criminal cases, and then will address the special problems in the Allen case that make standard group voir dire practice even less useful as a means of ensuring a fair and impartial jury.

12. General Problems in Voir Dire. The first step in understanding the difficulties involved in selecting a fair and impartial jury is a recognition of the degree to which prospective jurors enter the courtroom with biases and prejudices that are likely to affect their ability to be impartial in a given case. These biases have been repeatedly documented in the context of criminal proceedings. Surveys of prospective jurors conducted by the National Jury Project in jurisdictions throughout the country have revealed that from 23% to 58% of persons eligible for jury service would require a criminal defendant to prove his or her innocence, despite a judge's instructions to the contrary.[1] My own surveys, reported to the courts in dozens of cases, demonstrate that such attitudes continue to persist. For example, in recent years, in one study conducted among 402 jury-eligible residents of Sacramento County, 34% strongly agreed and 20% somewhat agreed that, "Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence." I asked the same question in Sacramento County in another study of 397 jury-eligible respondents, of whom 195—49%—agreed. And 74% (297) in that same survey agreed that, "Defendants in a criminal case should be required to take the witness stand and testify." Surveys conducted by the National Jury Project also showed that anywhere from 15% to 45% of jury-eligible respondents believe that if the prosecution has gone to the trouble of bringing a defendant to trial, that person is probably guilty.

13. Thus, it is likely that in any jurisdiction, a substantial proportion of prospective jurors will enter the courtroom holding opinions that do not conform to fundamental principles of the American criminal justice system. These biases which prospective jurors can be expected to hold in any case will be exacerbated by the special problems in the Allen case.

14. Instructions. These biases cannot be compensated for by instructions from the trial court. It has been found repeatedly that even after service as a trial

[1] Based on survey data compiled by the National Jury Project.

juror, a substantial proportion of persons are unable to understand correctly the principles of presumption of innocence, burden of proof, and reasonable doubt.[2]

15. There can be no question that prospective jurors enter the courtroom with problematic attitudes and opinions concerning the criminal justice system, law and order, and the role of jurors. These attitudes can have an effect on a juror's ability to listen to and evaluate evidence, and judicial instructions have limited utility in curing the problem.[3] If a fair and impartial jury is to be selected, these attitudes must be elicited and probed during the voir dire examination so

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[2] See, e.g., Strawn, D. and Buchanan, R., "Jury Confusion: A Threat to Justice," 59 Judicature 478 (1976) (50% of instructed jurors did not understand after trial that the defendant did not have to present evidence of innocence); Sales, B., et al., Making Jury Instructions Understandable, Michie Company, 1981 (average comprehension level among 1,000 jurors of attempted murder trial instructions was 51%). The subjects of both studies cited were actual jurors.

[3] E.g. Kline, F. and Jess, P, "Pre-trial Publicity: Its Effects on Law School Mock Juries," Journalism Quarterly, 1966, 43, 113-116. In this study, respondents were divided into eight six-person juries, half getting prejudicial news articles about the case, and half getting non-prejudicial articles. The case was a civil negligence action, and the prejudicial information was the defendant's poor driving record. All were given instructions to ignore the publicity.

The basic finding was that at least one member in each of the "prejudiced" juries made reference to the information contained in the news stories. Three of the four juries decided not to use the prejudicial information (though it certainly could have affected their evaluation of the case), but in the fourth case the jury did use the prejudicial information for its verdict.

To the same effect, Padawer-Singer, A., Singer, A. and Singer, R, "Legal and Social-Psychological Research in the Effects of Pre-trial Publicity on Juries, Numerical Makeup of Juries, and Nonunanimous Verdict Requirements," 3 Law and Psychological Review 7 (1977).

See also, Carroll, J., et al., "Free Press and Fair Trial: The Role of Behavioral Research, 10 Law and Human Behavior 187 (1986).

Thompson, W., et al., "Inadmissible Evidence and Juror Verdicts," 40 Journal of Personality and Social Psychology, 453 (1981), cited several studies demonstrating that simulated jurors who were instructed to ignore certain evidence or were told to decide the case only on the basis of evidence presented in court (when exposed to prejudicial news articles) were more likely to find the defendant guilty than those not exposed. The authors found that there was a "failure of the variation in judge's [sic] instructions to influence juror decisions [which is] consistent with the assertion by other social scientists that jurors tend to decide cases according to their own standards of justice and are not much influenced by what the judge says." [at 461]

The authors added, "Interestingly, the only other study to investigate the effect of judges' instructions on jurors' use of inadmissible evidence found that a strong admonition from the judge can actually be counterproductive." [at 462, note 6, citation omitted].

that prospective jurors whose attitudes and opinions will interfere with their evaluation of evidence can be excused.

16. The Courtroom Setting for Voir Dire. Voir dire is essentially an interview situation with all the problems and benefits inherent in obtaining information within that format. It involves the court and counsel gaining as much useful knowledge as possible on certain subjects about a prospective juror, given a short amount of time. Based on prospective jurors' responses to questions, the court and the attorneys decide which prospective jurors may become trial jurors. The quality of the information obtained is controlled by the conditions under which the interview is conducted, the type of information sought, and the interview subject's perceptions of the end result of the interview.

17. The courtroom is an intimidating place for most prospective jurors. Most people, and therefore most prospective jurors, are uncomfortable speaking in front of large groups, something they are asked to do during voir dire in a criminal trial. Extensive empirical research in social psychology has documented the degree to which attitudes and behavior are shaped and influenced by situational conditions.[4] That is, characteristics of the setting often determine behavior more than do the personality characteristics of the person in that setting. In a typical voir dire, jurors answer questions in front of a group of strangers who include other jurors, attorneys, the judge, courtroom personnel, and other spectators. For over half a century, social psychologists have been studying the topic of the independence of individual judgment in a group setting. In one classic study, it was demonstrated that over one-third of the subjects asked to judge the length of a line went along with the majority, even when that majority was clearly and demonstrably wrong in its factual judgment.[5] When the experimental stimuli are statements of opinion endorsed by the majority of the group, the proportion of agreement is much higher.

18. Thus, the immediate environment exerts a powerful influence on what people say and do. The voir dire setting makes jurors highly sensitive about the

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[4] E.g., Sarbin, T., "Contextualism: A World View for Modern Psychology, in J. Cole (Ed.) Nebraska Symposium on Motivation (1976).

[5] Asch, S., "The Effects of Group Pressure Upon the Modification and Distortion of Judgments," in H. Guetzlow, ed., Groups, Leadership and Men, Carnegie Press, 1951.

expected consequences of their words and actions.[6] The voir dire process may inhibit even the most conscientious jurors from responding frankly and openly. Individuals are concerned about whether they receive approval or disapproval from others. Thus, they devote considerable time and energy to learning what factors will have a positive influence on how they will be received or evaluated, and they try to behave in a manner that will give a favorable impression.[7] This is particularly true in the presence of a respected authority figure, such as the judge, who is often perceived as having a higher social status than the juror, especially in the courtroom.

19. The Court's Role. For example, if the trial judge begins voir dire by telling the jury panel that the court is seeking a "fair and impartial" jury, then the prospective jurors can learn that their response "should" reflect that they are fair and impartial jurors.[8] By contrast, if the judge indicates instead that the court seeks open and honest responses during voir dire, then the prospective jurors will be more likely to respond frankly to questions, regardless of whether their responses display impartiality.

20. Problems can also arise if, during voir dire, prospective jurors become aware of specific "qualities" that the court is looking for in a juror. If, for example, the court indicates a strong desire to impanel jurors who are specifically not prejudiced against lawyers, prospective jurors may place an inordinate importance on appearing non-prejudiced. This phenomenon is what social psychologists have termed "evaluation apprehension," or heightened concern for what respected authority figures think of them.[9]

21. Open Voir Dire. The expressed attitudes of prospective jurors are also greatly affected, and can be modified, by what they learn about the beliefs and

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[6] For a discussion of the effects that perceived consequences have on attitudes and beliefs, see B. Collins and M. Hoyt, "Personal Responsibility for Consequences: An Integration of the Forced Compliance Literature," Journal of Experimental Social Psychology, 558-93 (1972).
[7] R. Arkin, et al., "Social Anxiety, Self-Presentation and the Self-Serving Bias in Causal Attribution," 38 Journal of Personality and Social Psychology 23 (1980).
[8] Jurors are acutely aware of subtle cues or indications from judges in the courtroom, and they based a number of important inferences upon them. E.g., Note, "Judges' Non-verbal Behavior in Jury Trials: A Threat to Judicial Impartiality," 6 Virginia Law Review 1226 (1975).
[9] E.g., M. Rosenberg, "When Dissonance Fails: On Eliminating Evaluation Apprehension from Attitude Measurement," Journal of Personality and Social Psychology 28 (1965).

attitudes of other prospective jurors. It is not uncommon for jurors to adopt what is called a "social desirability response set."[10] That is, prospective jurors will attempt to respond in what they may consider is a socially appropriate manner instead of by simply being truthful. This social behavior pattern actually causes some people to modify their own answers to conform to those, which they have heard expressed earlier by other jurors. The tendency to conform in a group has been well documented in the social psychology literature. The effect of this tendency is that opinions given in public often differ from opinions given in private.[11] It is difficult to educate jurors so that they understand that the purpose of voir dire is to get at jurors' real feelings, not to get people to say they are fair and impartial or that they will follow the law or the court's instructions. However, conducting voir dire with each prospective juror individually, out of the presence of others, leads jurors to be more forthright and revealing of their opinions;[12] the problem of tainting other jurors with prejudicial information is also avoided in the sequestered setting.

22. In addition, voir dire is an unfamiliar and uncertain environment for prospective jurors. Courtroom proceedings are relatively formal social situations with which most people are unfamiliar. Because of uncertainty and unfamiliarity, people are highly susceptible to "social comparison information," indications from other persons about the appropriateness of their behavior, attitudes, and feelings.[13]

23. Basically, people ask themselves how they look in comparison with others before answering a question. For example, some prospective jurors will

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[10] D. Marlowe and D. Crowne, "Social Desirability and Response to Perceived Situational Demands," 25 Journal of Consulting Psychology, 109 (1968).

[11] See A. Hare, Handbook of Small Group Research, The Free Press of Glencoe, 1962, and studies cited therein.

[12] The superiority of sequestered voir dire has been extensively studied, demonstrating that it gets information that is more accurate and more complete. E.g., S. Jones, "Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor," 11 Law and Human Behavior 131 (1987); M. Nietzel and R. Dillehay, "The Effects of Variations in Voir Dire Procedures in Capital Murder Trials," 6 Law and Human Behavior 1(1982); R. Christie, reported in M. Nietzel and R. Dillehay, supra 3-4; D. Broeder, "Voir Dire Examinations: An Empirical Study," 38 Southern California Law Review 503 (1965).

[13] E.g., L. Festinger, "A Theory of Social Comparison Processes," 7 Human Relationships 117 (1954).

knowingly cover up certain feelings or opinions when questioned in a group voir dire situation. Others will consciously try to have their answers conform as closely as possible to those of other members of the group, especially answers of those who appear to be the most "respectable" members of the group. Still others will contrive to be seated or excused by adjusting their responses to the results observed during the questioning of other prospective jurors. Socially acceptable responses to voir dire questions are established early in the voir dire process. These responses appear continuously throughout the examination, so that less and less honest information is elicited from the venirepersons during standard group voir dire as the process continues.

24. During voir dire, prospective jurors are often being questioned about delicate personal information, as well as about deeply held attitudes and moral values. They often are questioned about highly emotion-provoking facts and complex legal issues. Many times, jurors are asked their opinions about subjects that they have never examined or even much thought about before, such as the death penalty and their racial feelings. The presence of a large audience hampers their performance of this unfamiliar task.[14]

25. The psychological influences discussed above operate in standard group voir dire to mask or distort juror responses to precisely the kind of highly difficult questions that will be asked in this case. Prospective jurors who are concerned about how they will be evaluated by others in the courtroom, or who are answering in a socially desirable fashion in order to obtain the court's approval, are unlikely to admit to prejudice. At the very least, they tend to minimize prejudicial knowledge or attitudes, and to exaggerate their willingness and ability to put aside such prejudice. Nor are they likely to concede confusion concerning the basic constitutional tenets that should govern this trial.

26. Voir Dire in Potentially High-Prejudice Cases. In reading transcripts of many potentially high-prejudice cases, I found it easy to be lulled into believing that while many jurors knew something or had feelings about the case, they did not know too much, and almost all could be fair. I found the same with respect to possible prejudice deriving from racial or other attitudes,

[14] R. Zajonc, "Social Facilitation," 149 Science 269 (1965).

such as the death penalty. As noted above, response bias causes the juror-interviewee to pick up the subtle, and not so subtle, clues as to what the lawyer-judge-interviewer wants to hear. In voir dire on prejudice, the message is clear: Good jurors are not supposed to have prejudicial biases about issues in the case, but if they do, good jurors can set aside such matters and decide the case solely on the law and the evidence presented in and as instructed by the court. And that is what jurors say. This is not to suggest that generally the venireperson will consciously dissemble; it is to suggest that response bias will tend to mask certain information, both from the interviewer and the interviewee.

27. The same "good citizen" impulse leads a number of respondents in anonymous telephone surveys to claim that they are registered to vote when in fact they are not.[15] This effect, in response to an anonymous telephone pollster, is amplified in the presence of real authority figures in the courtroom, and particularly in open voir dire. The same process makes it difficult to assess problematic attitudes in prospective jurors such as their reaction to the race of the defendant.

28. A typical example occurred in a rape-kidnapping-murder Florida case in which I was involved and wrote about.[16] The two defendants were black males and the victim was a white woman. In a series of face-to-face interviews with investigators in the small rural county, local people made recorded remarks like "Damn niggers should be hung;" "It's a shame all those niggers come down from Tallahassee and commit crimes;" "They ought to cut their cocks off;" "Twenty years ago they would have hung 'em instead of all this crap;" "People are ready to take the jail apart. They better not get turned loose;" "It's about as serious as the Bundy case. If they need a hangman, I'll be glad to donate my time free;" and many others. The interviewers were threatened with guns and late-night

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[15] B. Silver, et al., "Who Overreports Voting?" 80 American Political Science Review 6,13 (1986).

[16] E. Bronson, The Effectiveness of Voir Dire in Discovering Prejudice in High-Publicity Cases: An Archival Study of the Minimization Effect. California State University, Chico. Discussion Paper Series, 1989. Also published as The Effectiveness of Voir Dire in Discovering Prejudice in High Publicity Cases: A Case Study of the Minimization Effect in 20th Anniversary Celebration Seminar. California Attorneys for Criminal Justice, 1993, presented as Does Prejudicial Pretrial Publicity Affect Jurors? at national meeting, Law and Society Association, Madison, 1989.

anonymous phone calls. A scientific survey documented the extent and depth of the prejudice, and content analysis of the newspaper coverage of the interracial rape-murder made the prejudice obvious. A very substantial percentage of this county of just 10,000 was either related to or knew the victim or her family, who owned and ran the general store

29. Yet the tone at the open voir dire was entirely different from what was measured through interviews and the survey. One reading the transcript of that voir dire found not a single racial epithet, no threats of lynching, and no characterizations of the trial as "crap," even though one knew, based on surveys and interviews, how widespread those feelings were in that jury pool. Some had opinions about guilt, but all minimized their knowledge and everyone assured the court they could be fair and impartial. Indeed, it took close to an hour to bring in the guilty verdict and a full half-hour to bring in the death penalty. If voir dire did not demonstrate the depth and breadth of prejudice in a case where it was so palpable, its efficacy in less dramatic cases is marginal, especially without procedures to increase its utility.

30. Those results are entirely consistent with what I almost always find when I compare the results from anonymous surveys with what appears in the transcripts of the voir dire of those cases. In the courtroom, one is much more likely to hear a good due process response: "I've got to hear the evidence," "he's entitled to the presumption of innocence," "I've got to hear all the facts." These remarks are far less common in anonymous surveys. That is why it is so important to do the sort of voir dire that will pierce the shibboleths of the courtroom to get at what people really believe.

31. A juror who alters a response to satisfy the judge, or who has not been asked the precise probing questions to get at the material or attitude the juror has, or whose initial responses are not explored, is a walking time bomb on the jury, since the real attitude or hostility could surface at any time.

32. In standard voir dire, the approach often is a conclusory, leading, and fixed-response question asking if the juror can put aside any bias or improper attitude if instructed by the court to do so, and "decide the case fairly on the law and the evidence presented at trial." It is a rare person indeed who declines this

invitation to be fair, to be a good citizen, and to follow the instructions of the august, black-robed eminence peering down from the bench. A similar approach is often used in death qualification, where a prospective juror who states that he or she would favor death in some cases but favor life in others is usually accepted without much further inquiry especially when narrow time constraints are imposed.

33. Many people tend to be quite unaware of their biases. It has been noted by the California Supreme Court:

> In fact, some authorities suggest that the accuracy of a person's estimation of his own fairmindedness is likely to be inversely proportional to the depth of his actual prejudices and predispositions. (See Friendly & Goldfarb, Crime and Publicity (1967) p.103)[17]

34. Only with follow-up questions and individualized and sequestered voir dire (which is best, but small group voir dire with a reasonable time limit would be very helpful) will defense counsel be able to identify some of the biased jurors or explore possible racism, case knowledge, and death penalty attitudes accurately.

35. Case Specific Problems. I would like now to expand somewhat upon the special problems that the defendant faces in this case that require the voir dire procedures suggested. The major problems are (1) that Mr. Allen is African-American; (2) that the prosecution is seeking the death penalty, and thus the jury must be death qualified; (3) pretrial publicity; and (4) the status of the victim as a California Highway Patrolman.

36. (1) Race. An issue of overriding concern in this case that will require searching and sophisticated voir dire is that of race. The defendant is black and the victim is white, and possible racism on the part of some panel members must

[17] People v. Williams, 29 Cal.3d 392 n.2 (1981).

be explored, especially in light of all the evidence that black defendants are more likely to receive the death penalty, especially when the victim is white.[18]

37. There is a concept from the sociology of deviance called "master identity."[19] All people have a large number of characteristics that are important to them, whether it be humor, intelligence, kindness, strength, etc. Their uniqueness and true character cannot be reduced to one salient major label. For most people we meet, we are able to appreciate their uniqueness and complexity, but certain characteristics are so emotionally loaded that they override other important features of that person in our internal view of them. Race is the classic example of master identity, the 400-pound gorilla that defines people. We pretend to ignore it, but it overwhelms individual identity, which is -- or ought to be -- the salient element in trying to present a cogent mitigation defense in a capital trial.

38. Of course, the fact that the victim in this case is white adds an additional layer of potential prejudice, since most members of the jury pool will also be white, creating the problem that they will be more likely to identify with the victim. This played out dramatically in a recent venue case in which I was involved, the Mehserle trial, in which a white BART officer killed a black man. In the venue survey, I found a huge disparity between the white and black defendants on the percentages believing the defendant was guilty. Focusing on the responses to whether the defendant was guilty of murder (the only charge at the time), exactly twice as many black respondents as white respondents (by 78% to 39%) said they thought the defendant was guilty. Sad to say, race still matters. To the extent possible, we should do what we can to

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[18] There are many examples of empirical research documenting racial bias by jurors in death-penalty decisions, e.g., R. Ross and E. Bronson, A Meta-Analysis of the Effect of the Race of the Defendant and Victim on the Prejudgment of Guilt and Penalty by Whites and Blacks in the Jury Pool, presented at the American Association for Public Opinion Research, Portland, 2000, also published as part of California State University, Chico Discussion Paper Series, 2000. The conclusion was, "Support for the death penalty in these (actual) cases clearly supports our original conjecture that blacks are less likely to support it, but especially when the defendant is black" at 15.

D. Baldus, et al., "Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia," 83 Cornell Law Review 1638 (1998).

[19] See E. Goffman, Stigma (1963).

protect the defendant against this pernicious effect, in this situation through helpful voir dire procedures.

39. A fascinating recent study demonstrated the extent to which racism is still a pervasive problem, although not the sort of blatant racism we often associate with the issue, as with hate crimes or the use of racial epithets. Researchers analyzed every pitch from the 2004 through 2006 major league baseball seasons. Their paper is called, "Strike Three: Umpires' Demand for Discrimination."[20] They found that after controlling for umpire, pitcher, batter, and catcher fixed effects, and many other factors, strikes were more likely to be called if the umpire and pitcher matched race/ethnicity. If a pitcher shared the home-plate umpire's race/ethnicity, he gave up fewer hits, struck out more batters, and improved his team's chance of winning.

40. To indicate how this matter could effect Mr. Allen's trial, I note that Mr. Allen's trial was originally set for trial in Modesto, not far from Sacramento, but the case was transferred to Sacramento after a change of venue hearing. The expert for the prosecution at that hearing had done a large-scale venue survey, which he presented. In that survey he found that of the respondents who were asked, "[D]o you feel you would be very, somewhat, not very, or not all prejudiced against Columbus Allen because he is in fact black?" He reported that 6% admitted they would be prejudiced and another 1.5% did not know or were not sure. While that information was presented to the trial judge as part of an effort to demonstrate that the racial issue was not a significant problem, it demonstrated that about one in every 12, or one person on every jury, could not even assure the anonymous surveyor of a lack of racial animus, despite the social desirability of professing racial tolerance. And that is just those who recognized their racism who and were willing to acknowledge it.

41. While Modesto may perhaps be a somewhat greater problem than Sacramento in this regard, those data are ominous. In court, and particularly in an open voir dire, it will be much more difficult to explore and identify the

[20] C. Parsons, et al., Social Science Research Network, IZA Discussion Paper No. 3899 92008), rescheduled for publication in American Economic Review (2011) as "Strike Three, Discrimination, and Incentives."

extent of this problem unless a maximum effort is made to make the voir dire effective.

42. Another racial matter of concern is that Columbus Allen fits the portrait of the racial stereotype of an African-American who is dangerous. His appearance, including the way he wears his hair, facts that likely will emerge at trial, including his extensive involvement with rap music and drugs, the fact that he is married but has a girlfriend, the nature of the crime itself -- a cop-killing (of a white cop) -- all play into that fearsome racial stereotype. In a recent study of this very issue, researchers found that the more stereotypically black a defendant is perceived to be, the more likely that person is to be found deserving a sentence of death, even controlling for other appropriate variables.[21] ☐

43. Racial bias is not an attitude that can be sufficiently tested with a questionnaire or with closed-end or conclusory queries. That is because the problem is not so much with bigots or the socially incorrect, as it was at an earlier time, but with those poisoned by the bias that is insidious, omnipresent, and usually neither recognized by the biased person nor acknowledged.

44. Thus, a leading voir dire question, such as, "Is there anything about the race of the defendant or the victim which would prevent you from being fair and impartial?" will inform the prospective juror that the "correct" answer is "no," and will provide the Court with no information regarding the subtle impact of the juror's biases.

45. Not only must the questioning often be somewhat roundabout, but there must also be follow-ups. Counsel may get the panel member to talk about how he or she feels about topics like interracial dating by their children, affirmative action, cases like O.J. Simpson or Rodney King, etc. Crucially, if

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[21] J. Eberhardt, et al., "Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes," 17 Psychological Science 5 (2006).

this is done in a group setting, it only works for the first few panel members; the others quickly learn the ropes.

46. (2) The Death Penalty. The fact that this is a death penalty case means that the Court will have to death-qualify the jury in order to guarantee that both the prosecution and the defendant will have a jury that will be able to make the awesome penalty decision with fairness under the appropriate legal standards, should the case reach that stage.

47. Social scientists have demonstrated, and some courts have accepted, that the process of death qualification, by itself, makes jurors more death oriented and willing to convict.[22] Professor Craig Haney has offered five reasons why death qualification biases jurors: (1) Prospective jurors, in an unfamiliar situation, look to authority figures for cues as to appropriate behavior. Those cues during death qualification come from the attorneys and the judge. Their dwelling on penalty implies guilt. (Why else discuss the penalty decision?) (2) A discussion of the death penalty implies the appropriateness of death in the case at bar, suggesting that the respected trial participants believe the case especially severe. (3) Prospective jurors are required, in advance, to assess their ability to vote for the death penalty; thinking about or imagining an event (that the defendant will be found guilty, and that the venireperson will be voting in the penalty phase) makes it more likely to assume the event will occur. This in turn will lead to jurors organizing subsequent information in a manner consistent with that assumption, leading to a guilt-oriented view of the trial evidence. (4) Death qualification may desensitize jurors to the death penalty, just as repeated exposure to killing in wartime or the butchering of hogs may make those tasks seem less awful or difficult. Such desensitization may make it easier to vote for death. (5) Finally, prospective jurors who see conscientious objectors to the death penalty excused for cause may believe the judge disapproves of those who oppose the death penalty.[23] Obviously, if panel

[22] C. Haney, "On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process," 8 Law and Human Behavior 121 (1984).

[23] Haney noted a possible sixth factor, that requiring jurors to take a public stand on their commitment to a willingness to impose the death penalty may intensify their commitment to use it.

members are exposed not only to their own death qualification, but also to that of many others, the process effects are much more troubling.[24]

48. The Automatic-Death-Penalty Juror. One special problem with death qualification concerns the identification of those who would automatically vote for the death penalty and thus are not qualified to serve in a capital case, so-called "ADP's." They are disqualified just as those who would always vote for life. In reviewing many transcripts, it is often true that when the court conducts the death qualification, or that is done in a preliminary manner on the questionnaire, using closed-end and leading questions, most prospective jurors give the "correct" answers.

49. Even when an open-ended question such as, "What is your view on the death penalty?" is asked, several ADPs will respond with something like, "I would support it in some cases but not in others." Such an even-handed answer satisfies most judges (and many attorneys as well). That is particularly true when the questioning is done under severe time constraints, and those panelists seem like they are less likely to be fruitful candidates for the expenditure of precious time. However, in some instances when the attorney continues to probe, asking under what circumstances the panel member might oppose it, there are answers like, "well, if it was self-defense," or "if it was an accident." When asked when they might impose the death penalty, some respond with the equivalent of "if I was sure he was guilty." It is only then that it is discovered that what seemed to be a neutral juror is really an ADP.[25]

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[24] All of these conclusions were strongly supported by the empirical data.

[25] For an extreme example, an excerpt from a transcript of a capital trial, quoted in C. Sevilla, "Great Moments in Courtroom History," 22 Forum 65 (1995), is as follows.

> Q: Why do you hold the opinion that you do regarding the death penalty?
>
> A: I am not in favor or against it because I think each case has different circumstances. I feel if you are found guilty of a serious crime where you take someone's life, you should be punished by the death penalty. If you are found not guilty you should not be punished by the death penalty.

50. The problem is multi-faceted. First, the death-qualifying questions are not understood by a significant percentage of prospective jurors. The tri-furcated proceeding of a capital trial is difficult for many to comprehend, especially since for many panelists, this is their first time as a juror, much less a juror in a death penalty case.

51. A second problem is the leading nature of these and other closed-end questions. Typically they include phrases like "never consider," or "refuse to consider," or "automatically vote for." Those are notions that suggest the respondent would be doing something improper, and indeed, one who gives the "wrong" answer will be "fired." In an open voir dire, that will discourage those watching from giving answers that might lead to a similar embarrassing fate.

52. The third problem is that if the Court, rather than counsel, is asking the questions, venirepersons will be even more reluctant to admit prejudice. Furthermore, given the use of technical legal terms, the inevitable confusion puts additional pressure on those answering to find some cues to what they are expected to say.

53. Those who do not give the expected responses are then subjected to rehabilitation, which will often be successful, particularly if done by the Court. It is not always clear whether the rehabilitee was confused when he or she gave the original response or whether the rehabilitation was a successful conversion brought on by the pressure of the catechismal procedure. While the correct answer may satisfy the legal requirements, one can have little confidence that the juror can really be fair. Only with careful and probing questions under ideal voir dire conditions will the Court and counsel be able to clarify these difficult problems.

54. While I have been concerned about this problem for many years, only within recent years have I begun to investigate the extent to which these somewhat masked ADPs occupy the jury pools of capital trials. In the study, presented to the national meeting of the American Association for Public Opinion

Research,[26] and selected for publication (somewhat edited) in the Association's on-line journal,[27] my colleague and I attempted to measure the number of jurors who initially say they can be fair in deciding on penalty, but in fact are likely to be unwilling to ever vote for life and thus should be excluded.

55. The data were collected in connection with venue surveys in four California capital cases, representing two rural and two urban counties.[28] Our primary purposes were to measure the level of knowledge in the community concerning the case, to determine if respondents had formed an opinion as to the defendant's guilt, and to see what each would chose as the appropriate penalty if the defendant were found guilty.

56. If respondents recognized the case (1,191 respondents, all jury eligible, did recognize the case), they were then asked about guilt and what penalty they thought was appropriate if the defendant were convicted, either the death penalty or life without possibility of parole. That information was then submitted to the trial court if a change of venue was sought. As part of the survey we also sought additional information that was not part of the venue survey, but obtained for research purposes, and I will present the findings relevant to ADPs here.

57. We followed up on those who told us they would vote for the death penalty for that defendant if he were found guilty by asking three questions to make the initial determination of whether they were ADPs. First, we asked if they would always impose it for persons convicted of first-degree murder. Those who said yes were identified as general ADPs. We also asked them if they would always impose the death penalty for persons convicted of the type of crime that was the subject of the venue survey, a child killing, two cop killings, and a multiple murder of five people. Those who said yes were identified as case-specific ADPs. But what about the others, those who said they would not

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[26] Co-authored with Robert S. Ross, Strength of Opinion in Death Penalty Decisions: An Investigation of Death Qualification on Producing Pro-Prosecution Attitudes and Unrepresentativeness of Juries in Capital Cases (2006).

[27] "True Feelings: Strength of Opinion of Those Who Support the Death Penalty," with R. Ross, Public Opinion Pros, July 2006.

[28] Orange County, Tehama County, Solano County, and Tulare County.

always impose the death penalty, and thus who appeared to be open to either penalty?

58. Based on experience, we believed they included a fair number of respondents who might be masked ADPS, so we asked a simple follow-up question. Those whose responses indicated they would not always vote for the death penalty were tasked to provide an example of when they would not vote for death. We found another 62 respondents, a significant percentage of the respondents,[29] who either gave answers such as "if it was self-defense," or "if I wasn't sure he was guilty," or who could not give a single example of a case in which the nature of the crime or some mitigating factor would not justify a penalty other than death.

59. In a voir dire, as compared with the anonymous survey, the percentage of masked ADPs is likely to be substantially higher because of the greater difficulty panel members have in giving answers that do not show fairness, open mindedness, and other qualities of what they perceive to be the proper good-citizen answers expected. One often sees panel members actually apologize for expressing views contrary to those unarticulated norms during voir dire.

60. Even more significantly, the Court will face a larger pool from which to identify both the admitted ADPs and masked ones. That is because in the survey we only had to winnow down the group for follow-up from those who had supported death for the defendant in the case. That is always a significantly smaller group than those who express general support for the death penalty. General support is higher for two reasons. First, support drops by quite a bit when people are asked to choose between the death penalty and LWOP, as compared to when they were asked whether they favor or oppose the death penalty. In our questionnaire, respondents were given that choice.

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[29] Given the nature of the four cases -- the rape-murder-kidnapping of a six-year-old girl, two cop killings, and the inter-racial execution-style killing of five victims -- plus the very high publicity surrounding the cases (all the basis of a possible change of venue motion), the respondents were relatively familiar with the cases and repelled by the killings. That no doubt led to a higher percentage of expressed ADPs and thus a smaller number who masked their sentiments than would otherwise be found.

Second, it is a very different question to ask someone, on the one hand, if they favor a policy that allows the state to have the death penalty available, which implies using it perhaps only in the "worst of the worst" cases (the typical voir dire initial question and the one used by most pollsters like Field or Gallup), which today a large majority favor, compared to asking, on the other hand, whether a particular defendant should receive the death penalty (as we did in our survey). Thus, our survey reduced the number of those whose attitudes needed to be explored, while the Court will have to review the attitudes of the larger group.

61. That is another reason why the Court's should avoid using a voir dire in the Allen case that is open, non-individualized, overly shortened, and primarily conducted by the Court using primarily closed-end questions. Such a voir dire will not provide for the selection of the sort of truly fair and impartial jury necessary for this case.

62. (3). Pretrial Publicity: Another Reason That Will Require Heightened Voir Dire. As the Court is aware, the Allen case was moved to Sacramento after a successful change of venue motion in Modesto. Some of the Sacramento television stations' coverage includes Modesto, so almost surely some of that prejudicial publicity was seen in Sacramento. But the case has had an even closer nexus to Sacramento County in that the defendant is from next door (both to Modesto and to Sacramento) in Stockton, and a good portion of the coverage focused there. Of greater significance, since the case was moved to Sacramento, there has been a good deal of local coverage once that current scheduling became known, and it is reasonable to assume that there will be more coverage as the trial date approaches.

63. The area of greatest concern, however, concerns the fact that the victim was a California Highway Patrol officer, Earl Scott. While the murder of a cop has almost always generated substantial media coverage and thus the potential need for a change of venue or other remedy, the killing of Earl Scott raised special concerns because it was part of an onslaught of the killing of CHP officers. Indeed, it was reported that the CHP had quickly lost six officers in the line of duty, and a statewide "stand-down" was ordered.

64. Furthermore, some of those killings occurred in the Sacramento area and were widely covered locally. In recent years, Officer Andy Stevens was gunned down in Yolo County in a case that was strikingly similar to what happened in the killing of Officer Scott. I note that the defendant in that case, Brendt Volarvich, was sentenced to death for the murder. There was extensive media coverage of the case.

65. Another such murder trial is currently underway in Placerville, a case that originally arose in Sacramento where the tragic chase of defendant David Zanon began. Mr. Zanon is also facing the death penalty for the murder of CHP Officer Douglas Scott Russell during that chase, and the trial is being reported locally now, and has been widely covered locally.

66. Still another case involving the shooting of an officer is also currently pending, also in Yolo County, where Marco Antonio Topete is facing the death penalty for the murder of Deputy Antonio Diaz during a chase on I-5. This is also a case that has been extensively covered locally.

67. The previous and continuing pretrial coverage of this case and related ones in the Sacramento area media is an important factor requiring in-depth Hovey voir dire, and, indeed, all of the matters referred to above require more than a standard voir dire approach if the fair trial rights of the defendant are to be adequately protected.

68. Remedies. The following remedies will be helpful in producing a voir dire that will ameliorate some of the problems identified above:

(1) Utilize Individualized and Sequestered Voir Dire. The most important remedy will be to conduct most of the voir in a sequestered and individualized format, which in my experience, is now commonly used by trial court judges. If the Court is not willing to adopt this procedure, at least for death qualification and other sensitive issues, then questioning in small groups will still be helpful.

69. Voir dire questioning of individual prospective jurors out of the presence of all (or most) other panelists can go a long way to reduce the impact

of the psycho-social factors described above. Individual or even small group voir dire minimizes those problems in several ways: (a) a smaller "audience" reduces prospective jurors' concerns about peer opinion; (b) jurors will feel more at ease, and the reduced stress makes it easier for jurors to remember what they know or feel about the case; (c) jurors have minimal opportunities to pick up cues from others about socially approved responses; (d) prospective jurors will be unable to contrive to be seated or excused, because they will not have the opportunity to observe most or any other jurors being questioned; and finally, (e) the questioning of jurors out of the presence of others prevents the ever-present danger that panelists, as a group, will be exposed to the prejudicial statements of another prospective juror.

70. As the California Supreme Court explained over a quarter century ago, the very process of death qualification itself makes juries more conviction prone and pro-death penalty.[30] These factors are called "process effects," and arise in addition to the compositional effects of death qualification from excluding those who are disqualified under Witherspoon-Witt. While a full Hovey voir dire is no longer required (CCP § 223), voir dire in the presence of other jurors is only proper when the Court determines that it is "practicable." The recognition that there are cases where open voir dire is not practicable suggests that in extreme cases, it may not be practicable. There are few cases where the facts supporting death are more severe than the Allen case, especially considering the race of the defendant. This would seem to be the kind of case that would make either sequestered or small group voir dire the appropriate approach. (Of course, small group voir dire would not require any decision on the issue of practicable, since such voir dire would by definition be "in the presence of other jurors." But there is no requirement that the voir dire be in the presence of all other jurors.) While the Court's decision on the voir dire issue is no doubt, as least under current law, unlikely to be disturbed on appeal, that should not be the appropriate standard; the test, at least in my opinion, ought to be what is fair and likely to result in the best voir dire possible, not whether the decision is so unfair that it actually violates the law or due process.

[30] Hovey v. Alameda County Superior Court, 168 Cal. Rptr. 128 (1980),

71. Other Voir Dire Issues. At least three methods have been used to study the efficaciousness of various voir dire techniques. In addition to general social-psychological theory, there are direct empirical data that support the use of improved voir dire procedures. These studies deal with (1) individualized questioning rather than en masse, showing the superiority of individualized voir dire (2) sequestered versus open voir dire, supporting sequestered voir dire; and (3) who conducts the voir dire, judge or attorney, showing attorney-conducted voir dire is better.

72. One methodology is to administer a pre-test to subjects in order to determine their attitudes. The experimenter then measures the extent to which different types of voir dire accurately disclose those attitudes.[31]

73. A second method is to compare voir dire transcripts of different processes, using as a criterion a count of the number of sustained defense challenges for cause, and to a lesser extent the guilt and penalty verdicts.[32]

74. A third approach is to compare juror disclosure during voir dire with what jurors really knew and felt.[33] Collectively, the studies showed that the methods I am recommending provide a better means of getting the information needed.

75. (2) Maximize Attorney-Conducted Voir Dire. A second method I recommend (one the Court may already practice) is to use primarily attorney-conducted voir dire, particularly in death qualification. The primary reason for my preference is that prospective jurors are more likely to be candid about their views when the voir dire is conducted by an attorney. Much research has shown, consistent with social-psychological theory, that the judge is seen by prospective jurors as an important authority figure, and that jurors will tend to be concerned

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[31] E.g., S. Jones, "Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor," 11 Law and Human Behavior 131 (1987).

[32] E.g., M. Nietzel and R. Dillehay, "The Effects of Variations in Voir Dire Procedures in Capital Murder Trials," 6 Law and Human Behavior 1(1982); R. Christie, reported in M. Nietzel and R. Dillehay, supra 3-4. The Nietzel and Dillehay study tested these methods specifically in death penalty cases, as the title states.

[33] E.g., D. Broeder, "Voir Dire Examinations: An Empirical Study," 38 Southern California Law Review 503 (1965); See Bronson, supra, note 16.

about displeasing him or her. Such a concern is likely to cause jurors to be less honest in their replies. This can become a particular problem when during death qualification the judge attempts to rehabilitate prospective jurors who gave initially disqualifying answers by explaining the law and the juror's duty, then describing the process of penalty-phase decision making. What is a well-intentioned procedure becomes a tutorial on what the correct answers are, exerting subtle pressure on the panel member (and others listening) to conform his or her answers to the Court's expectations. The responses thus derived may satisfy the record, but to a defendant whose life is at stake, affirmations derived in this manner may be insufficient.

76. (3) No Pre-Instructing The Panel Members (before the questionnaires are filled out or the voir dire is completed). It is far better to avoid telling panelists in advance the purpose of the questionnaire or the voir dire is to get a fair jury, that the defendant is presumed innocent, etc., matters that might lead some panelists to downplay biased attitudes and information they hold. Instead, it would be preferable to instruct them that there are no right or wrong answers, only complete and incomplete answers. After all, the purpose of voir dire is not to instruct the panel as to what their correct answers should be on questionnaires or during voir dire, but to enable counsel and the Court to select the fairest jury possible.

77. One federal case from the Northern District of California, United States v. Layton, is worth noting. The trial court judge, the late Chief Judge Robert F. Peckham, introduced the voir dire process in a way designed to place the jurors at ease. (This refers to the voir dire, rather than a questionnaire, but the same principles apply.) After the prospective jurors filled out questionnaires, the voir dire was conducted with each juror individually, out of the presence of others, resulting in a substantially greater number of cause challenges than might have occurred ordinarily. This was the criminal case arising from the Jonestown massacre. Jurors were forthright in revealing their opinions. Here is an excerpt from Judge Peckham's introduction to the voir dire:

> Ladies and gentlemen, I am going to briefly talk with you this morning . . . and then we will ask you your indulgence while we ask individual prospective jurors

> questions. You have already filled in the questionnaires . . . but it is necessary to ask additional questions. . . .
>
> The process we are about to begin is known as voir dire. I will ask you questions regarding your qualifications to serve. As I indicated, it will be done individually. . . .
>
> With respect to the questions that I will ask you individually, I want to emphasize that there are no right or wrong answers; that this is not the giving of a test; that I have no expectation from you as to what your answer ought to be; that you shouldn't in any way . . . feel that you should strive to give an answer that will be acceptable to me . . . .
>
> What this is all about is to get your honest, straightforward feelings when we ask you what they are, or straightforward answers as to your opinions or a factual response . . . . I emphasize that, because . . . it has been suggested by those who have studied the process that prospective jurors may feel that the authoritarian figure of the judge may play a role that is not really helpful to the process, and I can assure you that that's not my purpose. It will be a very informal atmosphere in which the questions are given to you . . . and your only obligation is to answer truthfully. There are no right or wrong answers. What is important is that you be as honest as you can . . . .
>
> What is most important is that you be as honest and forthright as you possibly can. Many of you will be excused from this jury. It should not be an embarrassment to you in any way . . . . It carries with it no disqualification . . . certainly no stigma. . . .
> What we ask is that above all you be, again, honest and forthright in stating your opinions and feelings.

United States v. Layton, CR-80-416-RFP, N.D. Calif., July 1981, Trial Transcript at 933 et seq. Of course, instructions on such matters as the presumption of

innocence are crucial; I only suggest they be deferred until the voir dire is completed.

78. (4) Use of Open-Ended Questions. Another barrier to eliminating bias or prejudice is that voir dire is often conducted with questions on questionnaires and in voir dire that use so-called fixed-response or leading questions. A fixed-response question is one in which the answer is limited to a single response, such as yes or no, agree or disagree. In social science research, such fixed-response questions are often asked to elicit factual information about a particular respondent, including knowledge or attitudes, but the answers lack depth. Although leading questions can be useful to obtain factual information about a juror's residence, age, or occupation, such questions are often less useful to acquire more substantial information about a venireperson's attitudes. Such leading questions are often designed to suggest or control the content of the response elicited, as in cross-examination. Thus, a leading voir dire question, such as, "Is there anything about the race of the defendant or the race of the victim in this case which would prevent you from being fair and impartial?" will inform the prospective juror that the "correct" answer is "no," and will provide a court with no information regarding the subtle impact of the juror's biases. Only open-ended questions, which require jurors to formulate their thoughts in a sentence or two, will allow counsel some means of penetrating stereotyped and socially desirable responses, that is, to separate those jurors without unfair prejudice from those who are merely unaware of their unfair prejudices. Accordingly, it is important that the voir dire includes questions that are non-leading and that require the prospective juror to respond with a few sentences rather than a single word.

79. One additional observation is appropriate at this juncture. Voir dire that includes non-leading questions can take less time than most customary voir dire. A single open-ended question that allows a prospective juror to speak a few sentences will reveal more information than numerous and often lengthy leading questions.

80. (5) Reasonable Time for Voir Dire. In a case of this magnitude, I believe the Court should not set artificially low time limits for the voir dire.

81. Conclusion. In summary, as to voir dire, it is my opinion that the above-described social-psychological processes do operate in open, non-individualized, judge-conducted voir dire situations so as to impede the selection of a fair and impartial jury. The situation is exacerbated in the Allen case because the District Attorney is seeking the death penalty, because of the race of the defendant, and due to pretrial publicity. It will be extremely difficult to detect bias or prejudice without some less restrictive voir dire procedures.

82. Therefore, I urge the Court to take certain precautions during jury selection in the Allen case. Based on my own research and familiarity with the literature, the precautions I recommend are: (1) that voir dire questioning on most matters, but at least as to the identified sensitive ones discussed above, be conducted of the jurors individually and out of the presence of other jurors (or at least in small panels); (2) that voir dire be conducted as much as possible by the attorneys; (3) that the panel not be pre-instructed on applicable legal principles prior to filling out questionnaires and completing voir dire; (4) that the voir dire questioning be in-depth and extensive, with emphasis on open-ended questions, which encourage prospective jurors to express their own opinions and attitudes in their own words; and (5) that the Court provide a reasonable amount of time for voir dire questioning so that both sides can obtain a truly fair jury.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

Executed on this twelfth day of July 2010, at Chico, California.

EDWARD J. BRONSON

EXHIBIT 2

UNIVERSITY OF CALIFORNIA, BERKELEY
GOLDMAN SCHOOL OF PUBLIC POLICY

GSPP09-002

Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants

(Running Head: Race, Death, & Verdicts)

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June 24, 2009

Abstract

When anticipating the administration of the death penalty, mock jurors may be less inclined to convict defendants. Furthermore, minority defendants have been shown to be treated more punitively. We conducted a survey-embedded experiment with a nationally representative sample to examine the effect of sentence severity as a function of defendant race, presenting respondents with a triple murder trial summary, manipulating the maximum penalty (death vs. life without parole) and the race of the defendant. Respondents who were told life-without-parole was the maximum sentence were not significantly more likely to convict Black (67.7%) than White defendants (66.7%). However, when death was the maximum sentence, respondents presented with Black defendants were significantly more likely to convict (80.0%) than were those with White defendants (55.1%). The results implicate threats to civil rights and to effective criminal incapacitation.

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Keywords: Sentence severity; prejudice; discrimination; capital punishment; legal decisionmaking

Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants

Experimental research has demonstrated that when jurors expect that defendants will receive relatively severe punishments, they are more inclined to acquit (Kerr, 1978). The effect of sentence severity could apply with particular force to capital cases[1] because the death penalty is irreversible and morally potent. Alternatively, the possibility of a death sentence could signal crime brutality and trigger punitiveness.

Defendant race is likely to moderate the role of sentence severity. White defendants are, on average, treated more leniently than are minority defendants (e.g., U.S. General Accounting Office, 1990; Sommers & Ellsworth, 2001; Mitchell, 2005). Because people tend to dehumanize minorities (Demoulin et al., 2004; Goff, Eberhardt, Williams, & Jackson, 2008), concerns about wrongful convictions may be less of a factor for judgments of Black defendants.

Asking respondents in a nationally representative sample to make an acquit/convict decision on a murder case, we experimentally manipulated the possibility of a death sentence as the maximum sentence (vs. life without the possibility of parole) and the race of the defendant. In so doing, we offer the first test of the unique effect of the death penalty (above and beyond permanent incarceration) as well as the first test of the interaction of sentence severity and defendant race on verdicts.

[1] Hester and Smith (1973) found suggestive, mixed evidence for this in an American undergraduate sample judging cases ostensibly taking place in Mexico. Their conviction rate was surprisingly low – under 50% -- and their comparison condition was a sentencing range of 20 years to life, not life without parole, precluding a strict comparison of equally incapacitative sentences.

Method

Procedure. Respondents read a triple-murder trial summary within which were manipulated maximum sentence (life without parole vs. death) and defendant race (Black vs. White). Our manipulation of maximum sentence simulates the ways (e.g., living in a state that either does or does not have capital punishment) that jurors could come to presume that the death penalty was either possible or not for a given case.

The 1,185-word trial summary was pilot tested on an undergraduate sample to develop a realistic stimulus. The summary provided detailed information about the case, including description of the crime, witness testimony, the relationship between the defendant and the victims, and closing arguments. The maximum sentence was conveyed by anchoring the mandatory sentencing range, stated at the beginning of the summary and repeated twice, with "life in prison without parole" versus "death by lethal injection." The defendant's ostensible race was manipulated by using first names stereotypically associated with Blacks (Darnel, Lamar, Terrell) or Whites (Andrew, Frank, Peter).

The dependent variable, decision to acquit or convict, was assessed immediately following the case summary, using the following language:

> Based on your reading of the preceding case, if you were a juror in this case, what would be your judgment with regard to the three counts of murder? If you believe the defendant was guilty *beyond a reasonable doubt*, then you should vote to convict. If not, you should vote to acquit.

Sample. A random sample of 276 American adults was obtained through Time-Sharing Experiments in the Social Sciences (TESS).[2] TESS employs a high-quality national survey conducted by Knowledge Networks (KN). KN engages in rigorous sampling procedures, including random digit dialing with extensive follow-up recruitment. The survey is Web-administered, and KN provides personal computers and Internet access to participants who do not already have them. Median age was 46. 50% were women. 84.8% were White, 6.2% Hispanic, and 4.7% Black.

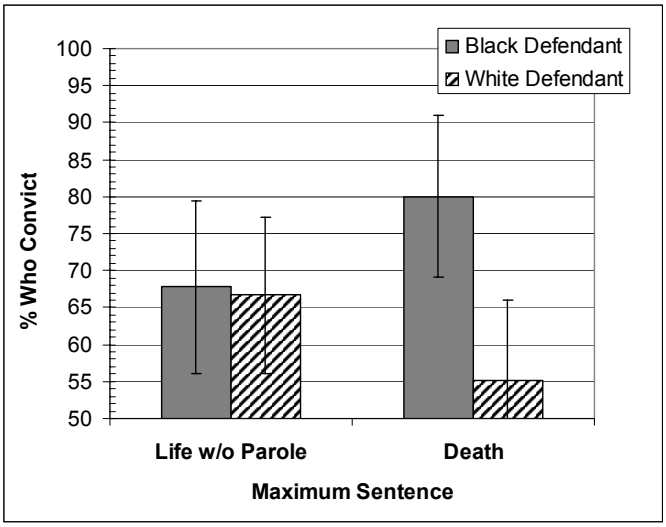
Results

We conducted a 2-way factorial analysis of variance.[3] As Figure 1 depicts, there is a significant interaction of maximum sentence and defendant race, $F(1, 272) = 4.54$, $P = .034$, $r = .13$, reflecting a larger race effect in the death penalty condition. There is a main effect of defendant race – a greater tendency to convict Black (73.9%) than White (60.9%) defendants, $F(1, 272) = 5.4$, $P = .021$, $r = .14$, but this is driven by the death penalty condition, where 25% more Black than White defendants were convicted, $Z(137) = 3.24$, $P = .002$, $r = .27$. The simple effects of maximum sentence for Black ($P = .11$) and White ($P = .156$) defendants trended toward significance.

[2] The collected sample had 314 respondents. Thirty-eight were dropped because they took an extremely short or long time to complete the survey, based on discontinuities in the duration distribution. The pattern of results was the same with these respondents.

[3] Log-linear and logistic regression analyses yielded equivalent results.

Figure 1. Effects of maximum sentence and defendant race on percent of respondents who indicate they would convict the defendant.



Error bars represent 95% confidence intervals.

Death Qualification. In capital cases, prosecutors "death qualify" juries by rejecting those disinclined to condemn anyone to death. Accordingly, we replicated the analysis excluding the 89 respondents who indicated that they do not support the death penalty. The pattern of results was nearly identical. In the death penalty condition, Black defendants were convicted at a higher rate (80.4%) than were White defendants (56.5%), $Z(95) = 2.6$, $P = .011$, $r = .26$.

Discussion

The demonstration that possible sentence severity has a qualitatively different effect on verdicts for ostensibly Black and White defendants is novel. The lower rate of convictions for White defendants is consistent with past work by Kerr (1978), who theorized that a more severe penalty raises the juror's estimated "cost" of a wrongful conviction. It is possible that for participants with Black defendants, wrongful conviction

was a lesser concern, and instead the death penalty reinforced the brutality of the crime. Furthermore, capital punishment may feel more appropriate for Black defendants, given that they are overrepresented on death row, and that research has indicating that convicted capital defendants who look more stereotypically Black are more likely to be given a death sentence (Eberhardt, Davies, Purdie-Vaughns, & Johnson, 2006). The present results provide evidence that capital punishment may be more than another *domain* of racial disparities; it may actually be a *cause*.

In addition to the civil rights concerns, another implication of the present findings relates to the death penalty's incapacitative function. Given that execution irreversibly incapacitates convicts, capital punishment's effectiveness in this regard should be uncontroversial. However, the present results indicate that the aggregate effect of capital punishment could be the incapacitation of fewer criminals. If we consider the conviction rate in the experiment's life-without-parole condition the "expected" outcome, upward departures (as with Black defendants) implicate increased probability of wrongful convictions. Downward departures (as with White defendants) increase the probability of wrongful *acquittals*. Wrongful convictions do not reliably promote criminal incapacitation, but wrongful acquittals reliably undermine it. The net effect of the death penalty could therefore be diminished incapacitation of society's most violent criminals.

Acknowledgments

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EXHIBIT 3

California Law Review
July, 2006

Symposium on Behavioral Realism

*1169 DISCRIMINATION AND IMPLICIT BIAS IN A RACIALLY UNEQUAL SOCIETY

R. Richard Banks, Jennifer L. Eberhardt, Lee Ross [FNd1]

Introduction

For most of American history, racial discrimination was legally permissible and racial bias was openly espoused. African Americans, in particular, were regarded as inferior to Whites and subjected to the most rank forms of overt discrimination.

Now, our society seems to have developed a broad consensus in opposition to racial bias and to discrimination that burdens minorities, a consensus from which only extremists would openly depart. Discrimination is prohibited, as a matter of constitutional and statutory law, in a wide range of settings. Racism has been morally condemned and discredited. However much commentators may disagree about measures that benefit minorities, all join in opposing bias and discrimination. [FN1]

A considerable amount of current scholarship assesses the extent of bias and discrimination in contemporary society. How much bias remains in people's hearts and minds? Does discrimination continue to stunt the progress of African Americans? These questions gain urgency from the persistence of racial disparities that disadvantage African Americans in various domains, including the criminal justice system. Many social ***1170** scientists, social psychologists among them, have investigated the persistence of bias and discrimination in American society. [FN2]

In this Article, we consider two bodies of social psychological research, one relating to the criminal justice system in particular, and the other concerning racial bias generally. The criminal justice studies bear on issues of racial profiling, the use of lethal force, and criminal sentencing. These studies all find evidence that race continues to influence individuals' decisionmaking and behavior. The racial bias research centers on the Implicit Association Test (IAT), which aims to measure implicit bias that operates beyond individuals' conscious awareness, and may exist even among individuals who genuinely believe themselves to be unbiased. Consistent with the criminal justice studies, the IAT research has found that race continues to be psychologically salient.

While these bodies of research constitute valuable empirical evidence of the continuing significance of race, in this Article we use the studies to probe the nature of the consensus opposition to bias and discrimination. More specifically, we show that the ostensible consensus fractures as one moves from broad statements of principle to specific circumstances. The consensus splinters not so much because of support for bias and discrimination, but rather because there are multiple ways to conceptualize bias and to enact the antidiscrimination principle in the criminal justice context.

Consider the application of the antidiscrimination principle in the criminal justice context. It is often extraordinarily difficult to identify individual instances of discriminatory decisionmaking by, say, police officers, in part because of the discretion they exercise. Thus, claims about discrimination will tend to focus on racially disparate outcomes, which may be interpreted as evidence of discriminatory decisionmaking. Moreover, racial disparities may be perceived as unfair in their own right, even in the absence of discriminatory decisionmaking. In the criminal justice context, then, the antidiscrimination principle becomes somewhat akin to an equal treatment principle. [FN3] Understood as equal treatment, however, the goal of nondiscrimination may be unrealizable. Equal treatment would mandate the removal of unjust disparities. But in a society as racially unequal as ours, in which Blacks and Whites are so dissimilarly situated, the ***1171** elimination of one troublesome disparity will often give rise to another. Being fair to Black perpetrators of crime, to use the simplest example, might entail being unfair to Black victims of crime. In sum, then, enforcement of the antidiscrimination principle in the criminal justice context entails choosing among inequalities.

Pervasive racial inequality also complicates the question of what it would mean to be racially unbiased. According to the most straightforward account, to be racially unbiased would require one to accord race no more significance than, say, eye or hair color, and to act as though one does not notice race. But this understanding accords with neither our actual practices nor the ideals those practices embody. Our social practices and legal rules permit, indeed encourage, some species of race consciousness that virtually no one views as morally objectionable. Identifying racial bias, then, must entail deciding that some forms of race consciousness are more, or less, morally objectionable than others, a determination with respect to which reasonable minds may differ.

Recognizing the indeterminacy of our antidiscrimination and antibias ideals as they are applied in our racially unequal society yields a number of benefits. It encourages us to think more concretely about the meaning of racial equality. It draws attention to the interplay between legal ideals and social structure. It highlights the tradeoffs that enforcement of the non-discrimination mandate may entail, and the substantive assessments that do, or at least should, inform that calculus. Ultimately, incorporating inequality into antidiscrimination analysis underscores the difficulty of the challenges we face in attempting to refashion the racial legacy of our past.

Part I presents the findings of studies that bear on the selection of individuals for investigation, the use of deadly force, and sentencing. Part II demonstrates the indeterminate meaning of the nondiscrimination mandate in the criminal justice context. Part III uses the IAT research to highlight the difficulty of defining racial bias.

I

The Research Findings

This Part reviews the findings from a number of studies that examine the potential influence of race with respect to investigative decisionmaking, the use of lethal force, and criminal sentencing. [FN4] Racially disparate outcomes in each of these areas have prompted claims of discrimination and unfairness.

***1172** A. Racial Profiling

During the mid- to late-1990s, the disproportionate stopping and investigation of innocent racial minority motorists fueled substantial controversy about racial profiling by law enforcement officers. [FN5] The issue of racial profiling is an obvious point of intersection between controversies about race, crime, and criminal justice on the one hand, and social psychological research on the other. Racial profiling is a form of stereotyping, [FN6] which social psychologists have studied extensively. [FN7] Psychologists have documented and explored the longstanding ste-

reotype of African Americans as violent and prone to criminality. [FN8] Indeed, this is the stereotype most commonly applied to Blacks--or at least to young Black males. [FN9]

In a recent series of experimental studies, Eberhardt and colleagues examined the psychological association between race and criminality. [FN10] In one study, they exposed police officers to a group of Black faces or a group of White faces and asked, “Who looks criminal?” [FN11] They found that police officers not only viewed more Black faces than White faces as criminal, but also viewed those Black faces rated as the most stereotypically Black (e.g., those faces with wide noses, thick lips, or dark skin) as the most criminal of all.

Eberhardt and colleagues also examined more directly how the stereotypic association between African Americans and criminality might operate in the context of racial profiling. Specifically, they investigated whether research participants would become more likely to visually attend to, or focus on, Black people when the participants were prompted, or more precisely primed, to think about crime. [FN12] Eberhardt and colleagues found that both students and police officers, when they were primed to think about violent ***1173** crime, became more likely to look at a Black face rather than a White face. [FN13] Moreover, officers who were primed to think about violent crime and who misremembered a Black male image tended to recall that image as more stereotypically Black than it in fact was. [FN14] Although one must be cautious in extending the findings of laboratory studies to real world settings, this research highlights the possibility that when officers are looking for wrongdoing, they may be inclined to look toward Blacks rather than Whites. Moreover, African Americans with a highly stereotypical Black appearance may be subject to the most scrutiny of all.

Perhaps surprisingly, Eberhardt and colleagues were unable to explain their results on the basis of individual differences in participants' levels of explicit racial bias. [FN15] The researchers examined whether student participants' performance in the various aspects of the study were associated with their scores on conventional measures of racial bias, and did not find any statistically significant relationship. [FN16]

B. Shooting Behavior

The most contentious issue with respect to which law enforcement officers have been accused of racial stereotyping may be the use of force, particularly lethal force. Information compiled by the Bureau of Justice Statistics indicates that African Americans are four times more likely than Whites to die during, or as a result of, an encounter with a law enforcement officer. [FN17] The most widely publicized case is that of Amadou Diallo, a West African immigrant shot to death by New York City police officers who believed, wrongly, that he was carrying a gun. [FN18]

The Diallo tragedy spurred a number of studies--conducted not only with university undergraduates but in some cases with community members and police officers as well--that have examined the potential ***1174** influence of a suspect's race on a research participant's decision to “shoot” the suspect. [FN19] Such studies generally use some form of video game simulation in which participants are presented with a series of images of Black or White men who are either “armed” (e.g., holding a gun) or “unarmed” (e.g., holding a wallet or cell phone), and instructed to “shoot” only if the “suspect” is “armed.” [FN20]

The shooting studies, conducted by several different groups of researchers, all found that shooting behavior differed based on the race of the “suspect.” [FN21] One finding was that images of unarmed Black men were more likely to be “shot” than were images of unarmed White men, [FN22] a result consistent with the shootings of unarmed Black men that have generated so much controversy. [FN23] As with the racial profiling studies discussed above, the shooting behavior studies that tested for a correlation between shooting behavior and explicit racial bias did not find it. [FN24] Shooting behavior did not ***1175** vary as a function of participants' scores on a conventional measure of racial bias.

C. Sentencing Decisions

There has been a great deal of empirical research concerning racial discrimination in sentencing, in particular capital sentencing. [FN25] The most common finding of the capital sentencing research is that killers of White victims are more likely to be sentenced to death than are killers of Black victims. [FN26] This finding holds even when statistically controlling for a wide variety of nonracial factors that may influence sentencing, and has been characterized by the United States General Accounting Office as "remarkably consistent across data sets, states, data collection methods, and analytic techniques." [FN27] A less consistent finding is that Black defendants are more likely than White defendants to be sentenced to death. [FN28]

Two recent studies have extended the sentencing discrimination research by examining what is arguably a more nuanced form of racial discrimination. Each study used actual sentencing data to investigate whether a stereotypically Black appearance is related to the severity of a defendant's criminal sentence. [FN29] In one study, Eberhardt and colleagues presented the photographs of actual African American defendants convicted of murder and eligible for the death penalty to naïve participants who were asked to rate the racial stereotypicality of each face. [FN30] The researchers ***1176** found that among African American defendants convicted of murdering White victims, death sentences were given to 58% of those rated as more stereotypically Black, but only to 24% of those rated as less stereotypically Black. This stereotypicality effect remained statistically significant even after controlling for defendant attractiveness and various other nonracial factors known to influence sentencing, including, for example, aggravating and mitigating circumstances, murder severity, defendant socioeconomic status, and victim socioeconomic status. [FN31]

In a similar study, [FN32] Blair and colleagues had participants view the faces of Black and White prison inmates, [FN33] and rate how stereotypically Black each face appeared relative to other members of the offender's racial group. [FN34] While Blacks and Whites were given sentences of comparable length, [FN35] "within each race, more Afrocentric features were associated with longer sentences, given equivalent criminal histories." [FN36] The researchers concluded that even when controlling for differences in criminal history, those defendants who possessed the most stereotypically Black facial features (relative to other members of their racial group) received, on average, sentences nearly eight months longer than those who possessed the least stereotypically Black features. [FN37]

These studies' use of actual sentencing data precludes any examination of whether sentencing decisions correlate with explicit bias. But both studies highlight a novel form of discrimination--racial stereotypicality discrimination--which has received substantial attention by social psychologists in recent years. [FN38]

***1177** The sorts of discrimination that these studies highlight--in the shooting of unarmed suspects, the investigation of innocent people, and criminal sentencing--may not be readily identifiable in specific cases. Efforts to eliminate such discrimination thus become efforts to eliminate racial disparities, which are taken as evidence of discrimination, and which may seem unfair in their own right.

As we will show, however, the effort to eliminate particular racial disparities in the domain of criminal justice is likely to produce other disparities, which might also be viewed as unfair. Such tradeoffs reflect the disproportionate numbers of African Americans in comparison to Whites among those who commit crime, are victimized by crime, and are incarcerated. [FN39] Racial disparities in incarceration rates have worsened during the past few decades, even as absolute levels of imprisonment have increased for all groups. [FN40] Between 1974 and 2001, the likelihood of entering prison increased for Black men more than for any other group. [FN41] Young Black men are now more than seven times more likely than young White men to be incarcerated. [FN42]

African Americans both disproportionately commit and are victimized by violent crime. African Americans are nearly seven times more likely than Whites to be murdered, and approximately twice as likely to be robbed, raped, or sexually assaulted. [FN43] Although less than 13% of the ***1178** country's population, [FN44] African Americans commit approximately half of murders and robberies, and one-third of assaults and rapes. [FN45] Even for drug crimes, where it is extraordinarily difficult to determine the race of offenders (as opposed simply to the race of those arrested or convicted), the best available evidence is consistent with the disproportionate involvement of African Americans in the drug trade, either as regular users of hard drugs or, especially, as drug dealers. [FN46]

II

Alternative Conceptions of Discrimination

In this Part, we illustrate competing meanings of nondiscrimination with respect to investigative decisionmaking, the use of force, and sentencing.

A. Racial Profiling

Consider three criteria of equal treatment in investigative decisionmaking: the likelihood that an innocent person will be investigated, the likelihood that a guilty person will be apprehended, and the likelihood that a stop or search will uncover evidence of wrongdoing. [FN47] If group crime rates differ substantially across groups, it may be impossible to simultaneously eliminate racial disparities in each of these outcomes. Given that the campaign against racial profiling arose largely in response to the disproportionate investigation of innocent minority motorists, one might decide to decrease the rate of investigation of Blacks, so that innocent Blacks would be no more likely to be investigated than innocent Whites.

Reducing the stop-search rate of Blacks might equalize the likelihood that an innocent person would be investigated, but it would also decrease ***1179** the likelihood that guilty Blacks will be apprehended. [FN48] If the crime rate is higher among Blacks than Whites, but the rates of investigation are the same, then an African American criminal will be less likely to be apprehended than a White criminal. [FN49] To equalize across groups the likelihood that a criminal will be apprehended would require increasing stop-search rates among Blacks, which would have the unfortunate consequence of also increasing the likelihood that innocent Blacks are investigated. Additional stops or searches would ensnare more of the guilty, but also burden more of the innocent. More generally, the basic dilemma is that one cannot attain equality across groups with respect to both the investigation of the innocent and the apprehension of the guilty. Either innocent members of the higher crime rate group will be subject to a greater likelihood of investigation, or a greater percentage of criminals from the higher crime rate group will be permitted to remain at large.

The calculus becomes even more complicated in light of the fact that equal treatment could also be defined in terms of either the level of crime or the social consequences of crime. In this view, the equal treatment principle would be violated either if law-abiding African Americans are burdened by more criminal wrongdoing than are Whites, or if the social harms of crime are greater in African American communities--perhaps because those communities are already disadvantaged--than in White communities.

These additional formulations of the equal treatment principle underscore the inevitability of tradeoffs when crime rates differ substantially across groups and most crime is intra-racial. Apprehending the same percentage of wrongdoers in each group, for example, would leave more Black criminals than White criminals at large as a proportion of each group's population, [FN50] and would leave law-abiding African Americans subject to more crime than law-abiding Whites.

This simple example underscores our central point: enforcing the nondiscrimination mandate in our racially stratified society often entails choosing among disparities. The various formulations of equal treatment are in tension and cannot all be realized. Thus, one must choose among them, which requires evaluating the costs and benefits, both for particular groups and for society as a whole, of the various sets of outcomes. [FN51]

***1180** B. Shooting Behavior

The findings of the shooting behavior studies further highlight the difficulty of simultaneously realizing alternative conceptions of equal treatment. Recall that research participants (some of whom were police officers) were more likely to "shoot" unarmed Black suspects than unarmed White suspects, and more likely to "not shoot" armed White suspects than armed Black ones. [FN52] The claim of unequal treatment is plain: unarmed Blacks were more likely to be shot than unarmed Whites, which might plausibly suggest that the lives of innocent Blacks were valued less than the lives of innocent Whites. These findings comport with Bureau of Justice Statistics data that Blacks are four times as likely as Whites to be killed by police. [FN53]

In the shooter bias studies, race is unrelated to the likelihood that a suspect is armed. [FN54] Data compiled by the Bureau of Justice Statistics, however, put into question whether that experimental condition reflects the circumstances that police officers actually confront. Blacks are not only overrepresented as victims of police violence, they are also overrepresented as perpetrators of violence against police. [FN55] While Blacks are four times more likely than Whites to be killed by police, police officers are also five times more likely to be killed by a Black person than by a White person. [FN56]

If race is associated with the likelihood that a suspect is armed, [FN57] eliminating the disproportionate shooting of unarmed Blacks might produce a racial disparity in the likelihood that an officer would be shot by an armed suspect. More generally, equalizing the probability across races of shooting an unarmed suspect could preclude equalizing the probability of failing to shoot an armed suspect. [FN58] Evaluating shooting outcomes would ***1181** require not only deciding how to balance the goals of protecting the lives of innocent suspects and of police officers, but also deciding how to balance protecting the lives of innocent Whites as opposed to innocent Blacks.

C. Sentencing

The sort of tradeoffs we have been describing are both salient and familiar in connection with capital sentencing, where research has consistently found that killers of Whites are more likely to be sentenced to death than are killers of Blacks. [FN59] Because most homicides are intra-racial, eliminating the race-of-victim disparity--either through executing more murderers of Blacks or fewer murderers of Whites--would create or exacerbate a race-of-defendant disparity. [FN60] The same dilemma would arise, of course, had the researchers initially found a sentencing disparity based on the race of the defendant rather than the race of the victim.

As with the race-of-defendant and race-of-victim disparities, eliminating stereotypicality discrimination in sentencing could produce a racial disparity in intergroup outcomes. Recall that Eberhardt and colleagues found that Black defendants' racial stereotypicality influenced their likelihood of being sentenced to death only when their victims were White. [FN61] Eliminating stereotypicality discrimination through executing fewer high stereotypicality Blacks would diminish the race-of-victim disparity. Alternatively, executing more low stereotypically Black defendants would exacerbate the race of the victim disparity. In either case, a race-of-defendant disparity would emerge if there had not been one previously. Similarly, eliminating the stereotypicality disparity that Blair uncovers only among White defendants would yield a race-of-defendant disparity. Eliminating such stereotypicality discrimination through lessening the sentence severity of some White defendants, for example, would result in Black defendants, as a group,

receiving harsher penalties than White defendants. [FN62]

The studies reviewed above examine discrimination in the domain of criminal justice. In the next Part, we consider the study of implicit bias.

***1182** III

Alternative Conceptions of Bias

In this Part, we use the Race IAT to consider the question of the meaning of racial bias in a society that has disavowed racism, yet remains racially unequal.

A. The Implicit Association Test

When social scientists began to measure racial bias in the early decades of the twentieth century, they focused on attitudes and beliefs that people consciously hold and explicitly endorse. [FN63] Racial bias,as reflected in such conventional measures, has declined precipitously since then, as changing social norms have stigmatized racism as morally repugnant. [FN64] However, it is difficult to know whether the apparent decline in bias reflects simply people's unwillingness to voice sentiments that they continue to hold but know are socially disfavored, or their lack of awareness of their own bias. In response to these possibilities, social psychological researchers in recent years have developed a number of less obtrusive or indirect measures of racial bias. [FN65]

Perhaps the best known and most widely publicized of such measures is the Implicit Association Test (IAT), [FN66] a methodologically rigorous, computer administered test that now can be taken over the internet. The IAT is intended to uncover “implicit bias” by measuring the strength of the association between social categories (e.g., Blacks or Whites) and positive and negative attributes (e.g., “joy” and “love” versus “agony” and “evil”). Although separate IATs have been developed with respect to many different traits (e.g., sex, age, nationality, weight, political affiliation, and sexual orientation), [FN67] the form of the IAT that has attracted the most attention is the Race IAT, [FN68] which has been taken by more than four million people. [FN69]

***1183** The Race IAT requires the participant to sort images or words that appear on a computer screen as quickly as possible into either of two categories. [FN70] Each category consists of the pairing of a racial group and a positive or negative attribute. In one iteration, the negative attribute would be paired with Blacks, and the positive attribute with Whites. [FN71] As words appear on the computer screen, the participant is instructed to indicate as quickly as possible, by pressing specific buttons on the keyboard, whether the word belongs to the Black-negative pairing or the White-positive pairing. In the next iteration, the pairings are reversed (i.e., in our example, Black would be paired with the positive attribute and White with the negative one), and participants are again instructed to assign new words as quickly as possible to one pairing or the other. [FN72]

The difference in response time in these two conditions is the measure of implicit bias. If a participant more quickly sorts images and words when Black is paired with the negative attribute and White with the positive attribute (compared to when the pairings are reversed), then the participant is said to have an implicit bias against African Americans. [FN73] The majority of participants sort words and images faster when White is paired with the positive attribute, and Black with the negative attribute. [FN74] The majority of participants are thus said to have an implicit bias against African Americans. [FN75] For the findings of the IAT to be viewed as a measure of bias, however, requires a definition of bias.

***1184** B. “Bias” and Race Blindness

A common starting point for thinking about racial bias might be that it involves perceiving or thinking differently of someone on the basis of race. An unbiased person, in this view, would accord race no more significance than, say, eye or hair color, and would behave as though one does not notice race. [FN76]

However appealing this conception of bias may seem in the abstract, most people do not really believe that according race any more significance than eye or hair color necessarily constitutes bias. The centrality of race to our history and the substantial racial inequalities that continue to pervade society render race an extraordinarily salient and meaningful social category. A generation after the civil rights movement, African Americans remain segregated, [FN77] and disadvantaged relative to Whites with respect to employment, earnings and assets, educational achievement and attainment, and health and longevity. [FN78] The average White family earns 1.5 times as much income, [FN79] and has several times as much wealth, as the average Black family. [FN80] Additionally, African Americans are more than twice as likely as Whites to be unemployed. [FN81] In fact, in 1996, Black male high school dropouts aged twenty to thirty-five were more likely to be in prison than employed. [FN82] The race gap in educational achievement is substantial as well. [FN83]

The significance of these pervasive inequalities is reflected in our actual intuitions about bias. Even those who laud the ideal of race blindness would admit, if pressed, that in our society one need not, and perhaps cannot, be blind to race. [FN84] Most of us believe that it is proper, desirable even, ***1185** to pay some attention to race, even in ways that burden racial minorities. Indeed, some commentators have argued that not noticing race, or acting as though race does not matter, is itself a form of racial bias. [FN85]

In the criminal justice context alone there are many instances where private citizens and public officials alike act in a race conscious fashion and yet are not viewed as racially biased. The crime victim who notices the race of an assailant, and the police officer who only stops people of the same race as the assailant are not viewed as having engaged in racial discrimination. Equal protection doctrine reflects these intuitions: no court has ever found a law enforcement officer's decision to stop individuals of one race rather than another racially discriminatory if the officer does so because he is seeking a specific criminal suspect of that race. [FN86] Indeed, virtually no scholar or court has seriously considered the possibility that either private citizens or law enforcement officers should act as though they are blind to the race of specific criminal assailants or accord race no more weight than any other observable characteristic. [FN87]

So, the distinction between being racially biased and racially unbiased cannot be a distinction between race blindness and race consciousness, or between according race significance and not, for everyone is race conscious and vests race with more meaning than physical characteristics such as eye or hair color. On this view, if the findings of the Race IAT constitute evidence of racial bias it cannot be because they confirm that people deviate from some ideal of being (nearly) blind to race.

C. Bias and Race Consciousness

So when we decide whether something is racially biased we are drawing distinctions among psychological states that are all, at some level, race conscious. We might designate a race conscious psychological state as biased if it is sufficiently similar to paradigmatic forms of bias or if it causes racial discrimination.

1. A Similarity-Based Determination

One way of deciding whether a particular psychological state should be viewed as biased would be to compare it to states of mind that are universally regarded as racist. An irrational animus toward or dislike of an entire group, a

broadly applied and invariant stereotype that is resistant to refutation, a belief that some fundamental or inherent difference marks ***1186** some groups as inferior to others--such views are paradigmatic instances of racism. [FN88] The more similar the new case to these paradigmatic cases, the greater the warrant for the designation "bias." [FN89] Yet such similarity-based judgments are far from objective. Rather than merely cataloguing features, similarity judgments entail the selection of some features as more fundamental than others, [FN90] a calculus that invariably relies on some implicit account of what makes something what it is. [FN91] With respect to racial bias, this is precisely the sort of question about which views differ.

Controversy regarding the Race IAT aptly illustrates this sort of disagreement. [FN92] Some researchers assert that Race IAT scores do not signify bias because they measure one's knowledge of racial stereotypes and prejudices that are prevalent in society, and do not imply that one endorses those beliefs and attitudes. [FN93] Other researchers counter that one need not endorse an attitude or stereotype for it to warrant the designation "racial bias." [FN94] These researchers may disagree about whether the Race IAT measures bias partly because they disagree about the nature of bias. Is an unfavorable stereotype an instance of bias only if one endorses it? Does bias refer only to attitudes or beliefs that are irrational? [FN95] Or only those beliefs that are either conscious or resistant to change? [FN96] While commentators may interpret the empirical evidence differently, they may also conceptualize bias differently, in which case the disagreement would likely not be resolved by further methodological refinement. Precisely because the ***1187** identification of bias entails conceptual and normative judgment, it will reflect differences in individual values that may be irreconcilable.

2. A Behavior-Based Determination

One way out of this conceptual morass would be to declare simply that a mental state signifies bias if it consistently produces discrimination against African Americans. In this view, if implicit bias against African Americans, as measured by the IAT, predicts discrimination against African Americans, then Race IAT scores would signify a form of racial bias. [FN97] This is a reasonable approach. Explicit measures of bias do not powerfully predict discrimination. Nor is implicit bias, as measured by the IAT, highly correlated with explicit bias. [FN98] So maybe discrimination, of the sort evident in the shooting studies for example, could be predicted by implicit bias. [FN99]

Thus far, however, there is little evidence that Race IAT scores correlate with discrimination against African Americans. Most of the race-crime research has not yet incorporated an IAT measure. The one study we discuss that attempted to correlate IAT scores with shooting behavior did not find a statistically significant relationship between the two. [FN100]

Beyond the domain of race and crime, evidence linking IAT scores and racially discriminatory behavior is similarly sparse. The few published studies that have found a statistically significant relationship between participants' Race IAT scores and their performance in a study concern aspects of one's demeanor that are both subtle and ambiguous (e.g., eye contact, speech errors, and facial expression). [FN101] While such physical cues ***1188** may be socially consequential, [FN102] they are probably not what most people think of when they think of discriminatory behavior. Such aspects of demeanor might also be consistent with any of a number of psychological states. A White person might make less eye contact with a Black person than a White person because he dislikes or devalues Black people, because he fears being perceived as a racist, [FN103] or because he feels more comfortable with other White people. It is difficult to characterize such subtle "behaviors" as biased in the absence of information about their psychological antecedent. [FN104] A disinclination to make eye contact would reflect bias if prompted by group animus or negative stereotypes, but probably not if prompted by fear of oneself being negatively perceived or evaluated. And views might differ as to whether comfort with one's own racial group is necessarily racist. If eye contact, speech errors, and facial expression can only be condemned as discriminatory behavior based on suppositions about the psychological state that produced them, then such "behaviors" cannot be used as the basis for deciding whether the Race IAT measures bias. In sum, the behavioral approach does not resolve the question of whether Race IAT scores constitute

bias because the promise of the IAT as a predictor of unquestionably racially discriminatory behavior has yet to be realized. [FN105]

The difficulty in deciding whether Race IAT scores signify racial bias is part of a broader disagreement about the meaning of racial bias and discrimination. Consider, for example, the sentencing studies by Eberhardt and by Blair, both of which found that the more stereotypically Black a defendant appeared, the more likely he was to receive a harsh sentence. [FN106] ***1189** Whereas Eberhardt found that stereotypicality discrimination operated against Blacks convicted of murdering White victims, [FN107] Blair found that Whites who looked more stereotypically Black received harsher sentences than Whites who looked less so. [FN108] People might disagree about whether such stereotypicality discrimination should count as racial discrimination and, by extension, whether the psychological state that animates such discrimination should count as racially biased. If a juror treats Whites and Blacks equally as a group, but disfavors Blacks who appear most stereotypically Black, has that juror manifested racial bias? And if one views stereotypicality discrimination against some Black murderers of White victims as racially biased, would the same judgment apply to Blair's findings, [FN109] where only White defendants' sentences were found to depend on how stereotypically Black they appeared? [FN110]

Ultimately, what constitutes bias depends, quite simply, on how we choose to conceptualize it. In a society as racially unequal as ours, in which to be unbiased cannot require something akin to race blindness, the question of what should count as racial bias is itself contestable.

Conclusion

In this first decade of the twenty-first century, we often talk as though we have developed a consensus opposition to racial bias and to discrimination that burdens racial minorities. The simplest and most straightforward account of the normative consensus is that bias and discrimination are wrong and should be eliminated. Our primary goal in this Article has been to show that this consensus is imperiled by the racial inequality that pervades our society. The apparent consensus operates at a high level of generality and fractures as one applies it to concrete cases in our racially stratified society. We have renounced racial bias, but we have yet to agree what constitutes racial bias. We oppose discrimination in the criminal justice system, but we may have very different ideas about what non-discrimination would look like. The terms bias and discrimination are thus ***1190** much more indeterminate than lay, and scholarly, discourse often presuppose.

The indeterminacy of these terms undermines their analytical usefulness. An abstract commitment to antidiscrimination and antibias principles will, all too often, fail to resolve a concrete policy question or dictate a moral stance toward a particular race conscious state of mind. One means of better grappling with questions of racial fairness that arise in the criminal justice system would be to evaluate directly the harms and benefits associated with particular outcomes. This approach could help to realize the substantive values that animate the antidiscrimination principle, even as it would, ironically, deemphasize the question of whether any decision-maker acted on the basis of race. Whatever the analytical benefits of such a more policy-oriented approach, its ideological consequences would need to be considered as well. Popular understanding of the antidiscrimination and antibias principles may obscure substantive disagreement, but it also has made much useful political action possible. Our central claim then is not normative so much as descriptive: The ascendance of the antidiscrimination principle and the disavowal of racism have relocated rather than resolved disagreement about the meaning of racial equality in this first decade of the twenty-first century.

[FNd1]. The authors are all faculty members at Stanford University, Banks in the Law School, and Eberhardt and Ross in the Department of Psychology. The authors benefited greatly from the feedback offered at discussions at the University of Pennsylvania Law School and at the Center for Advanced Study in the Behavioral Sciences. Thanks as well to Christine Jolls, Mark Kelman, Dick Craswell, Carol Steiker, Kim Forde-Mazrui, Cecilia Ridgeway, Bob Weisberg, Ewart Thomas, and Laura Beny for extraordinarily useful comments and conversations regarding earlier versions of this Article. Hilary Burbank Bergsieker, Su Jin Gatlin, Uchenna Ibekwe, Mehdi Miremadi, Renee Stowitzky, and Lori Wu provided excellent research and editorial support. The extraordinary patience of the editors of the California Law Review has been appreciated during the long development of this Article.

[FN1]. A note about our terminology is in order. Throughout this Article, the terms racial bias and racism are used interchangeably, as are Black and African American. When we refer to discrimination we mean discrimination that burdens historically disadvantaged racial minorities.

[FN2]. See, e.g., Confronting Racism: The Problem and the Response (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998); John F. Dovidio & Samuel L. Gaertner, Aversive Racism, in 36 Advances in Experimental Social Psychology (M.P. Zanna ed., 2004); Susan T. Fiske, Stereotyping, Prejudice, and Discrimination, in 2 Handbook of Social Psychology 357 (Daniel T. Gilbert et al. eds., 4th ed. 1998); James M. Jones, Prejudice and Racism (1998); Prejudice, Discrimination, and Racism (John F. Dovidio & Samuel L. Gaertner eds., 1986).

[FN3]. Our characterization of antidiscrimination as equal treatment is meant to capture popular understanding of the antidiscrimination principle, in the criminal justice context in particular. We are making no strong claim, either descriptive or normative, about the interpretation of the antidiscrimination principle, and are fully aware that any such argument would require much more elaboration than we are able to provide here.

[FN4]. Consistent with the focus of the social psychological research, we focus on the case of African Americans. Of course, similar issues may arise with other groups.

[FN5]. See R. Richard Banks, Beyond Profiling: Race, Policing, and the Drug War, 56 Stan. L. Rev. 571 (2003).

[FN6]. A racial profile represents the belief that members of one racial group are more likely than members of another racial group to be involved in a particular type of criminal activity. See R. Richard Banks, Race-Based Suspect Selection and Color Blind Equal Protection Doctrine and Discourse, 48 UCLA L. Rev. 1075 (2001).

[FN7]. For an overview of stereotyping research, see, e.g., Fiske, supra note 2, at 357.

[FN8]. Patricia G. Devine & Andrew J. Elliot, Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited, 21 Personality & Soc. Psychol. Bull. 1139 (1995).

[FN9]. Paul M. Sniderman & Thomas Piazza, The Scar of Race 43-45 (1993).

[FN10]. Jennifer L. Eberhardt et al., Seeing Black: Race, Crime, and Visual Processing, 87 J. Personality & Soc. Psychol. 876 (2004).

[FN11]. The faces were all of Stanford University students and staff, none of whom had any criminal history.

[FN12]. A priming manipulation is a widely used technique in experimental psychology studies that involves briefly presenting participants with a stimulus (e.g., a word or image) and subsequently with some other stimulus to which the

participants must respond. The research aims to determine how the prime influences responses to the subsequent stimulus.

[FN13]. Eberhardt et al., supra note 10, at 886-88.

[FN14]. Id. at 881-83. The student participants did not complete a memory task.

[FN15]. Eberhardt and colleagues used the Modern Racism Scale and the Motivation to Control Prejudiced Responding Scale as measures of explicit racial bias and bias control, respectively. Both are commonly used measures in social psychological studies. For discussion of the Modern Racism Scale, see John B. McConahay, et al., Has Racism Declined in America? It Depends on Who Is Asking and What Is Asked, 25 J. of Conflict Resolution 563 (1981). For discussion of the Motivation to Control Prejudice Measure, see Bridget C. Dunton & Russell H. Fazio, An Individual Difference Measure of Motivation to Control Prejudiced Reactions, 23 Personality & Soc. Psychol. Bull. 316 (1997).

[FN16]. Eberhardt et. al., supra note 10, at 880, 884-85. The researchers were unable to obtain explicit prejudice measures for individual officers.

[FN17]. Jodi M. Brown & Patrick A. Langan, U.S. Dep't of Justice, Bureau of Justice Statistics, Policing and Homicide, 1976-98: Justifiable Homicide by Police, Police Officers Murdered by Felons 5 (Mar. 2001). The disproportion we refer to is judged against population figures and does not imply that African Americans who have violent encounters with the police are 4 times as likely to die as Whites who have violent encounters with the police.

[FN18]. Although the Diallo case has become popularly associated with racial profiling, the officers involved contended that they were searching for a rape suspect whose description Diallo allegedly matched. Francie Latour, Protests Rise Over Diallo Verdict, Boston Globe, Feb. 27, 2000, at A6; Tracey Tully & John Marzulli, Feds Rip NYPD on Racial Bias, Cite Poor Defense vs. Profiling, N.Y. Daily News, Apr. 28, 2000, at 8.

[FN19]. See, e.g., Joshua Correll et al., The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J. Personality & Soc. Psychol. 1314 (2002); Anthony G. Greenwald et al., Targets of Discrimination: Effects of Race on Responses to Weapons Holders, 39 J. Experimental Soc. Psychol. 399 (2003); E. Ashby Plant & B. Michelle Peruche, The Consequences of Race for Police Officers' Responses to Criminal Suspects, 16 Psychol. Sci. 180 (2005); E. Ashby Plant et al., Eliminating Automatic Racial Bias: Making Race Non-Diagnostic For Responses to Criminal Suspects, 41 J. Experimental Soc. Psychol. 141 (2005).

[FN20]. In a related set of studies, participants were primed with either a Black or White face and asked to identify, as quickly as possible, whether an object displayed on a computer screen was a gun or a tool. B. Keith Payne, Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon, 81 J. Personality & Soc. Psychol. 181 (2001). See also Eberhardt et al., supra note 10; Charles M. Judd et al., Automatic Stereotypes vs. Automatic Prejudice: Sorting Out the Possibilities in the Payne (2001) Weapon Paradigm, 40 J. Experimental Soc. Psychol. 75 (2004).

[FN21]. See Correll et al., supra note 19, at 1325; Greenwald et al., supra note 19, at 403; Plant & Peruche, supra note 19, at 182; Plant et al., supra note 19, at 153.

[FN22]. See, e.g., Correll et al., supra note 19, at 1325. More generally, participants made the fastest and most accurate decisions when deciding whether to shoot armed Black men and unarmed White men. See Greenwald et al., supra note 19, at 403; Correll et al., supra note 19, at 1320. As one research team concluded, “[T]he decision to shoot an armed target is made more quickly and more accurately if that target is African American than if he is White, whereas the

decision not to shoot is made more quickly and accurately if the target is White." Correll et al., supra note 19, at 1320. While Plant and Peruche did find that police officers were more likely to mistakenly shoot an unarmed Black suspect than an unarmed White suspect, they tested for accuracy only, not for speed. See Plant & Peruche, supra note 19, at 181.

[FN23]. See, e.g., Julian E. Barnes, Haitian-Americans March to Protest Brutality by Police, N. Y. Times, Apr. 21, 2000, at B3; Francis X. Clines, Appeals for Peace in Ohio After Two Days of Protests, N. Y. Times, Apr. 12, 2001, at A18; Bill Farrell, Gowanus Park Will Honor Teen, N.Y. Daily News, July 18, 2001, at Suburban 1; The Patrick Dorismond Case, N. Y. Times, Mar. 21, 2000, at A22; Amy Waldman, Officer Charged with Misdemeanor Assault in Shooting of Teenager, N. Y. Times, June 10, 2000, at B3.

[FN24]. Correll, for example, after noting that participants who scored low in racial prejudice were just as likely to exhibit the shooter bias as participants who scored high in racial prejudice, concluded that shooting behavior "does not seem to simply reflect prejudice toward African Americans, and there is reason to believe the effect is present simply as a function of stereotypic associations that exist in our culture." Correll et al., supra note 19. Neither Plant and Peruche nor Plant et al. attempted any such correlation. The other studies found no correlation between shooting behavior and explicit bias.

[FN25]. One of the leading empirical analysts of the death penalty is David Baldus. See, e.g., David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990); David C. Baldus et al., Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661 (1983); David C. Baldus et al., Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia, 18 U.C. Davis L. Rev. 1375 (1985); David C. Baldus et al., Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction, 51 Wash. & Lee L. Rev. 359 (1994); see also Samuel R. Gross & Robert Mauro, Death and Discrimination: Racial Disparities in Capital Sentencing (1989).

[FN26]. U.S. Gen. Acct. Off., Report to the Senate and House Committees on the Judiciary, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (Feb. 1990).

[FN27]. Id.

[FN28]. David Baldus et al., **Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638 (1998)**.

[FN29]. See, e.g., Irene V. Blair et al., The Influence of Afrocentric Facial Features in Criminal Sentencing, 15 Psychol. Sci. 674 (2004); Jennifer L. Eberhardt et al., Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, 17 Psychol. Sci. 383 (2006);. An interesting experimental study of discrimination in the sentencing of juvenile offenders is Sandra Graham & Brian Lowery, Priming Unconscious Racial Stereotypes About Adolescent Offenders, 28 Law & Hum. Behav. 483 (2004).

[FN30]. Eberhardt et al., supra note 29. Drawing from a database of 600 death-eligible cases in Philadelphia that reached the penalty phase between 1979 and 1999, Eberhardt and colleagues asked study participants to rate, on a scale of 1 to 11, how stereotypically Black each of 162 Black defendants appeared. The photographs included a randomly selected group of 118 defendants who had murdered Black victims, and the entire group of 44 Black defendants who had murdered White victims. The participants who rated the faces neither knew the purpose of the study nor that the photographs depicted convicted murderers. Id. at 383-84.

[FN31]. Id. at 384.

[FN32]. Blair et al., supra note 29.

[FN33]. The researchers randomly selected from the Florida Department of Corrections Database 216 male inmates whose trials took place during a three year period when sentencing laws were unchanged. Id. at 675.

[FN34]. This comparison is an important aspect of their methodology. Faces were given stereotypicality ratings relative to other members of their group. Participants were asked to rate how stereotypically Black a Black person appeared relative to other Blacks, and how stereotypically Black a White person appeared relative to other Whites. Thus, ratings of Black stereotypicality cannot be readily compared across groups. Because offenders' stereotypical Blackness was rated relative to other members of their own racial group, White offenders were judged, in the aggregate, as no more stereotypically Black than Black offenders. Id.

[FN35]. The researchers found that "Black and White offenders, given equivalent criminal histories, were given roughly equivalent sentences." Id. at 677.

[FN36]. Id. at 677.

[FN37]. Blair, supra note 29, at 674-79.

[FN38]. See, e.g., Irene V. Blair et al., The Automaticity of Race and Afrocentric Facial Features, 87 J. Personality & Soc. Psychol. 763 (2004); Irene V. Blair et al., The Role of Afrocentric Features in Person Perception: Judging by Features and Categories, 83 J. Personality & Soc. Psychol. 25 (2002); Irene V. Blair et al., The Use of Afrocentric Features as Cues for Judgment in the Presence of Diagnostic Information, 35 Eur. J. Soc. Psychol. 59 (2005); Eberhardt et al., supra note 10; Keith B. Maddox & Stephanie A. Gray, Cognitive Representations of Black Americans: Reexploring the Role of Skin Tone, 28 Personality & Soc. Psychol. Bull. 250 (2002); Keith B. Maddox & Stephanie A. Gray, Manipulating Subcategory Salience: Exploring the Link Between Skin Tone and Social Perception of Blacks, 34 Eur. J. Soc. Psychol. 533 (2004).

[FN39]. The most provocative effort to situate increased incarceration rates in the context of racial inequality more generally was made by Loïc Wacquant. Loïc Wacquant, Deadly Symbiosis: When Ghetto and Prison Meet and Mesh, 3 Punishment & Soc'y 95 (2000).

[FN40]. In 2002, the prison and jail population in the United States exceeded two million for the first time. See Paige Harrison & Jennifer Karburg, Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2002 2, tbl.1 (2003).

[FN41]. Thomas P. Bonczar, U.S. Dept. of Justice, Prevalence of Imprisonment in the U.S. Population, 1974-2001, 5 (2003). The number of Black individuals in prison or on parole grew from 1,117,200 in 1986 to 2,149,900 in 1997. Bureau of Justice Statistics, Adults Under Correctional Supervision By Race 1986-97, available at http://www.ojp.usdoj.gov/bjs/glance/tables/cpracetab.htm (last visited May 19, 2006). For an earlier thoughtful analysis of racial trends in incarceration, see Alfred Blumstein, Racial Disproportionality of the U.S. Prison Populations Revisited, 64 U. Colo. L. Rev. 743 (1993).

[FN42]. According to recent data, Black men ages twenty-five to twenty-nine are 7.6 times more likely to be in prison than White men of the same age group. Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 11 (2005). Black women are 4.4 times more likely than White women to enter prison. Id. Black

men are more than 6.9 times more likely than their White peers to enter prison. Id. at 11, tbl.14. Among Black men born between 1965 and 1969, 30% without a college education and 60% of those who dropped out of high school had been in prison by 1999. Becky Pettit & Bruce Western, Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration, 69 Am. Soc. Rev. 151 (2004).

[FN43]. More precisely, African Americans are 6.8 times as likely as Whites to be murdered, twice as likely to be robbed, and 2.1 times as likely to be raped or sexually assaulted. These ratios were calculated based on information contained in Shannan M. Catalano, Bureau of Justice Statistics, Criminal Victimization 2004 7, tbl.6 (2005).

[FN44]. African Americans constitute 12.8% of the U.S. population. U.S. Census Bureau, Annual Estimates of the Population by Sex, Race and Hispanic or Latino Origin for the United States: April 1, 2000 to July 1, 2004 (2006), available at http://www.census.gov/popest/national/asrh/NC-EST2004-srh.html (last visited Apr. 28, 2006). Approximately 14% of males fifteen to twenty-four years old (a group that commits a disproportionate amount of street crime) are African American. See U.S. Census Bureau, Male Population by Age, Race and Hispanic or Latino Origin for the United States: 2000, available at http:// www.census.gov/population/cen2000/phc-t9/tab02.pdf (last visited May 19, 2006).

[FN45]. According to the U.S. Department of Justice Statistics, in 2004 African Americans were arrested for 47.2% of murders, 53.3% of robberies, 32.7% of assaults, and 31.9% of rapes. Federal Bureau of Investigation, U.S. Department of Justice, Crime in the United States 2004 298, tbl.43 (2005).

[FN46]. Banks, supra note 5, at 582-82.

[FN47]. If an innocent person's likelihood of being stopped does not depend on his race, then innocent Whites and Blacks are being treated equally. Guilty African Americans and Whites would be treated equally if a Black perpetrator is no more or less likely than a White perpetrator to be apprehended. Under the third criterion, the equal treatment principle would be satisfied if stops of Blacks are as likely as stops of Whites to yield evidence of wrongdoing. For a finer grained discussion of this issue, see Banks, supra note 5.

[FN48]. The equalization of stop-search rates might also cause accuracy rates to diverge. See Jeff Dominitz, How Do the Laws of Probability Constrain Legislative and Judicial Efforts to Stop Racial Profiling?, 5 Am. L. & Econ. Rev. 412 (2003).

[FN49]. A disparity across groups in the percentage of wrongdoers apprehended could be viewed as unfair to either group. Not only might law-abiding members of the high crime rate group assert a claim of unfairness, but perhaps so too could criminal perpetrators from the low crime rate group, who would face a higher likelihood of apprehension than their high crime rate group peers. See Albert W. Alschuler, Racial Profiling and the Constitution, U. Chi. Legal F. 163, 223 (2002).

[FN50]. See Amy Farmer & Dek Terrell, Crime Versus Justice: Is There a Trade-Off?, 44 J.L. & Econ. 345 (2001).

[FN51]. Banks, supra note 5, at 586-87.

[FN52]. More generally, there are two types of potential errors--one is to shoot an unarmed suspect; the other is not to shoot an armed suspect--the frequency of which is likely inversely related. Fewer shootings of unarmed suspects, for example, could be achieved at the price of more failures to shoot armed suspects and, presumably, more dead police officers. In some studies the joint probability of an error was nominally greater for White suspects, see, e.g., Correll et al., supra note 19; and Plant et al., supra note 19. In other studies the joint probability of error was nominally greater

for Black suspects. See Plant & Peruche, supra note 19.

[FN53]. Brown & Langan, supra note 17, at 26.

[FN54]. Studies conducted by Plant and colleagues attempted both to document the so-called shooter bias and to reduce or eliminate it through training. Using the same videogame format as Correll, Plant found that "although the participants were initially more likely to mistakenly shoot unarmed Black suspects than unarmed White suspects, after extensive practice with the program, in which the race of the suspect was unrelated to the presence of a weapon, this racial bias was eliminated both immediately and 24 hr. later." See Plant & Peruche, supra note 19.

[FN55]. Brown & Langan, supra note 17.

[FN56]. Id. at 26.

[FN57]. Throughout this discussion, references to the likelihood that a suspect is armed also include the likelihood that a suspect would use his or her weapon to avoid arrest.

[FN58]. Moreover, it could be the case that the best way to minimize the joint probability of any innocent person being shot and of any law enforcement officer being shot would be to employ a different shooting criterion for Blacks than for Whites. The decision to select a baseline that minimizes both types of error would conflict with the principle of raceblind decisionmaking if race is associated with the likelihood that a suspect is armed, and if decisionmaking is more accurate when race is taken into account than when it is not.

[FN59]. U.S. Gen. Acct. Off., supra note 26.

[FN60]. This tradeoff has been discussed, most famously, in connection with the empirical data the Supreme Court confronted in McCleskey v. Kemp, 481 U.S. 279 (1987). See, e.g., Randall L. Kennedy, McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court, 101 Harv. L. Rev. 1388 (1988).

[FN61]. Eberhardt et al., supra note 29.

[FN62]. In this case, the antidiscrimination norm would benefit the group viewed as the historical beneficiary rather than as the victim of discrimination. For a similar use of antidiscrimination in the gender context, see, e.g., Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[FN63]. See Gordon W. Allport, Attitudes, in A Handbook of Social Psychology 798 (Carl Murcheson ed., 1935); Daniel Katz & Kenneth W. Braly, Racial Prejudice and Racial Stereotypes, 30 J. Abnormal & Soc. Psychol. 175 (1935); Daniel Katz & Kenneth W. Braly, Racial Stereotypes of One Hundred College Students, 28 J. Abnormal & Soc. Psychol. 280 (1933).

[FN64]. Devine & Elliot, supra note 8; John F. Dovidio & Samuel L. Gaertner, Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches, in Prejudice, Discrimination, and Racism 1 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

[FN65]. See Russell H. Fazio & Michael A. Olson, Implicit Measures in Social Cognition Research: Their Meaning and Use, 54 Ann. Rev. Psychol. 297 (2003) (reviewing a range of methods for measuring implicit bias).

[FN66]. Anthony G. Greenwald et al., Measuring Individual Differences in Implicit Cognition: The Implicit Association Test, 74 J. Personality & Soc. Psychol. 1464 (1998). The IAT has received a substantial amount of publicity in the popular press. See, e.g., Don't Race to Judgment, U.S. News & World Rep., Dec. 26, 2005, at 90, available at http:// www.usnews.com/usnews/health/articles/051226/26spirit.race.htm; Shankar Vedantam, See No Bias, Wash. Post, Jan. 23, 2005, at W12.

[FN67]. See, e.g., Rainer Banse et al, Implicit Attitudes Towards Homosexuality: Reliability, Validity, and Controllability of the IAT, 48 Zeitschrift Fur Experimentelle Psychologie 145 (2001); Greenwald et al., supra note 66 (utilizing the IAT to measure differences between Japanese Americans and Korean Americans in their evaluative associations toward Japanese and Korean ethnic groups); Becca R. Levy & Mahzarin R. Banaji, Implicit Ageism, in Ageism: Stereotyping and Prejudice Against Older Persons (Todd D. Nelson ed., 2002); Brian A. Nosek et al., Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site, 6 Group Dynamics: Theory, Research, and Practice 101 (2002) (reporting results from race, age, gender, and political affiliation IATs).

[FN68]. See Fazio & Olson, supra note 65, at 307-08 (describing various IATs).

[FN69]. Don't Race to Judgment, supra note 66.

[FN70]. See Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1510 (2005); Greenwald et al., supra note 66.

[FN71]. In the actual Race IAT test, the formal race category labels “African American” and “European American” are used instead of “Black” and “White,” as the latter labels conjure associations with “good” and “bad” independent of race. Such associations could confound measurements of bias in the test. Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Calif. L. Rev. 945, 952 (2006).

[FN72]. The IAT is methodologically rigorous. The order of the pairings, for example, is randomized across test administrations. For a discussion of the methodological soundness of the IAT, see Kang, supra note 70, at 1510.

[FN73]. If the participant sorts words and images equally quickly irrespective of which racial group is associated with which attribute, then the participant is said not to have an implicit bias. And finally, of course, if the participant more quickly sorts images and words when the pairings are White-negative and Black-positive, then the participant is said to have an implicit bias against Whites.

[FN74]. See Greenwald & Krieger, supra note 71, at 958, tbl.2.

[FN75]. See Greenwald & Krieger, supra note 71, at 958, tbl.2. Note, however, that while any non-African American racial group in the United States has a significant number of persons with an implicit bias against African Americans, African Americans themselves do not show substantial implicit bias in a particular direction. According to data gathered from the Project Implicit website, 71.5% of White participants favor European Americans, whereas only 32.4% of Black participants favor European Americans. Moreover, 33.4% of Black participants favor African Americans, and 33.6% show no preference for either racial group. Id.

[FN76]. See R. Richard Banks, “Nondiscriminatory” Perpetuation of Racial Subordination, 76 B.U. L. Rev. 669 (1996); Banks, supra note 6.

[FN77]. See Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass (1993); Gary Orfield et al., Losing Our Future: How Minority Youth Are Being Left Behind by the Gradua-

tion Rate Crisis (2004); Social Stratification: Class, Race, and Gender in Sociological Perspective (David Grusky ed., 2d ed. 2001).

[FN78]. White men can expect to live, on average, more than six years longer than Black men. The average life expectancy for White men is 75.1 years, and for Black men 68.8 years. U.S. Census Bureau, Statistical Abstract of the United States 78, tbl.98 (2006). Black infants are 2.5 times more likely than White infants to die within a year of birth. Id.

[FN79]. U.S. Census Bureau, supra note 78, at 460, tbl.673. The average White family earned $45,631 in 2003, while the average Black family earned $29,645.

[FN80]. Id.

[FN81]. Id. at 409, tbl.610 (2006).

[FN82]. Bruce Western, The Impact of Incarceration on Wage Mobility and Inequality, 67 Am. Soc. Rev. 526 (2002).

[FN83]. See, e.g., Ronald F. Ferguson, Test-Score Trends Along Racial Lines, 1971 to 1996: Popular Culture and Community Academic Standards, in America Becoming: Racial Trends and Their Consequences (Neil J. Smelser et al. eds., 2001).

[FN84]. The decision to cast a White actor in a theatrical or movie role, for example, is not viewed by most people as racist. Russell K. Robinson, Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms, 95 Calif. L. Rev. (forthcoming 2007). Nor would the intentional use of race in an advertisement be viewed as necessarily racist.

[FN85]. Juan Perea, Thinking About Race and Races: Reflections and Responses, 89 Calif. L. Rev. 1653 (2001).

[FN86]. See Banks, supra note 6, at 1077, 1081-82.

[FN87]. Id.

[FN88]. See, e.g., Gordon W. Allport, The Nature of Prejudice 17 (1954).

[FN89]. Such similarity based judgments are characteristic of reasoning about many categories. See Douglas L. Medin, Concepts and Conceptual Structure, 44 Am. Psychologist 1469 (1989); Douglas L. Medin et al., Respects for Similarity, 100 Psychol. Rev. 254 (1993).

[FN90]. Id.

[FN91]. Id.

[FN92]. See Hal R. Arkes & Philip E. Tetlock, Attributions of Implicit Prejudice, or “Would Jesse Jackson ‘Fail’ the Implicit Association Test?”, 15 Psychol. Inquiry 257 (2004); see also Andrew Karpinski & James L. Hilton, Attitudes and the Implicit Association Test, 81 J. Personality & Soc. Psychol. 774 (2001); Philip E. Tetlock & Hal R. Arkes, The Implicit Prejudice Exchange: Islands of Consensus in a Sea of Controversy, 15 Psychol. Inquiry 311 (2004).

[FN93]. See, e.g., Arkes & Tetlock, supra note 92; Michael A. Olson & Russell H. Fazio, Reducing the Influence of Extrapersonal Associations on the Implicit Association Test: Personalizing the IAT, 86 J. Personality & Soc. Psychol. 653 (2004); Andrew Karpinski & James L. Hilton, Attitudes and the Implicit Association Test, 81 J. Personality & Soc. Psychol. 774 (2001).

[FN94]. See Arkes & Tetlock, supra note 92 at 260-61; Bruce Bower, The Bias Finders: A Test of Unconscious Attitudes Polarizes Psychologists, Sci. News Online, Apr. 22, 2006, available at http://www.sciencenews.org/articles/20060422/bob9.asp.

[FN95]. Economists, for example, sometimes tend to view rational statistical discrimination as unworthy of the condemnation accorded animus or taste based discrimination. See, e.g., John Knowles, Nicola Persico & Petra Todd, Racial Bias in Motor Vehicle Searches: Theory and Evidence, 109 J. Pol. Econ. 203 (2001).

[FN96]. This position is arguably reflected in the Supreme Court's Equal Protection Clause jurisprudence. While the Supreme Court has never said that unintentional discrimination is exempt from the nondiscrimination mandate of the Equal Protection Clause or of federal statutes, the Court has stated that "Proof of a discriminatory intent or purpose is required to show a violation of the equal protection clause." Vill. of Arlington Heights v. Metro. House. Dev. Corp., 429 U.S. 252, 265 (1977).

[FN97]. We do not mean to suggest, though, that a belief or attitude is not a form of bias unless it influences behavior. The causal link between attitudes and beliefs on one hand and behavior on the other is weaker than commonly supposed.

[FN98]. See Fazio & Olson, supra note 65, at 303 ("Within the domain of prejudice and stereotypes, the correlations [of implicit and explicit bias] tend to be quite low ... although there are occasional reports of significant correlations.").

[FN99]. Greenwald & Krieger, supra note 71, at 966.

[FN100]. Greenwald et al., supra note 19. In addition to completing a shooter-bias task, participants were given tests measuring both implicit and explicit race prejudice. No correlation was found between the results of the shooting task and the implicit and explicit measures of bias. Id. at 400 n.3.

[FN101]. See, e.g., Allen R. McConnell & Jill M. Leibold, Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes, 37 J. Experimental Soc. Psychol. 435 (2001) (finding that participants with IAT scores indicating a bias in favor of Whites made fewer speech errors, hesitated less, and were more friendly toward a White experimenter than they were toward a Black experimenter); see also Leslie Ashburn-Nardo et al., Black Americans' Implicit Racial Associations and Their Implications for Intergroup Judgment, 21 Soc. Cognition 61 (2003) (finding that the more Black participants preferred their own race over Whites, as measured by the IAT, the greater their preference for a Black partner relative to a White partner on an intellectually challenging activity); Kurt Hugenberg & Galen V. Bodenhausen, Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization, 15 Psychol. Sci. 342 (2004) (finding that participants high in implicit prejudice--as measured by the IAT--were more likely to categorize racially ambiguous faces as African American when the faces displayed hostile or angry expressions); Kurt Hugenberg & Galen V. Bodenhausen, Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat, 14 Psychol. Sci. 640 (2003) (finding that higher implicit bias against African Americans was associated with a greater readiness to perceive anger in Black faces). Jennifer Richeson, Nicole Shelton and colleagues found that White participants with higher IAT scores were impaired on a Stroop test following interaction with a Black individual. The researchers also used an fMRI technique to ex-

amine the neurological correlates of this effect. Jennifer A. Richeson & J. Nicole Shelton, When Prejudice Does Not Pay: Effects of Interracial Contact on Executive Function, 14 Psychol. Sci. 287 (2003); Jennifer A. Richeson et al., An fMRI Investigation of the Impact of Interracial Contact on Executive Function, 6 Nature Neuroscience 1323 (2003).

[FN102]. See Carl O. Word et al., The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction, 10 J. Experimental Soc. Psychol. 109 (1974).

[FN103]. See, e.g., Patricia G. Devine & Kristin A. Vasquez, The Rocky Road to Positive Intergroup Relations, in Confronting Racism: The Problem and the Response 234 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998); Jacquie D. Vorauer & Cory A. Turpie, Disruptive Effects of Vigilance on Dominant Group Members' Treatment of Outgroup Members: Choking versus Shining Under Pressure, 87 J. Personality & Soc. Psychol. 384 (2004).

[FN104]. The rhetorical relationship between bias and discrimination is bidirectional. Identifying a discriminatory behavior inclines one to view its psychological correlate as a form of bias, and conversely, identifying a psychological state as biased bolsters the condemnation of a discriminatory behavior.

[FN105]. To date, there are no published studies that have found a statistically significant relationship between Race IAT scores and the sort of discrimination against African Americans that would constitute disparate treatment in violation of the law. See, e.g., T. Andrew Poehlman, Eric L. Uhlmann, Anthony G. Greenwald, & Mahzarin R. Banaji, Understanding and Using the Implicit Association Test: III. Meta-analysis of Predictive Validity (unpublished manuscript).

[FN106]. See Blair et al., supra note 29, at 675; Eberhardt et al., supra note 29 at 384.

[FN107]. They hypothesize that this is because the mixed character of such cases highlights the salience of race, and perhaps makes the case seem a matter of intergroup conflict, rather than interpersonal conflict (as with a same-race case).

[FN108]. The Blair study found a statistically significant relationship (after controlling for a number of nonracial factors associated with severity of punishment) between Afrocentric features and sentence length. However, as the authors acknowledge in a footnote, treating the Black and White samples separately revealed that the Afrocentric features and sentence length relationship was statistically significant for White defendants, but not for Black defendants. See Blair et al., supra note 29, at 675.

[FN109]. Blair et al., supra note 29.

[FN110]. Blair and colleagues described their findings as evidence of a “pernicious” process contrary to the state of Florida's “demonstrated commitment to race neutrality in sentencing.” Id. They concluded that “Be they White or Black, offenders who possess more Afrocentric features are receiving harsher sentences for the same crimes, compared with less Afrocentric-looking offenders.” Id. at 678. See also William T. Pizzi, Irene V. Blair & Charles M. Judd, Discrimination in Sentencing on the Basis of Afrocentric Features, 10 Mich. J. Race & L. 327 (2005).

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EXHIBIT 4

Research Report

Looking Deathworthy

Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes

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ABSTRACT—*Researchers previously have investigated the role of race in capital sentencing, and in particular, whether the race of the defendant or victim influences the likelihood of a death sentence. In the present study, we examined whether the likelihood of being sentenced to death is influenced by the degree to which a Black defendant is perceived to have a stereotypically Black appearance. Controlling for a wide array of factors, we found that in cases involving a White victim, the more stereotypically Black a defendant is perceived to be, the more likely that person is to be sentenced to death.*

Race matters in capital punishment. Even when statistically controlling for a wide variety of nonracial factors that may influence sentencing, numerous researchers have found that murderers of White victims are more likely than murderers of Black victims to be sentenced to death (Baldus, Pulaski, & Woodworth, 1983; Baldus, Woodworth, & Pulaski, 1985, 1990, 1994; Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 1998; Bowers, Pierce, & McDevitt, 1984; Gross & Mauro, 1989; Radelet, 1981; U.S. General Accounting Office, GAO, 1990). The U.S. GAO (1990) has described this race-of-victim effect as "remarkably consistent across data sets, states, data collection methods, and analytic techniques" (p. 5).

In one of the most comprehensive studies to date, the race of the victim and the race of the defendant each were found to influence sentencing (Baldus et al., 1998). Not only did killing a White person rather than a Black person increase the likelihood of being sentenced to death, but also Black defendants were more likely than White defendants to be sentenced to death.

In the current research, we used the data set from this study by Baldus and his colleagues (1998) to investigate whether the probability of receiving the death penalty is significantly influenced by the degree to which the defendant is perceived to have a stereotypically Black appearance (e.g., broad nose, thick lips, dark skin). In particular, we considered the effect of a Black defendant's perceived stereotypicality for those cases in which race is most salient—when a Black defendant is charged with murdering a White victim. Although systematic studies of death sentencing have been conducted for decades, no prior studies have examined this potential influence of physical appearance on death-sentencing decisions.

A growing body of research demonstrates that people more readily apply racial stereotypes to Blacks who are thought to look more stereotypically Black, compared with Blacks who are thought to look less stereotypically Black (Blair, Judd, & Fallman, 2004; Blair, Judd, Sadler, & Jenkins, 2002; Eberhardt, Goff, Purdie, & Davies, 2004; Maddox, 2004; Maddox & Gray, 2002, 2004). People associate Black physical traits with criminality in particular. The more stereotypically Black a person's physical traits appear to be, the more criminal that person is perceived to be (Eberhardt et al., 2004). A recent study found that perceived stereotypicality correlated with the actual sentencing decisions of judges (Blair, Judd, & Chapleau, 2004). Even with differences in defendants' criminal histories statistically controlled, those defendants who possessed the most stereotypically Black facial features served up to 8 months longer in prison for felonies than defendants who possessed the least stereotypically Black features. The present study examined the extent to which perceived stereotypicality of Black defendants influenced jurors' death-sentencing decisions in cases with both White and Black victims. We argue that only in death-eligible cases involving White victims—cases in which race is most salient—will Black defendants' physical traits function as a significant determinant of deathworthiness.

PHASE I: BLACK DEFENDANT, WHITE VICTIM

Method

We used an extensive database (compiled by Baldus et al., 1998) containing more than 600 death-eligible cases from Philadel-

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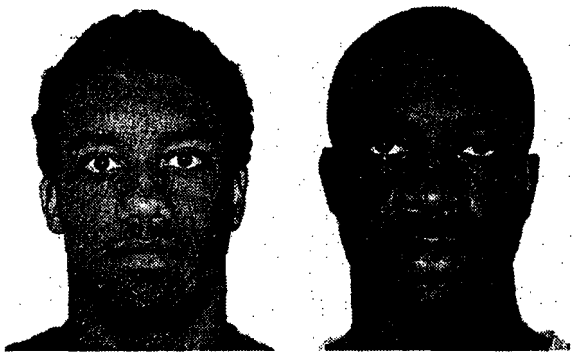

Fig. 1. Examples of variation in stereotypicality of Black faces. These images are the faces of people with no criminal history and are shown here for illustrative purposes only. The face on the right would be considered more stereotypically Black than the face on the left.

phia, Pennsylvania, that advanced to penalty phase between 1979 and 1999. Forty-four of these cases involved Black male defendants who were convicted of murdering White victims. We obtained the photographs of these Black defendants and presented all 44 of them (in a slide-show format) to naive raters who did not know that the photographs depicted convicted murderers. Raters were asked to rate the stereotypicality of each Black defendant's appearance and were told they could use any number of features (e.g., lips, nose, hair texture, skin tone) to arrive at their judgments (Fig. 1).

Stanford undergraduates served as the raters. To control for potential order effects, we presented the photographs in a different random order in each of two sessions. Thirty-two raters (26 White, 4 Asian, and 2 of other ethnicities) participated in one session, and 19 raters (6 White, 11 Asian, and 2 of other ethnicities) participated in the second session. The raters were shown a black-and-white photograph of each defendant's face. The photographs were edited such that the backgrounds and image sizes were standardized, and only the face and a portion of the neck were visible. Raters were told that all the faces they would be viewing were of Black males. The defendants' faces were projected one at a time onto a screen at the front of the room for 4 s each as participants recorded stereotypicality ratings using a scale from 1 (*not at all stereotypical*) to 11 (*extremely stereotypical*). In both sessions, raters were kept blind to the purpose of the study and the identity of the men in the photographs. The data were analyzed for effects of order and rater's race, but none emerged.

Results

We computed an analysis of covariance (ANCOVA) using stereotypicality (low-high median split) as the independent variable, the percentage of death sentences imposed as the dependent variable, and six nonracial factors known to influence sentencing (Baldus et al., 1998; Landy & Aronson, 1969; Stewart, 1980) as covariates: (a) aggravating circumstances, (b) mitigating circumstances, (c) severity of the murder (as determined by blind ratings of the cases once purged of racial information), (d) the defendant's socioeconomic status, (e) the victim's socioeconomic status, and (f) the defendant's attractiveness.[1] As per Pennsylvania statute (Judiciary and Judicial Procedure, 2005), aggravating circumstances included factors such as the victim's status as a police officer, prosecution witness, or drug-trafficking competitor; the defendant's prior convictions for voluntary manslaughter or violent felonies; and characteristics of the crime, such as torture, kidnapping, or payment for the murder. Mitigating circumstances included factors such as the defendant's youth or advanced age, extreme mental or emotional disturbance, lack of prior criminal convictions, minor or coerced role in the crime, and impaired ability to appreciate the criminality of his conduct. The Baldus database of death-eligible defendants is arguably one of the most comprehensive to date; using it allowed us to control for the key variables known to influence sentencing outcomes.

The results confirmed that, above and beyond the effects of the covariates, defendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black, $F(1, 36) = 4.11, p < .05, \eta_p^2 = .10$ (Fig. 2a). In fact, 24.4% of those Black defendants who fell in the lower half of the stereotypicality distribution received a death sentence, whereas 57.5% of those Black defendants who fell in the upper half received a death sentence.

PHASE II: BLACK DEFENDANT, BLACK VICTIM

Method

Using the same database and procedures described earlier, we examined whether this stereotypicality effect extended to cases in which the victims were Black. Of all cases that advanced to penalty phase, 308 involved Black male defendants who were convicted of murdering Black victims. The photographs for all of these defendants were obtained. The death-sentencing rate for these 308 defendants, however, was only 27% (as compared with 41% for the cases with White victims). Given both the low death-sentencing rate and the large number of cases involving Black defendants and Black victims, we selected 118 of these 308 cases randomly from the database with the stipulation that those defendants receiving the death sentence be oversampled. This oversampling yielded a subset of cases in which the death-sentencing rate (46%) was not significantly different from that for the cases with White victims (41%; $F = 1$). Using this subset provided a conservative test of our hypothesis. We then pre-

[1]With the exception of defendant's attractiveness, all of the covariates employed here were included in the Baldus database and have been described in detail elsewhere (e.g., see Baldus et al., 1998). We added defendant's attractiveness, basing this variable on 42 naive participants' ratings of the defendants' faces using a scale from 1 (*not at all attractive*) to 11 (*extremely attractive*).

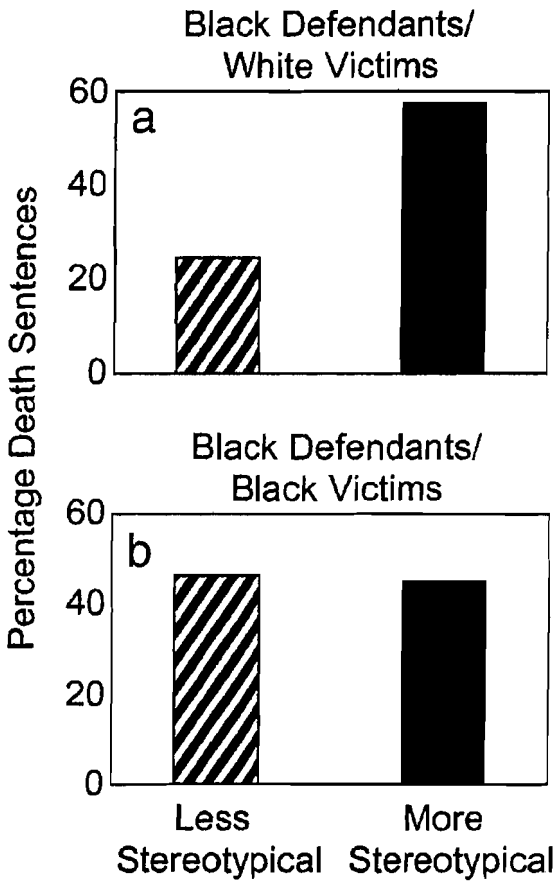

Fig. 2. Percentage of death sentences imposed in (a) cases involving White victims and (b) cases involving Black victims as a function of the perceived stereotypicality of Black defendants' appearance.

sented this subset of Black defendants who murdered Black victims to 18 raters (12 White and 6 Asian), who rated the faces on stereotypicality.[2]

Results

Employing the same analyses as we did for the cases with White victims, we found that the perceived stereotypicality of Black defendants convicted of murdering Black victims did not predict death sentencing, $F(1, 110) < 1$ (Fig. 2b). Black defendants who fell in the upper and lower halves of the stereotypicality distribution were sentenced to death at almost identical rates (45% vs. 46.6%, respectively). Thus, defendants who were perceived to be more stereotypically Black were more likely to be sentenced to death only when their victims were White.

Although the two phases of this experiment were designed and conducted separately, readers may be interested in knowing whether combining the data from the two phases would produce a significant interactive effect of victims' race and defendants' stereotypicality on death-sentencing outcomes. Analysis confirmed that the interaction of victims' race (Black vs. White) and defendants' stereotypicality (low vs. high) was indeed significant, $F(1, 158) = 4.97$, $p < .05$, $\eta_p^2 = .03$.

[2]Faces of 15 of the Black defendants who murdered White victims were repeated in this session. Analysis of the ratings confirmed interrater reliability.

DISCUSSION

Why might a defendant's perceived stereotypicality matter for Black murderers of White victims, but not for Black murderers of Black victims? One possibility is that the interracial character of cases involving a Black defendant and a White victim renders race especially salient. Such crimes could be interpreted or treated as matters of intergroup conflict (Prentice & Miller, 1999). The salience of race may incline jurors to think about race as a relevant and useful heuristic for determining the blameworthiness of the defendant and the perniciousness of the crime. According to this racial-salience hypothesis, defendants' perceived stereotypicality should not influence death-sentencing outcomes in cases involving a Black defendant and a Black victim. In those cases, the intraracial character of the crime may lead jurors to view the crime as a matter of interpersonal rather than intergroup conflict (Prentice & Miller, 1999).

These research findings augment and complicate the current body of evidence regarding the role of race in capital sentencing. Whereas previous studies examined intergroup differences in death-sentencing outcomes, our results suggest that racial discrimination may also operate through intragroup distinctions based on perceived racial stereotypicality.

Our findings suggest that in cases involving a Black defendant and a White victim—cases in which the likelihood of the death penalty is already high—jurors are influenced not simply by the knowledge that the defendant is Black, but also by the extent to which the defendant appears stereotypically Black. In fact, for those defendants who fell in the top half as opposed to the bottom half of the stereotypicality distribution, the chance of receiving a death sentence more than doubled. Previous laboratory research has already shown that people associate Black physical traits with criminality (Eberhardt et al., 2004). The present research demonstrates that in actual sentencing decisions, jurors may treat these traits as powerful cues to deathworthiness.

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EXHIBIT 5

Persuasion and Resistance: Race and the Death Penalty in America

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Although there exists a large and well-documented "race gap" between whites and blacks in their support for the death penalty, we know relatively little about the nature of these differences and how the races respond to various arguments against the penalty. To explore such differences, we embedded an experiment in a national survey in which respondents are randomly assigned to one of several argument conditions. We find that African Americans are more responsive to argument frames that are both racial (i.e., the death penalty is unfair because most of the people who are executed are black) and nonracial (i.e., too many innocent people are being executed) than are whites, who are highly resistant to persuasion and, in the case of the racial argument, actually become more *supportive of the death penalty upon learning that it discriminates against blacks. These interracial differences in response to the framing of arguments against the death penalty can be explained, in part, by the degree to which people attribute the causes of black criminality to either dispositional or systemic forces (i.e., the racial biases of the criminal justice system).*

The conventional wisdom on public opinion toward the death penalty in the United States, as summarized nicely by Ellsworth and Gross, is that people "feel strongly about the death penalty, know little about it, and feel no need to know more" (1994, 19). As a consequence of these feelings, the authors argue, attitudes tend to be relatively crystallized and, therefore, unresponsive to question phrasing or arguments that are contrary to an individual's belief.

We must wonder, then, why views of the death penalty vary so dramatically over time and across contexts. Gallup surveys document a sharp increase in support for capital punishment between 1966 and 1994, clearly in response to rising violent crime rates during this period (e.g., Page and Shapiro 1992). However, with the dramatic surge in arguments questioning the fairness of the sentence (due, in part, to DNA exonerations of death row inmates) in the national media in the late 1990s (Baumgartner, De Boef, and Boydstun 2004), support then began to wane, falling from 80% in 1994 to 66% in 2000. Moreover, approval varies substantially depending on the characteristics of the target and the alternatives posed, with much lower support for putting juveniles and the mentally ill to death (26% and 19%, respectively, in 2002) and for the alternative of life imprisonment without the possibility of parole (52%; Bohm 2003; Gallup 2005). Given the fact that attitudes toward this policy are often responsive to events, to characteristics of the target, and to alternatives, the conventional wisdom—that death penalty attitudes are impervious to change—is surely overstated. Accordingly, any analysis of death penalty attitudes must account for the *responsiveness* of such attitudes, as well as their reputed *resistance* to change.

Such an analysis is essential because attitudes toward the death penalty are consequential in ways that most other public attitudes are not. According to McGarrell and Sandys (1996), the U.S. Supreme Court has used public support for the policy as its barometer of "evolving standards of decency," a criterion the Court in turn uses to settle the "cruel and unusual" question (Soss, Langbein, and Metelko 2003, 398). The decisions of state jurists, as well, have been found to be influenced by public opinion on this issue. For example, Brace and Hall (1997) determined that, in states with citizens supportive of capital

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punishment, supreme court justices are significantly more likely to uphold the death sentence (or less likely to dissent from a prodeath majority) when they face "competitive electoral conditions" (e.g., they are close to the end of a judicial term or they won by narrow margins).

Legislatures are also influenced by the public. Congress (and President Clinton), for example, mandated the death penalty for certain federal crimes as a part of the Violent Crime Control and Law Enforcement Act of 1994, largely in response to growing public concerns with escalating crime rates. There are also numerous studies finding an impact of public opinion on state death penalty statutes (e.g., Mooney and Lee 2000) and state implementation rates (e.g., Norrander 2000). And capital punishment offers a form of direct democracy that is found in no other area of public policy. Citizen jurists often make the decision to take or spare the life of a convict in capital cases, thereby *directly* translating their beliefs into public policy.

Because such attitudes are both responsive and so extraordinarily important, we need to know a great deal more about what, exactly, shapes them. We need to understand the conditions under which these attitudes change, the types of arguments that are most persuasive, and the types of individuals who are most susceptible. But most importantly, we need to understand the differential responses of whites and African Americans to these arguments. As we will argue, the death penalty has become an extremely racialized policy in the United States, necessitating an analysis that is both inter- and intraracial. And as we will show, not only do whites and African Americans hold quite different beliefs about the death penalty, but they also respond quite differently to arguments against it.

Attitudes toward Capital Punishment

The Racial Element

While arguments against the death penalty have ranged from the biblical to the economic, two have been particularly prominent. In their examination of *New York Times* abstracts from 1960 to 2004, Baumgartner, De Boef, and Boydstun (2004) found that the death penalty underwent a dramatic new issue redefinition beginning in the mid-1990s from a focus on morality and constitutionality to charges that *innocent people* may be on death row and, later, a focus on charges of *racial bias* in the application of the death penalty.

The first of the newly salient antipunishment arguments, then, hinges on the question of fallibility. Particularly with the availability of DNA testing, which has exonerated a number of death row inmates, we know the legal system is flawed to the point where an unknown proportion of individuals on death row are innocent. This argument was underscored in dramatic fashion in 2003 when the outgoing Republican Governor, George Ryan, placed a moratorium on the executions of 164 prisoners on death row in Illinois on the grounds that the punishment is both irrevocable and flawed in the sense that at least some individuals are, doubtless, losing their lives for crimes they never committed. And according to Haines (1992), such "flawed convictions" seriously erode public support for capital punishment.

But the other case to be made, as documented by Baumgartner, De Boef, and Boydstun, is that it is rife with racial and ethnic discrimination, so much so that, as of this writing, no fewer than 38 states have empanelled commissions to investigate these biases. Death rows are populated with African Americans in numbers far in excess of their proportions in the broader population. While these statistics do not, by themselves, prove the system to be racially discriminatory, they do lead to the all-important *perception* of discrimination on the part of many individuals, particularly those within the African American community. Further, there is by now a virtual consensus that black assailants convicted of murdering whites are far more likely to face the death penalty than those convicted of murdering minorities (e.g., Keil and Vito 1995). And much of the bias is more subtle, such as the practice of "jury bleaching," whereby district attorneys dismiss African Americans from jury pools in capital cases for reasons other than cause. The discriminatory nature of capital punishment, in other words, is more than a mere perception. It is a reality.

Moreover, there is considerable evidence that the death penalty has become racialized in the minds of the mass public. Whites in the United States often conflate issues of race and crime, drawing on their racial stereotypes of African Americans when thinking about punishment (Gilliam and Iyengar 2000; Peffley and Hurwitz 2002; Valentino 1999). More specifically, Soss et al. (2003) found racial prejudice to be among the most important predictors of whites' attitudes toward the death penalty. And not unexpectedly, to many African Americans the death penalty is also seen as a highly racialized form of punishment (Young 1991).

Because it is difficult to think about the death penalty in America without thinking about its racial component, any examination of the forces that shape death penalty beliefs must necessarily analyze the attitudes of whites and African Americans separately. Cohn, Barkan, and Haltman (1991) argue that blacks and whites tend to favor equally punitive treatment of criminals, but for quite

different reasons: the former out of fear of victimization and the latter out of racial prejudice. The death penalty, however, presents a notable exception, with, as will be shown, far higher levels of support among whites than among blacks. And to date, we have no convincing explanation of this disparity. We know little about interracial differences in crime attitudes, for much of the research has focused almost exclusively on the attitudes of whites (e.g., Soss et al. 2003). What little we do know about interracial differences (e.g., Cohn, Barkan, and Haltman 1991) typically comes from probability surveys that include only small numbers of African Americans, thereby limiting the conclusions that can be drawn (cf. Bobo and Johnson 2004).

Susceptibility to Arguments

Our purpose is to understand receptivity to argument regarding attitudes that, as we have seen, exhibit both resistance and responsiveness, and to determine if blacks and whites respond comparably to arguments against the death penalty. Most research on issue framing in political science has emphasized the lability of political attitudes, which are often described "as highly malleable and responsive to whatever cues are available in survey questions" (Kuklinski et al. 2000, 793). Research on issue framing has demonstrated that people respond differently to alternative frames of an issue. As Nelson and Oxley explain, "Framing effects work by altering the *importance* that individuals attach to certain beliefs" (1999, 1041).[1]

But while issue frames are often described as powerful persuasive tools in the hands of elites, accumulating evidence suggests that individuals do not mindlessly respond to frames, but instead consciously think about the different considerations suggested by a frame (e.g., Nelson, Clawson, and Oxley 1997) and thus may end up resisting frames under a variety of conditions, such as when they are associated with less credible sources (Druckman 2001a) or, most importantly for our purposes, when frames conflict with citizens' predispositions (e.g., Brewer 2001; Haider-Markel and Joslyn 2001). Frames (and persuasive messages more generally) can precipitate either persuasion *or* resistance, depending on the degree to which the frame is either consonant or dissonant with the prior predispositions that are activated. In the context of our study, given the documented interracial differences in prior beliefs related to the death penalty, it is quite likely that message frames will affect whites and African Americans in fundamentally different ways.

In addition, research in both political science and social psychology suggests that when people react to arguments on intense and visceral issues like the death penalty or welfare, they are much more likely to engage in a biased processing of information that confirms their prior beliefs.[2] For example, research rooted in different theories of persuasion (e.g., Petty and Cacioppo's 1996 elaboration-likelihood model and Eagly and Chaiken's 1993 heuristic-systematic model) finds that people's prior attitudes influence their evaluations of the quality or strength of the arguments presented, and, consequently, their tendency to accept or resist those arguments. Notably, among "engaged" or "involved" individuals (i.e., those for whom the issue is connected to their values, self-definition, or self-interest), a proattitudinal argument is likely to produce the expected movement in the direction of the argument, but a counterattitudinal argument is likely to be perceived as "weak" and can result in an attitudinal shift *away* from the message position (often termed attitude "bolstering" or "boomerang" effects; e.g., Johnson et al. 2004). In addition, research on motivated reasoning has shown that when individuals with strong prior beliefs on a topic are presented with contradictory evidence or arguments, they tend to seize on consistent information with little scrutiny while subjecting challenging information to withering skepticism in ways that allow them to maintain or bolster their prior attitudes (e.g., Edwards and Smith 1996; Taber and Lodge 2006). Thus, an accounting of the processes of persuasion and resistance reduces to the basic question(s): what prior predispositions are activated by the argument, and what is the degree of consistency between the argument and the individual's prior predispositions?

For our purposes, we are less concerned with precise microtheoretical explanations for the susceptibility of death penalty attitudes to argument for, despite the differences between approaches, they share a common focus on the properties of the *message* and the properties of the *recipient*: the content of the message as it is framed influences which prior predispositions are activated, and once in play, these predispositions influence assessments of the message. Differential assessments, consequently, precipitate very different reactions to arguments made against

[1] If, for example, an argument against affirmative action is framed as an "undeserved advantage" for blacks, then whites' opposition to the policy is more closely tied to their racial attitudes than when the issue is framed as "reverse discrimination" against whites (Kinder and Sanders 1996).

[2] James Kuklinski et al. (2000), for example, found it extremely difficult to influence the inaccurate welfare beliefs of respondents, largely, according to the authors, because when people hold firm beliefs they often engage in a biased processing of information that confirms their prior beliefs.

policies that people care deeply about—in this case, capital punishment.[3]

The Importance of Predispositions: Beliefs about Race and the Causes of Crime

We have already noted two of the most important messages pursuant to the issue—i.e., fallibility and racial discrimination. But what predispositions of the *recipient* should be most important? We have considerable evidence that, at least for whites, racial beliefs play an important role: prejudice renders individuals more punitive (e.g., Cohn, Barkan, and Haltman 1991), as does merely living in areas with higher concentrations of African Americans (e.g., Smith 2004). And more specifically pertaining to death penalty attitudes, Soss, Langbein, and Metelko (2003) found that race was an important predictor of whites' support for the death penalty in 1992—both contextually (living among African Americans) and attitudinally (being racially prejudiced, as measured by racial stereotypes). Bobo and Johnson (2004) also found that racial resentment is a more important determinant of white respondents' support for the death penalty than for black respondents.

There seems to be little doubt that, at least for whites, racial attitudes often affect their support for capital punishment. But there is another predisposition that has received far less attention, even though it can potentially explain support among both blacks and whites: their *attributions of the causes of crime*. Causal beliefs—particularly the classic distinction between internal and external causation—have been conceptualized as central elements in political belief systems. For example, those who view poverty as being caused more by internal, dispositional forces (e.g., laziness) than external, structural forces (e.g., a poor national economy) are much more likely to oppose poverty programs (Appelbaum 2001; Gilens 1999). By the same token, beliefs about the causes of crime have been found to influence support for crime policies, with internal attributions (e.g., criminals have a violent nature) being associated with support for more punitive policies and external attributions (e.g., individuals are driven to crime because of poverty, poor schooling, or even a discriminatory justice system) associated with support for more rehabilitative policies (e.g., Roberts and Stalans 1997). More germane for our purpose, there is also considerable evidence (e.g., Cochran, Boots, and Heide 2003; Young 1991) that support for capital punishment is highest among those who believe crime is due to dispositional factors (such as inherent criminal tendencies) and lowest among those who, instead, attribute crime at least partly to structural factors (such as poverty or the unfairness of the justice system).

Survey Experiment and Hypotheses

The analysis below is designed to shed light on the thinking that goes into death penalty attitudes, and, more specifically: (1) the degree to which such attitudes are influenced by various arguments against it; (2) the role played by attributional beliefs; and (3) quite centrally, how these processes differ interracially.

To explore interracial differences, we examine approximately 600 white and 600 black respondents from the National Race and Crime Survey (to be described below in greater detail). Embedded in the NRCS is a survey experiment in which respondents are randomly assigned to one of three argument conditions: in the *baseline* (no argument) condition, individuals were simply asked about their support for the punishment "for persons convicted of murder" on a 4-point scale ranging from "strongly oppose" to "strongly favor." In the *racial* condition, they were asked the same question, but only after exposure to an argument stating that the penalty, according to sources, is unfair because "most of the people who are executed are African Americans." And in the *innocent* condition, the same question followed the argument that the "penalty is unfair because too many innocent people are being executed."[4]

In the aggregate, consistent with numerous studies (e.g., Bobo and Johnson 2004; Bohm 2003), we expect whites to support the death penalty more than do African

[3]The assumption that attitudes toward the death penalty are important is not without foundation. In 1983, 70% of a national sample of GSS respondents rated the death penalty issue as important to them personally, and in a 2001 ABC News/*Washington Post* Poll 72% of the public indicated it was important that candidates in a state or national election agree with their position on the death penalty.

[4]By asserting that the death penalty is "unfair," the two arguments are intended to mimic claims made by elites, and echoed in the mass media (Baumgartner, De Boef, and Boydstun 2004), against capital punishment in clear and simple terms. Other research shows that more subtle and indirect arguments have little discernible effect on death penalty attitudes. Bobo and Johnson (2004), for example, provided respondents with information suggesting (but not explicitly stating) that the death penalty is racially unfair (e.g., "Blacks are about 12% of the US population, but they are almost half (43%) of those currently on death row"). Similarly, Edwards and Smith (1996) found that syllogistic arguments such as "Implementing the death penalty means that there is a chance that innocent people will be sentenced to death . . . . [t]herefore, the death penalty should be abolished" had little effect on participants' attitudes in their study. Perhaps more direct and argumentative messages are necessary to move support for capital punishment.

Americans (H_1). We also expect the framing of the antideath penalty arguments to vary interracially. Given the heightened skepticism of many blacks toward the policy and toward the fairness of the criminal justice system in general, we anticipate that anticapital punishment arguments—of either variety—emphasizing a lack of fairness should be more persuasive with blacks than with whites (H_{2a}) because, relative to whites, African Americans are attitudinally predisposed to accept such arguments, which are more consistent with their prior predispositions that both the death penalty and the justice system are unfair. Whites, for whom antideath penalty attitudes are more inconsistent, should be less persuaded.

While we expect African Americans to be persuaded by both (i.e., discrimination and innocent) arguments, we hypothesize (H_{2b}) that many whites should be particularly unimpressed with the racial argument. While they may, in other words, be *somewhat* persuaded by the argument that innocent individuals are being executed, there is ample research (e.g., Hurwitz and Peffley 2005) documenting a naïve faith among whites that the criminal justice system is racially fair. There is also, as we will document, ample evidence that most whites believe African Americans to be disproportionately inclined to criminal behavior (rather than being victims of discrimination) and, consequently, that they deserve to be treated more punitively. The racial fairness argument, consequently, is anathema to many whites and may therefore be wholly rejected, perhaps even to the degree that it produces a reactance or boomerang effect.

How exactly should attributional beliefs (regarding the causes of crime) affect support for the death penalty? Disregarding the race of the respondent and the experimental manipulation, we expect to find that respondents who believe that individuals engage in crime for dispositional (i.e., internal) reasons should be more supportive of the death penalty than those who attribute crime to structural (i.e., external) reasons (H_3). But how, if at all, does the relationship between attributional beliefs and capital punishment attitudes differ across experimental treatments? And do attributional beliefs play the same role for both whites and blacks?

In order to examine the racial elements of death penalty attitudes (and their responsiveness to argument), it is necessary to put both the argument itself and the criminal in a racial context. As noted, one of our two antideath penalty arguments is inherently racialized inasmuch as it suggests that the policy is biased against African Americans. Additionally, in asking about the causes of criminal behavior, we ask specifically about the perceived causes of *black* criminal behavior—whether African Americans get into trouble due to some internal failing or, instead, to the biases of the justice system. Specifically, respondents hear the following: "Statistics show that African Americans are more often arrested and sent to prison than are whites. The people we talk to have different ideas about why this occurs. I'm going to read you several reasons, two at a time, and ask you to choose which is the *more important* reason why, in your view, blacks are more often arrested and sent to prison than whites.

- First, the police and justice system are biased against blacks, OR blacks are just more likely to commit more crimes?
- Next, the police and justice system are biased against blacks, OR many younger blacks don't respect authority?"

For each comparison, therefore, respondents are instructed to choose between a dispositional ("just more likely to commit more crimes" and "don't respect authority") and a structural ("the police and justice system are biased against blacks") explanation of black crime.[5] The resulting additive index, Causes of Black Crime, ranges from 0 to 4, with higher values indicating more dispositional attributions of the causes of black crime. Whites are far more likely than African Americans to attribute the greater arrest rate of blacks to the failings of blacks who run afoul of the law than to the biases of the criminal justice system, and these sharp interracial differences are revealed in both the average (mean = 2.5 for whites vs. 1.5 for blacks; sd = 1.4 for both races) and the modal response of the scale (4 for whites, 0 for blacks).[6]

More importantly, we also expect interracial differences in the degree to which explanations of black crime influence capital punishment beliefs across the three experimental groups. Framing research demonstrates how different messages can affect what prior beliefs (in this case, attributional beliefs) are used to evaluate the messages. Given the conflation of race and crime in the minds of many whites, the racial argument against capital punishment should activate beliefs about the origins of black crime. In the baseline and innocent conditions, however, beliefs about the causes of black crime are much less germane. We do not expect, consequently, causal beliefs

[5]For each question, choosing a structural cause was coded as 0, a dispositional cause as 2, and volunteering that both causes are equally important was coded as 1.

[6]These interracial differences are not surprising and are reminiscent of whites' failure to recognize discrimination in the economic realm (e.g., Sigelman and Welch 1991), where such beliefs have been viewed as a more subtle form of prejudice (e.g., Bobo, Kluegel, and Smith 1997), an argument on which we elaborate in the conclusions.

about black crime to strongly predict attitudes toward capital punishment in these two treatments. In the race condition, however, such causal beliefs are, doubtless, activated by the question itself and should, therefore, become strong determinants of whites' attitudes toward the death penalty (H_{4a}).

Yet, there is abundant evidence that African Americans regard the U.S. criminal justice system as inherently unfair—i.e., that it discriminates against them on the streets and in the courts (e.g., Lauritsen and Sampson 1998). For this reason, blacks do not need any reminder of the racially discriminatory nature of the death penalty, and, consequently, the relationship between causal explanations of black crime and support for the policy should be much less affected by experimental treatment. In other words, regardless of whether black respondents are in the baseline, innocent, or racial argument conditions, we expect those who attribute black criminality to structural sources to be less likely to endorse the punishment relative to those who hold dispositional explanations (H_{4b}).

The analysis below unfolds in two stages. First, we investigate the degree to which whites and blacks modify their support for the death penalty in response to arguments against it (H_1 and H_2). Next, we investigate the role of attributional beliefs in influencing blacks' and whites' receptivity to different arguments against the death penalty (H_3 and H_4).

Analysis

Data

The data for the analysis are from the National Race and Crime Survey (NRCS), a nationwide random-digit telephone survey administered by the Survey Research Center (SRC) at the University of Pittsburgh. Between October 19, 2000, and March 1, 2001, the SRC completed half-hour interviews with 603 (non-Hispanic) whites and 579 African Americans, for an overall response rate (RR3) of 48.64% (www.aapor.org). White respondents were selected with a variant of random-digit dialing, and an oversample of black respondents was randomly selected using stratified sampling techniques. Details on the sample are available from the authors on request.[7]

[7]For most respondents (90%), the race of the interviewer was matched to that of the respondent in an effort to minimize social desirability bias from race of interviewer effects. The survey instrument was subject to extensive pretesting, consisting of in-depth, face-to-face "cognitive interviews" with a small number of African American respondents and telephone interviews with 25 white and 25 black respondents.

Support for the Death Penalty across Race and Experimental Conditions

How does support for the death penalty vary across the races and the experimental conditions? Table 1 shows the percentage of whites (top portion of the table) and blacks (bottom portion) who favor and oppose the death penalty in the baseline (no argument), racial, and innocent treatment conditions. Focusing first on levels of support in the baseline condition, our study confirms our first hypothesis (H_1): there is a substantial race gap in support for the death penalty, with 65% of whites supporting the policy, compared to only 50% among African Americans (significant at $p < .01$). Of greater interest is how support changes across the baseline (no argument) and the two (argument) conditions for blacks and whites. Consistent with our second hypothesis, we find that blacks are significantly more receptive to both arguments against the death penalty than are whites. In response to the argument that "the death penalty is unfair because too many innocent people are being executed," support for the policy drops by 16% among blacks; support drops by 12% when blacks are exposed to the argument that "the death penalty is unfair because most of the people who are executed are African Americans."

As a whole, however, whites are not receptive to either argument. Not only do they appear resistant to persuasion when presented with an argument against the death penalty, but *support for the death penalty actually increases in the racial argument condition*. Statistically speaking, the trivial decrease (.68%) from the baseline to the innocent condition is not significant. But the more substantial 12% *increase* in response to the racial argument is significant at the .01 level. To repeat, whites overall not only reject the racial argument against the death penalty, but some move strongly in the direction *opposite* to the argument. For example, whereas 36% of whites strongly favor the death penalty in the baseline condition, 52% strongly favor it when presented with the argument that the policy is racially unfair.

Predicting Death Penalty Support across Race and Argument Conditions

But what motivates whites and blacks to respond so differently to arguments against the death penalty? And what role do causal beliefs play in influencing these responses? In the next portion of the analysis, we investigate the antecedents of support for the death penalty for whites and blacks, pooling the data across the argument conditions. Although our primary interest is in the impact of causal

Table 1 Percentage Support for the Death Penalty across Race and Experimental Conditions

	Baseline Condition (No Argument)	Racial Argument	Innocent Argument
		Some people say* that the death penalty is unfair because most of the people who are executed are African Americans.	Some people say* that the death penalty is unfair because too many innocent people are being executed.
	Do you favor or oppose the death penalty for persons convicted of murder?	Do you favor or oppose the death penalty for persons convicted of murder?	Do you favor or oppose the death penalty for persons convicted of murder?
Whites			
Strongly oppose	17.95%	11.38%	20.09%
Somewhat oppose	17.09	11.79	15.63
Somewhat favor	29.06	25.20	29.46
Strongly favor	*35.90*	*51.63*	*34.82*
% Favor	64.96%[b]	76.83%[b]	64.28%[b]
% Favor v. Baseline		+12% favor[ab]	−.68% favor[b]
N	117	246	224
Blacks			
Strongly oppose	34.17%	43.60%	45.98%
Somewhat oppose	15.83	18.48	20.09
Somewhat favor	22.50	17.54	18.75
Strongly favor	*27.50*	*20.38*	*15.18*
% Favor	50%	37.92%	33.93%
% Favor v. Baseline		−12% favor[a]	−16% favor[a]
N	120	211	224

*The experiment also randomly manipulated the source of the argument as either "some people" or "FBI statistics show that," which had no discernible influence on support for the death penalty.
[a]Difference across baseline and argument condition is statistically significant ($\leq .05$).
[b]Difference across race of respondent is statistically significant ($\leq .05$).
Note: Statistical significance was computed by estimating an ordered probit equation for the pooled data that regressed support for the death penalty on two dummies for argument condition (baseline versus innocent argument, baseline versus racial argument), a dummy for race of respondent, and two race $*$ argument condition interactions.

beliefs, we include a range of additional "control" variables[8] in the equation below because support for the death penalty is doubtless shaped by a variety of confounding (attitudinal and demographic) factors.

Death Penalty Support
= Causes of Black Crime
+ General Causes of Crime + Antiblack Stereotypes
+ Fear of Crime + Punitiveness + Ideology
+ Partisanship + Demographic Factors
+ Racial Argument + Innocent Argument
+ Racial Argument × Predictors
+ Innocent Argument × Predictors,

[8]Although some analysts eschew control variables in laboratory experiments, our survey experiment essentially provides three independent treatments of differently worded survey questions on the death penalty. For each question wording condition, the effect of any given predictor of support for the death penalty must be evaluated alongside controls for possible confounds. In addition, the inclusion of control variables helps to guard against the possibility that differences in the distribution of social and political variables across treatment groups might affect our results.

where the remaining variables and their measurement are described as follows.

General Causes of Crime. Because support for the death penalty (as well as beliefs about the causes of black crime) is likely to be affected by people's more global views about the causes of crime in general (e.g., Young 1991), we include an index of *General Causes of Crime* as a control. Once again, respondents were asked to choose between pairs of dispositional and structural causes, but instead of asking about black crime, we asked whether generic causes—e.g,, poverty versus being too lazy to get an honest job—were more important reasons for crime in America these days (see Appendix A, items 1 and 2).[9]

Antiblack Stereotypes. As indicated, Soss, Langbein, and Metelko (2003) found racial prejudice to be an important predictor of whites' attitudes toward the death penalty. It is also at least conceivable that blacks' opposition to the death penalty is associated with more negative attitudes toward whites, who, for some blacks, may be viewed as part of the power structure that uses the death penalty as a discriminatory tool. *Antiblack Stereotypes* is a measure of the degree to which individuals view blacks more negatively than whites and is created by subtracting ratings of "most whites" from those of "most blacks" on a series of traits, such as lazy, violent, and dishonest (see Appendix A, item 6).[10]

Fear of Crime. Support for the death penalty may also stem from a fear of crime if individuals believe that capital punishment will provide a deterrent to violent crime. Accordingly, the *Fear of Crime* index consists of responses to questions asking individuals whether they worry about being a victim of violent crime (see Appendix A, item 5).

Other Controls. Another potential confound is that some of our predictors may be tied to support for the death penalty because they are associated with a more general desire to simply punish bad behavior, or punitiveness. Thus, we include a measure of *Punitiveness*, which is assessed by agreement with two Likert statements indicating the value of strong punishment to teach people right from wrong and to get children to behave properly (see Appendix A, items 3 and 4). In addition to *Partisanship* and *Ideology*, each measured with the standard 7-point scales, several demographic factors (education, income, gender [1 = male], and age) have been linked to support for the death penalty and so are included in the model as well (Bohm 2003). Aside from race, perhaps the most important demographic factor underlying differences in support for the death penalty is gender, with males more supportive of capital punishment than women (Bohm 2003).

Argument Conditions and Interactions. The argument conditions are represented by two dummy variables (*Racial Argument* and *Innocent Argument*), scored "1" when they equal the condition and "0" otherwise, with the baseline condition as the omitted, comparison category. We include interaction terms between each of the two condition dummies and the predictors to allow the effects of the regressors to vary across the treatment conditions.

The estimated parameters for the equation for whites and blacks are reported in full in Appendix B (Table B1). The ordered probit coefficients in the first 11 rows of Table B1 estimate the (conditional) effect of the predictors for the omitted baseline condition only. To gain a more complete picture of how the effects of causal attributions (and other predictors) vary across the argument conditions, the results in Table B1 are used to generate coefficient estimates in Table 2, where we present the (conditional) effects of the predictors for all three of the argument conditions. Our principal focus is on the first row of ordered probit coefficients that gives the influence of people's views of the causes of black crime on support for the death penalty across different argument conditions. Ignoring the differences across columns, we note the empirical support for H_3—i.e., overall, individuals who hold dispositional beliefs about the causes of black crime are substantially more supportive of capital punishment relative to those who allow for the possibility that the environment may play some role in higher levels of black crime.

Consistent with our expectations, however, the pattern of the coefficients is markedly different for whites and blacks. Among whites, the influence of views of black crime has only a small and statistically insignificant effect on death penalty approval in the baseline

[9]It should be noted that the generic and black crime questions were placed at opposite ends of the survey (with some 40 survey items separating the two batteries) to minimize any tendency to think about one set of items while answering the other. The modest correlation between the two scales (r = .30) suggests that responses to the two sets of questions were substantially independent. In addition, a factor analysis of all four items, using principal axis extraction and varimax rotation, uncovered two separate factors of general versus black causes of crime.

[10]The Antiblack Stereotype scale ranges from −30 to +30, with higher values indicating more negative ratings of blacks than whites. It should be noted that correlations between Antiblack Stereotypes and the two causal belief measures among blacks and whites were fairly modest, ranging from .13 to .27.

TABLE 2 Predicting Support for the Death Penalty across Race and Experimental Conditions

A. Whites	Baseline (No Arg.)		Racial Argument		Innocent Argument	
Black Crime Attrib.	.01	(.08)	.22***[a]	(.06)	.09	(.06)
General Crime Attrib.	.14*	(.08)	.17**[c]	(.06)	.04	(.09)
Antiblack Ster.	.02	(.03)	.03	(.02)	−.02	(.02)
Fear of Crime	−.15	(.13)	.09	(.09)	.06	(.09)
Punitiveness	.24**[c]	(.09)	.19***	(.06)	.18***	(.06)
Party ID	−.07[c]	(.07)	.07[ab]	(.04)	−.08*	(.05)
Ideology	.06	(.08)	−.06[b]	(.05)	.12**	(.05)
Education	−.08	(.08)	−.15***	(.06)	−.08[c]	(.07)
Female	−.56**	(.23)	−.52***[c]	(.17)	−.32**[c]	(.16)
Income	.15*	(.08)	.14***[b]	(.06)	−.01	(.05)
Age	−.01	(.01)	−.003	(.004)	−.003	(.005)
N	117		240		223	

B. Blacks	Baseline (No Arg.)		Racial Argument		Innocent Argument	
Black Crime Attrib.	.15*	(.08)	.15***	(.06)	.16***	(.06)
General Crime Attrib.	.08	(.09)	−.03	(.06)	.10*	(.05)
Antiblack Ster.	−.02	(.02)	−.01	(.01)	−.01	(.01)
Fear of Crime	.08	(.11)	−.02	(.02)	.05	(.07)
Punitiveness	.01	(.07)	.16***[a]	(.05)	.11**	(.05)
Party ID	.10	(.07)	.08	(.05)	.03	(.05)
Ideology	.03	(.06)	−.02	(.04)	.03	(.04)
Education	−.02	(.09)	−.04[b]	(.07)	.20***	(.07)
Female	−.47**	(.23)	.42**[a]	(.18)	−.12	(.18)
Income	.01	(.08)	.04	(.06)	−.08	(.06)
Age	−.01	(.01)	.004	(.005)	.002	(.006)
N	118		210		218	

*p < .10, **p < .05, ***p < .01.
[a]Coefficient is statistically different across baseline and racial argument conditions (≤ .05).
[b]Coefficient is statistically different across innocent and racial argument conditions (≤ .05).
[c]Coefficient is statistically different across race of respondent (≤ .05).
Note: Entries are ordered probit regression coefficients with standard errors in parentheses. Coefficients and statistical significance across argument conditions are based on estimates from the pooled model in Table B1. Higher values on the above variables indicate greater support for death penalty, more dispositional attributions of crime, more negative stereotypes of blacks than whites, more fear of crime, more punitive, more Republican, conservative, educated, female, higher income, and older.

Statistical significance across the race of the respondent is based on models estimated for each condition pooled across race that including a race dummy and interactions between race and each of the predictors.

and innocent conditions. When presented with the argument that capital punishment is racially unfair, however, whites' beliefs about whether black crime is shaped by dispositional or structural forces have a substantial impact on death penalty support. Consistent with H_{4a}, when whites are confronted with a racial frame, attributions of black crime become consequential to whites' death penalty attitudes—i.e., those who feel that black arrest rates are more attributable to the criminal dispositions of blacks are substantially more likely to support the death penalty than those who attribute blame to a biased justice system.

Among African Americans, we find a very different pattern. As demonstrated by the coefficients in the first row of Table 2B, attributions of black crime emerge as a robust and statistically significant predictor of death penalty support in *all three* experimental conditions. Whether blacks receive no argument, the innocent argument, or the racial argument, support for the death penalty is significantly lower among those who attribute black punishment

more to a racially biased justice system than to the characteristics of blacks themselves. Consistent with our expectations (H_{4b}), blacks apparently need no explicit prompting to view questions about the death penalty as a racial issue. Their support for the death penalty, regardless of how the issue is framed, is affected substantially by their beliefs about the causes of black crime and punishment.

Table 2 reveals a number of other interesting findings concerning the determinants of death penalty attitudes.[11] First, antiblack stereotypes are not significant predictors of death penalty attitude among either race, which is contrary to Soss, Langbein, and Metelko's (2003) finding that prejudice against blacks is a powerful determinant of death penalty approval (in 1992) among whites. One possible reason for the difference is that we include several predictors that Soss, Langbein, and Metelko do not, including attributions of black crime and generic crime, and these variables may carry the effects of racial stereotyping.[12]

Another important, though less surprising, finding is that support for the death penalty among both races emanates from a more general desire to punish wrongdoing. In every case but the baseline condition for blacks, Punitiveness plays a statistically significant role in conditioning higher levels of support for capital punishment. Also, consistent with other studies (Tyler and Weber 1982), fear of crime does not significantly elevate death penalty approval, a result that is constant across all three conditions for both blacks and whites.

Finally, while the impact of Partisanship and Ideology is only occasionally significant, various demographic factors play a more reliable and substantial role, even after controlling for a host of attitudinal measures. One is struck, for example, by the powerful role that gender plays in shaping approval of capital punishment—a role that is fully consistent with findings from much of the extant literature (Bohm 2003). Among whites, males are consistently more supportive of the death penalty than are females, regardless of the presence or type of argument involved. Among blacks, however, we find a very different pattern for gender. Although black men express greater support for executing convicted murderers in the baseline condition, when presented with the argument that the death penalty is racially unfair, they become much *less* supportive of capital punishment than black women. Although any explanation of this reversal of gender effects is necessarily post hoc, one could speculate that because black men receive the brunt of discriminatory treatment in the justice system—whether in the form of police brutality or death sentencing, when they are explicitly reminded of the racial bias in the system, they are much less supportive of the ultimate punishment relative to black women.[13]

White Backlash. We conclude with a closer look at the changing influence of whites' beliefs about black causes of crime on death penalty support across the baseline and racial argument conditions in order to account for the aggregate shift in support across these two conditions—i.e., the so-called "boomerang" or "backlash" effect—observed in Table 1. As indicated, one likely source of whites' strong resistance to the racial discrimination argument against the death penalty is the tendency for most whites to believe that black criminal behavior is caused by dispositional factors. Figure 1, designed to better document the power of these beliefs to affect death penalty support in the racial argument condition, displays a bar chart of the predicted probabilities of whites' support for the death penalty across the entire range of the black causes of crime scale.[14] One is struck by the steep ascent in strong support for the death penalty as whites' views on the causes of black crime shift from more structural to more dispositional attributions. Moving from the lowest (most structural) to the highest (most dispositional) points on the scale, expressions of strongly favoring the death penalty more than double, from 28% to 64%, suggesting a strong negative reaction to the racial argument among many whites.

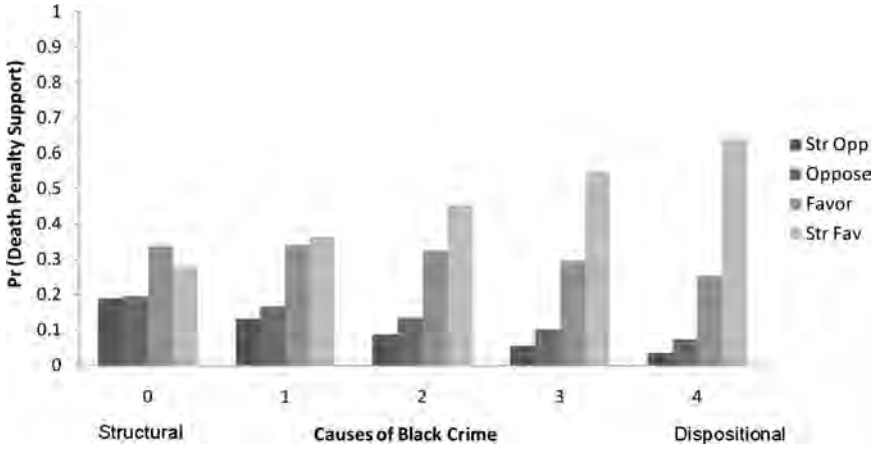
[11] Given the modest correlations between theoretical predictors (i.e., attributions, stereotypes) in our models mentioned earlier, collinearity does not appear to be a problem in reducing the precision of the estimates. Calculating the Variance Inflation Factor (VIF) for the independent variables of equations estimated separately for whites and blacks in each of the three conditions, the VIFs never exceed 2.0, which is well below common problematic thresholds for this statistic (e.g., Fox 1991).

[12] For example, as already indicated, there is a modest correlation between antiblack stereotypes and the black causes of crime variable (e.g., .22 for whites and .26 for blacks). We did not estimate the precise indirect impact of antiblack stereotypes on death penalty attitudes via causes of black crime because we were not prepared to assume that stereotypes are causally prior to black causes of crime, as one could just as easily argue the reverse—i.e., that attributions of black crime underlie whites' antiblack stereotypes. We therefore leave this important question to future research.

[13] While black women are subject to numerous forms of negative encounters with police and discriminatory treatment by the justice system, black men disproportionately bear the brunt of this treatment (e.g., Walker, Spohn, and DeLone 2003). Thus, it is not surprising that predicted probabilities of blacks' death penalty support reveal that the changing coefficient for gender in Table 2 turns on the drop in support among black men from 60% to only 26% from the baseline to racial argument conditions, respectively, while support among black women is unchanged (43% and 41%).

[14] Predicted probabilities were generated based on the ordered probit results in Table B1, using Stata 9.0, by varying Causes of Black Crime and holding other predictors at their sample means.

FIGURE 1 Whites' Probability of Death Penalty Support for Racial Argument across Causes of Black Crime



Because whites tend to fall heavily toward the dispositional end of the black causes of crime scale, it is no small wonder that when such views are activated (as in the racial treatment), whites collectively are highly resistant to the argument that the death penalty is racially unfair. Many whites begin with the belief that the reason blacks are punished is because they deserve it, not because the system is racially biased against them. So when these whites are confronted with an argument against the death penalty that is based on race, they reject these arguments with such force that they end up expressing more support for the death penalty than when no argument is presented at all. This result is consistent with studies in persuasion (e.g., Johnson and Eagly 1989) that find when people with strong convictions (or who are otherwise highly involved) are presented with arguments that are inconsistent with their prior beliefs, they are likely to reject such arguments so strongly that a negative change occurs—i.e., attitude change runs in the direction opposite to the argument.

Summary and Conclusions

While there have been numerous studies of death penalty attitudes, few have examined the resistance of these attitudes to arguments against capital punishment among both whites and blacks, two groups central to any debate on the issue. Our survey experiment examines the power of two arguments against capital punishment—one racial, one not—to reshape support for the policy. We find that such frames may result in either persuasion or resistance, depending on the characteristics of the message and of the recipient.

The dominant theme of the empirical story is that whites and blacks diverge substantially in their support for the death penalty *and* their receptivity to arguments against it. We find, quite clearly, that African Americans are much more responsive to persuasive appeals that are both racial and nonracial (i.e., innocence) in nature, likely because such arguments are consistent with their existing predispositions. Given their belief that the criminal justice system is racially unfair, blacks appear receptive to any argument against the death penalty that frames the issue in terms of fairness. Whites, in contrast, seem immune to persuasion and, in the case of the racial argument, exhibit a response in the direction opposite of the message. Indeed, our most startling finding is that many whites actually become more supportive of the death penalty upon learning that it discriminates against blacks.

On this count, we believe that the conventional wisdom, which holds that death penalty attitudes are virtually immune to the types of pressures that give most political attitudes their lability (Ellsworth and Gross 1994), is a far more accurate characterization of whites than of blacks. While we would never label the opinions of African Americans as flimsy or random, we do believe that many blacks are willing to reconsider their support for punitive crime policies when presented an argument that is consistent with their belief that the criminal justice system is racially, and generally, unfair. Although the laboratory studies reviewed by Ellsworth and Gross benefit from high levels of internal validity, it is safe to say that they did not examine the effectiveness of arguments against the death

penalty among a large number of minority participants, thereby exaggerating the perseverance of attitudes toward the policy.

The interracial differences in the nature and role of naïve beliefs about the causes of black crime are no less intriguing. In the first place, as noted, African Americans are substantially more likely to attribute the disproportionate black crime rate to external (i.e., a discriminatory justice system) rather than internal causes, a belief that is consistent with the large body of scholarly evidence documenting substantial de facto procedural discrimination in our legal system (e.g., Lauritsen and Sampson 1998). It is also wholly consistent with the personal experiences of many blacks who are subjected to unfair treatment by police and the courts. Whites, on the other hand, are much more likely to view black criminality as being dispositionally caused, believing the reason blacks are more likely to be arrested and imprisoned than whites is that blacks commit more crimes (and thus deserve the punishment), not because the criminal justice system is biased against them.

Not only do blacks and whites hold different causal beliefs regarding black crime, but they also employ them in quite different ways when responding to questions about the death penalty. Blacks who believe that African American criminality is due more to biases in the justice system are less supportive of the death penalty, regardless of how the argument is framed. Even when race is not explicitly mentioned (as in the baseline and innocent conditions), these respondents are influenced by their causal beliefs, presumably because capital punishment is an inherently racialized issue for many in the African American community. Whites, by contrast, employ such causal beliefs more selectively. When confronted with the argument that the death penalty is racially unfair, whites who believe that black crime is due more to blacks' dispositions than to a biased justice system end up rejecting the racial argument with such force that they become even more supportive of the death penalty.

The different reactions of blacks and whites are consistent with studies in persuasion finding that, for important issues like the death penalty, one's prior beliefs affect whether one resists or responds to a message. Blacks overall are more responsive to arguments against the death penalty because they are more consistent with their beliefs about the lack of fairness of the CJS. Many whites, on the other hand, come to the table with a very different set of beliefs that prompt them to react to these same arguments with intense skepticism. Their response to the racial argument, in particular, is consistent with studies in persuasion that find when people are presented with arguments that run counter to their convictions, they are often rejected so strongly that attitude change runs in the direction opposite to the argument.

Our findings also help to extend recent studies documenting the limits of issue frames as tools of persuasion (e.g., Druckman 2001b). In theory, issue frames work by altering the importance individuals attach to certain beliefs used to evaluate the message (Nelson and Oxley 1999). In reality, framing the argument against the death penalty in terms of racial discrimination does not appear to have worked as intended for either blacks or whites. Among blacks, the importance of their causal beliefs for shaping support for the death penalty was not altered by the arguments but remained constant across all three argument conditions, presumably because when blacks are asked about capital punishment such beliefs are chronically salient regardless of how the issue is framed. And among whites, although the racial argument successfully activated their beliefs about the causes of black crime, their prior beliefs prompted them to strongly *reject* the racial argument.[15] The lesson for elites who use frames as persuasive tools is that frames can have a variety of unintended consequences and can be less efficacious than is often suggested.

A similar lesson is gained from Chong and Druckman's recent study of competing frames, where the authors find evidence for what they term a "contrast effect," when a weak frame backfires when "matched against a strong frame by causing individuals to move *away* from the position advocated by the weak frame" (2006, 20; emphasis in original). If whites in our study viewed the racial discrimination argument as weak compared to the proposition of using the death penalty to punish murderers (an implicit "strong" frame), the backlash effect we find could be interpreted as being consistent with such a contrast effect. The difference is that in the Chong and Druckman study, people rejected the weak frame, whereas in our study, whites did not reject the racial *frame*, which served to activate their naïve causal beliefs. Rather, their more salient causal beliefs prompted them to reject the racial *argument*.

Still other interpretations of the "backlash" effect among whites are possible. It has been suggested, for example, that instead of rejecting the racial argument, whites may be ignoring the first part of the manipulation arguing against the death penalty, focusing instead on the death

[15]We note that rejecting the argument is fundamentally different from rejecting the frame.

penalty as a punishment for *black* convicted murderers.[16] In other words, the manipulation may have framed the death penalty as a punishment for black offenders and because many whites view black criminals as particularly violent or beyond redemption, they are more supportive of the punishment. While plausible, we see two problems with this interpretation. First, it assumes that whites ignore the main thrust of the introduction of the racial argument ("some people think the death penalty is unfair") that contains a very powerful stimulus—"unfair," a word that should not be ignored given its prominence in the justice system. Second, if whites are reacting to their images of black offenders, as suggested by this alternative explanation, surely antiblack stereotypes should play a more direct role in shaping whites' responses to the racial argument than we found to be the case. Clearly, the microtheoretical mechanisms underlying such backlash effects deserve more attention in future research.

A wholly different interpretation of the backlash effect is that it is a "principled" reaction to the racial argument driven by the conservative beliefs held by many whites about the causes of black crime (e.g., Feldman and Huddy 2005; Sniderman and Carmines 1997). A closer look at our instrumentation and findings suggests otherwise, however. As noted, whites' views about the causes of black crime are not independent of their antiblack stereotypes ($r = .23$). Thus, racial prejudice contributes indirectly to whites' reactions to the racial argument. In addition, the popular belief among whites that black crime is attributable to the failings of blacks, with no real weight given to biases in the criminal justice system, can be interpreted as constituting a more subtle form of prejudice. In the economic sphere, for example, whites' denial of racial discrimination has been termed "laissez-faire racism" (Bobo, Kluegel, and Smith 1997) because, it is argued, the maintenance of racial hierarchies no longer requires widespread endorsement of the idea that blacks are genetically inferior. Rather, it presumes that all major obstacles facing blacks as a group have been removed, making government-sponsored efforts to reduce racial inequality unnecessary.

By the same token, by denying the discrimination that blacks face in the justice system, whites are free to "blame the victim" or turn a blind eye to the many injustices that blacks suffer at the hands of the police and the courts. Thus, whites' resistance to racial arguments against the death penalty is likely motivated, at least in part, by racial animus, or at the very least, a mixture of racial insensitivity and ignorance about the reality of discrimination in the justice system.

Put differently, we do not take exception to the findings generated by Bobo and Johnson (2004), or Soss, Langbein, and Metelko (2003), who find racial prejudice to be linked to prodeath penalty attitudes. In one way or another, racism (even if defined as a denial of the de facto discrimination that is rampant in the justice system) surely affects many whites' beliefs regarding this policy. But whatever the precise explanation for our finding, the results are clear—i.e., a majority of whites supports capital punishment, a majority of whites believes that high levels of black criminality can be attributable mainly to dispositional characteristics, and a majority of whites refuses to abandon support for the death penalty despite evidence that the policy is highly flawed.

We must, as always, accept these results alongside the usual caveats, the most important in our case being the fact that we only provided respondents with antideath penalty arguments. It is always possible that arguments supportive of the policy would catalyze a fundamentally different dynamic, both intra- and interracially. It is possible, for example, that African Americans would have demonstrated greater resistance if they had been "pressured" with procapital punishment messages.[17]

Nonetheless, our results are strongly suggestive that future research should further explore the tendency of blacks and whites to respond to the death penalty in quite different ways. To date, we know comparatively little about blacks' views on the issue—an unfortunate deficiency because of the unique role that they have played in the criminal justice system, generally, and the administration of the death penalty, specifically. As such, they provide an important contrast group that enables us to understand better the views not just of African Americans but of whites, as well.

One important practical implication of our findings is that groups (or politicians) who attempt to mobilize opposition to the death penalty face an acute political dilemma. While such groups clearly need the support of blacks, who are likely to comprise an important part of

[16] We are grateful to an anonymous reviewer for suggesting this possibility.

[17] We did not include prodeath penalty arguments in our study for three reasons. First, our primary concern was to evaluate the effectiveness of racial versus other death penalty arguments, and we find it hard to imagine a "pro" argument based on race. Second, because our design included a source manipulation (which had no effect on responses), we decided that the small number of cases in a 2 (pro vs. con arguments) × 2 (race of respondent) × 3 (argument condition) × 2 (source) design would compromise a major strength of survey experiments, which is that respondents in each cell approximate a representative sample of the public. And third, because opinion in the United States has been solidly supportive of capital punishment, it is far more difficult to devise frames that "move" respondent attitudes in an even more favorable direction.

any antideath penalty coalition, direct appeals based on the claim that the policy discriminates against African Americans are likely to create a backlash among whites who see no real discrimination in the criminal justice system. Looking again at Figure 1, for example, we see that once a racial argument against the death penalty has been introduced, even a majority (62%) of whites at the extreme liberal (i.e., structural) end of the causes of black crime scale supports capital punishment. Because most whites do not see widespread racial discrimination in the criminal justice system (or any other domain, see Sigelman and Welch 1991), direct appeals based on claims of discrimination are unlikely to win their support.

Our results suggest that a more effective argument for encouraging opposition to the death penalty is one that frames the unfairness of the policy more generally, without focusing on race, thereby avoiding whites' resistance to more direct racial appeals. The argument that many innocent people are being executed may not move whites in great numbers toward opposition, but neither does it precipitate a white backlash. In addition, as we have seen, such nonracial arguments against the death penalty can and do elicit blacks' opposition to the policy because many blacks already have a deep suspicion about the fairness of the legal system. Thus, making more general arguments against the lack of fairness of the death penalty without making a direct reference to race may constitute a successful "stealth" strategy that appeals to blacks but does not produce countermobilization among whites.[18]

In many respects, whites' responses in our study provide a more general rationale for focusing more on resistance in studies of political persuasion. Not only did many whites appear immune to persuasive appeals, but they also exhibited the type of "bolstering" (or boomerang) effect noted in the literature (Johnson and Eagly 1989). We know, if only experientially, that instances of resistance are commonplace—witness the large numbers of supporters of George W. Bush who continued to believe in the existence of weapons of mass destruction in Iraq despite months of media coverage to the contrary. But nonfindings seldom receive placement in journals, and students of opinion and persuasion are typically more interested in agents that are persuasive than in those that are not.

[18]We do not wish to push the argument for a "stealth" strategy too far. We examine only one racial argument against the death penalty in a "one-shot" survey experiment; alternative wording or framing repeated over the long haul could produce more opposition, though we admittedly are at a loss to imagine how a substantially more effective appeal might be constructed.

Appendix A
Survey Items

General Attributions of Crime

The people we talk to have different reasons for crime in America these days. I am going to read you several reasons, two at a time, and ask you to choose the one you feel is the MORE IMPORTANT cause of crime.

1. Do you feel crime is caused more by poverty and lack of opportunity, OR by people being too lazy to work for an honest living?
2. Is it due to poverty and lack of opportunity, OR because many younger people don't respect authority?

Punitiveness Likert scales (1 = "strongly disagree;" 4 = "strongly agree")

3. Parents need to stop using physical punishment as a way of getting their children to behave properly. (reverse coded)
4. One good way to teach certain people right from wrong is to give them a good stiff punishment when they get out of line.

Fear of Crime

5. How worried are you about you or a member of your family being a victim of a serious crime? Would you say very worried (4), somewhat worried (3), only a little worried (2), or not worried (1)?

Antiblack Stereotypes

6. "On a scale from 1 to 7, where 1 means that it is a very poor description and 7 means that it is a very accurate description, how well do you think [. . . .] describes most whites/most blacks? (1) lazy; (2) prone to violence; (3) prefer to live on welfare; (4) hostile; and (5) dishonest." Individual trait items were reverse-coded and recalibrated to a 0 to 6 scale, with higher values reflecting more negative ratings.

Appendix B

Table B1 Predicting Support for the Death Penalty, Pooled across Condition

	Whites	Blacks
Predictors		
Black Crime Attrib.	.01 (.08)	.15* (.08)
General Crime Attrib.	.14* (.08)	.08 (.09)
Antiblack Ster.	.02 (.02)	−.02 (.02)
Fear of Crime	−.15 (.13)	.08 (.11)
Punitiveness	−.24*** (.09)	.01 (.07)
Party ID	−.07 (.06)	.10 (.07)
Ideology	.06 (.08)	.03 (.05)
Education	−.08 (.08)	−.02 (.09)
Female	−.56** (.24)	−.47** (.22)
Income	.15** (.08)	−.00 (.08)
Age	−.01 (.01)	−.01 (.01)
Conditions & Interactions		
Racial Argument (1 = Condit.)	−1.02 (1.12)	.15 (1.01)
Innocent Argument (1 = Condit.)	−.61 (1.15)	−.61 (1.00)
Racial ∗ Black Crime Attrib.	.21** (.10)	.01 (.11)
Racial ∗ Gen. Crime Attrib.	.03 (.10)	−.10 (.11)
Racial ∗ Antiblack Ster.	−.00 (.03)	−.01 (.02)
Racial ∗ Fear of Crime	.24 (.16)	−.11 (.14)
Racial ∗ Punitiveness	.05 (.10)	−.18** (.09)
Racial ∗ Party ID	.14* (.08)	−.02 (.09)
Racial ∗ Ideology	−.11 (.09)	−.05 (.07)
Racial ∗ Education	−.07 (.10)	−.02 (.12)
Racial ∗ Female	.04 (.29)	.89*** (.29)
Racial ∗ Income	−.01 (.10)	.05 (.10)
Racial ∗ Age	.00 (.01)	.01 (.01)
Innocent ∗ Black Crime Attrib.	.09 (.10)	.02 (.11)
Innocent ∗ Gen. Crime Attrib.	−.10 (.10)	.02 (.10)
Innocent ∗ Antiblack Ster.	.04 (.03)	−.01 (.02)
Innocent ∗ Fear of Crime	.21 (.16)	−.14 (.14)
Innocent ∗ Punitiveness	.06 (.11)	−.12 (.09)
Innocent ∗ Party ID	−.01 (.08)	−.07 (.09)
Innocent ∗ Ideology	.06 (.09)	.00 (.07)
Innocent ∗ Education	−.00 (.10)	.22* (.11)
Innocent ∗ Female	.24 (.29)	.58** (.29)
Innocent ∗ Income	−.16* (.09)	−.08 (.10)
Innocent ∗ Age	.00 (.01)	.01 (.01)
Cutpoint 1	2.42 (.97)	−.08 (.82)
Cutpoint 2	1.85 (.97)	.44 (.82)
Cutpoint	−.98 (.96)	1.08 (.82)
N	584	546

*p < .10, **p < .05, ***p < .01.

Note: Entries are ordered probit regression coefficients with standard errors in parentheses. Variable coding is in the text and in Table 2. The omitted argument condition is the baseline condition.

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EXHIBIT 6

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. COLUMBUS ALLEN, JR., II, Defendant.	Case No. 1222451

Before the Honorable HURL W. JOHNSON, Judge Presiding

July 23, 2009

DEFENDANT'S MOTION FOR CHANGE OF VENUE

SECOND DAY OF HEARING

APPEARANCES:

ALAN CASSIDY, Deputy District Attorney, appeared for and on behalf of the People.

JOHN GRELE, Attorney at Law, appeared for and on behalf of the Defendant.

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July 23, 2009 -- 9:35 a.m.

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THE COURT: All right. Let's go on the record. Everybody is present in Mr. Allen's case, Mr. Allen, the attorneys. The doctor is back on the stand.

Mr. Grele, you may resume your cross.

MR. GRELE: Thank you, Your Honor.

THE WITNESS: Glad you called it that.

THE COURT: Direct, I mean. Thank you, sir.

EDWARD J. BRONSON,

called as a witness for and on behalf of the Defendant, having been duly and regularly sworn, testified as follows:

DIRECT EXAMINATION (Continued)

MR. GRELE: Q. Okay. Dr. Bronson, we were about to discuss some of the survey results in your testimony, and the actual results. Do you have that report in front of you?

I believe, Your Honor, it's Exhibit H.

THE COURT: All right. Thank you.

THE WITNESS: Yes, sir.

MR. GRELE: Q. Okay. And we were going for the -- first -- I'm not going to ask you about the first five pages except for the fact that they're basically the statement by the entity that conducted the survey as to how it was done and the representative sample and those kind of things; isn't that correct?

A. Yes. Though, I should point out this there's a typographical minor thing.

Q. I was going to ask you about that. If you could clarify that for us, I would really appreciate that.

A. Yes, on page three of what's called the main questionnaire that has these criminal justice attitude questions.

MR. GRELE: Maybe, if I could for the Court, Your Honor, there's two pagination systems in this document. The first five pages are at the top right-hand corner and then there's a part two that follows.

THE COURT: Right.

MR. GRELE: With the page numbers at the bottom.

Q. I believe, Professor, you're talking about the page numbers at the bottom?

A. Yes.

THE COURT: All right. Thank you. So what page did you want to go to?

MR. GRELE: Page three, Your Honor.

THE COURT: All right. Thank you.

THE WITNESS: It's not -- I don't know if I -- should I just answer?

MR. GRELE: Q. Could you just tell us what the question is, please? As I understand it, it's in Q1-A?

A. That's right. If you look at where it says "agree somewhat" on question Q1-A, fully to the right where it says 10.0, that's 19.

THE COURT: Yeah, it's been changed on mine to 19.

MR. GRELE: On the copy we provided the Court?

THE WITNESS: Oh, good. Thank you.

MR. GRELE: Q. It was your understanding that was merely a typographical error?

A. Yes, you can see the numbers. That's how I discovered it.

Q. Now, I wanted to ask you about one part of the questionnaire, the beginning part of the questionnaire we've been talking about. I see what you call a don't-know instruction here --

A. Yes.

Q. -- at the very beginning. Okay. It's my understanding that there is some debate within the survey field about whether or not to ask participants a don't-know question.

A. Yes.

Q. And it's my understanding --

A. Well, that's the general idea. But it's not that you don't ask it, don't -- it's whether how to include that.

Q. Okay. The debate is how to include the don't-know question.

Now, as I understand the don't-know, the debate is whether or not you include it within the question itself or at the beginning as you've done?

A. Or not include it at all.

Q. Or not include it at all. Okay.

A. The big debate is between those, Your Honor, who say, look, if you don't -- when you give people choices like

yes, no, don't know, one side argued that giving them, telling them they can choose "don't know" encourages people to cop out, that is; and, therefore, some who may have opinions, probably not strong opinions, will be forced -- and that's what's called a forced choice, to say yes or no, when they're really they don't know.

THE COURT: So is the counter argument if they only have yes or no they're required to make a choice even if they don't know.

THE WITNESS: Even if they don't know. Either way there's a problem. Now, what I decided long ago and I used this technique for a long time is sort of use a middle ground rather than encourage one slight inaccuracy or the other slight inaccuracy. What I tell them is don't know right at the beginning, I'd like you to know there's no right or wrong answers. You're free to respond with "don't know." In fact, what we see is a whole bunch of people, depending on the question, will say they don't know. These questions are set up so almost everybody has an opinion on this type stuff.

MR. GRELE: Q. Professor, when you're talking about these questions, you're talking about the Q1 series?

A. That's right. That's why they're put in to bring people in to encourage them to participate. They don't have any real purpose, that is any substantive purpose within the survey. They do several things. I don't think you need me to explain why. There are four or five reasons. I just wanted to say that.

THE COURT: All right.

MR. GRELE: Q. All right. Now, the idea behind the survey, as I understand it, is to measure possible prejudice to pretrial exposure within the media; is that correct?

A. That's right, although it doesn't ask about prejudice, per se.

Q. I understand. We'll get to how to ask questions.

Are you familiar with any other means of measuring possible jury prejudice using other formats or questionnaires or a different type of sample?

A. Yes. While this has probably become the major one that's used, there are indirect ways, even the technical formulation of a survey can differ a bit, where you place questions. I think it's fair to say that, it's not I that invented this particular thing, but I followed some people, added my own variations, and I think it generally conforms to the conventional way this is been done.

Q. Has it been used in various courts?

A. Oh, I've used -- specific questions vary depending on the case or the issues in the case, but I've used this in all cases.

Q. Does it meet the ASTC standards you've talked about?

A. Well, I'm reasonably certain it does.

Q. Does it allow for comparisons of responses and drawing conclusions from some of those comparisons?

A. Yes, and that's important, Your Honor, because if I'm going to say there was higher prejudgment in case A as

opposed to these other ones to rank it, for example. If I'm comparing a very different way in measuring that in one case with what I've used in a subsequent case, then the comparison is not very helpful, because if you ask questions a dramatically different way, you may get a higher or lower response, so we like to keep it, if possible?

Q. So it allows you to compare the results you've obtained and sort of place them within an overall view of the cases you've worked on and used a similar type survey?

A. Yes, because when I started, I had no idea what certain recognition or prejudgment meant.

Q. Now, is this a better way of sampling than simply a jury list or a phone book, for instance?

A. Oh, yes. And by that, I need to quickly say, is this what the sampling was here. This is random digit dialing.

Q. Okay. I don't want to go into what random digit dialing is because I see that everybody agrees.

A. Yeah.

Q. But just briefly, is it a better sampling method than simply going to the local barber shop or walking around town and asking people what they think?

A. Generally, yes, but if you're doing certain specific things like evaluating barber shops in your survey, then it maybe it makes sense.

Q. Obviously we're not evaluating barber shops in our survey.

In terms evaluating potential exposure to pretrial

publicity for those likely to serve on juries, is it a better method than going to the local barber shop or walking around the community?

A. By far.

Q. By far, that's right. It has a scientific basis to it; is that correct?

A. Yes.

Q. And a random sampling effort attached to it; is that correct?

A. Yes.

Q. An anonymous quality to it that lends itself to better thought-out responses?

A. Absolutely.

Q. All right. Thank you.

Now, what was this survey intended to measure?

A. Well, in a general way, recognition, awareness of the case in some related facts, prejudgment to some extent, well, more than some, a lot, based on guilt and penalty responses when they were asked about those things.

Q. Now, does a survey like this, are you able to predict a trial outcome based on that?

A. No.

Q. Let's get to some of the data, and let's talk about the Q2 series if we could on the next page.

A. Yes.

Q. I'm not going to spend much time on this, Professor, because the numbers were so similar across the three surveys.

By the way, the fact that they're so similar across the surveys, does that lend validity to each of the surveys?

A. Yes. Obviously it strengthens the conclusion at least as to what the numbers are.

MR. GRELE: Now, what I want to ask you about some particular aspects that may be relevant when we hear from the People's expert.

That's why I'm going through this, Your Honor.

THE COURT: So the Q2 series is basically recognition questions?

MR. GRELE: That's right.

THE COURT: Go ahead.

MR. GRELE: The recognition questions.

THE COURT: Right.

MR. GRELE: And then Q4 would be the --

THE COURT: I got the idea.

MR. GRELE: Prejudice questions are Q4, Q5.

Q. Now, on -- what's the objective here on these recognition questions?

A. Test for recognition and awareness.

Q. Okay. I understand that. I'll rephrase my question.

In doing these recognition questions, are you at all concerned with framing them in a manner that does not affect the questions that follow, such as I'll call them prejudice? Is that what your concern -- one of the concerns here?

A. It's a major concern, at least to the extent that you can do so.

Q. Okay.

A. In some cases where you've got to include prejudicial stuff.

Q. Right. In order to get an accurate recognition factor?

A. Yes.

Q. So the art here that a surveyor with experience, such as yourself, has to engage in, as I understand it, is figuring out what to ask in a way that will get a general response about recognition and then doing it in a manner that does not affect the responses of potential prejudices?

A. Yes, those are called order effects.

Q. Order effects. You don't ask, for instance, in the recognition question whether or not you've heard that Officer Scott that lived in such and such a place was, you know, left at the side of the road with the registration in his hand, Mr. Allen turned himself into the police station and has a prior criminal record, do you recall this case? You don't do that?

A. Not in this case. There may be other cases where a certain fact is so integral to what the public knows about the case that you have to include it.

Q. But not in this case?

A. Not in this case.

Q. You're able to get good recognition data without including prejudicial facts?

A. That's right.

Q. Okay. Is there anything about the recognition

facts that are contained in these questions that would in any way influence the bias questions that followed?

A. I don't think so.

Q. Now, I call them bias or prejudice questions. I think you call them prejudgment questions?

A. Yes.

Q. And in terms of question, I think it is --

A. 3-A.

Q. -- on page 4-A, I think it is.

A. 3 is prejudgment.

Q. 3-A? I don't have a 3-A. I'm sorry.

A. It's right after 2-A.

THE COURT: If you look, Counsel, on page 4, that first square box, that's his question 3-A.

MR. GRELE: Oh, question. I'm looking for pages.

Q. So those are your prejudgment questions; is that right?

A. I may to just very briefly, I suspect His Honor is fully aware of what's going on here, but just to describe what we do for the recognition.

There are two recognition questions 2-A and 2-B. From the nodding of His Honor's head, I deduce that he already understands how that branching works.

THE COURT: You can go ahead and explain it anyway.

THE WITNESS: All right. If somebody recognizes -- we call those probes. If somebody recognizes on the first probe, which is question 2-A, we immediately ask them about guilt, because we know, or at least they tell us that they

recognize the case. Now, if they don't recognize, if they say I don't know or whatever they may say, then when we want to try again, because giving them some additional factor may trigger the memory if it's there.

You can go on with this with eight or ten probes. Usually I use two. So we go then to 2-B. There we just add the name of the defendant and that he's now charged with murder. Not much more, but a little something. Then if they recognize there, then we ask the 3-B question, which is essentially the same question.

MR. GRELE: Q. Okay. So let me see if I get this straight. You've only asked them about a small set of facts about the case from which they can draw upon and recognize the case?

A. Yes, in 2-A.

Q. I understand. Is there a phenomenon that you've observed for instance, during the voir dire process where individuals say I don't really recall the case and then they start asking questions about the case, and all of a sudden it triggers their memory?

A. Sure.

Q. This is an attempt in some way to capture this, although somewhat minimally; is that correct?

A. That's right.

Q. Okay. In fact, if you ask four or five questions, you would expect the recognition rates to begin to increase of the case?

A. Yeah, but if you've asked a good first probe and a

second, you pretty well tapped close to 99 percent of the people who do have that memory somewhere.

Q. Okay.

THE COURT: Let me ask you a question. You're doing this or somebody's doing this on the telephone; right?

THE WITNESS: Yes.

THE COURT: So you call up and ask this person this question. The person on the other line says, I don't really remember too much about this, is this the guy such and such? And they start asking you questions. The person who's doing the questionnaire, what's the person instructed to do how to handle that situation?

THE WITNESS: That's a classic situation, and by the way, each interviewer will have an instruction sheet.

THE COURT: I understand that. I saw the instructions. I want you to put it on the record.

THE WITNESS: The overriding prime directive is you're not supposed to give people any more information because that allows for variability. What one interviewer may say to try to help them explain, they will simply say, may say that in the instruction sheet that you simply repeat the question and hope that that will do it. It may not identify everybody who knows something about the case, but you can't have a situation where some are given one piece of information and maybe an opinion, who knows what, and someone is given something else. You got to have it standardized.

Q. Well, let's go onto the prejudgment. I notice you

have two prejudgment rates, and what are they and why do we have them?

A. Well, the data in response to questions 2 and 3 are shown on the next page, 4-A.

Q. Right.

A. So what you see is there that -- I don't know if I'm not directly answering your question yet, but just to explain what's on the page.

THE COURT: Just tell us what we're looking at.

THE WITNESS: Did you say I should tell you?

THE COURT: Yeah, go ahead.

THE WITNESS: On question 2, the recognition based upon 400 completed interviews with non-felons, the total recognition was 83.8 percent or 849 rounded off. Now, what the information below says that almost all of those, 328 of the 335 who recognized did so on the first probe, and we just picked up another seven people when we asked -- gave them the defendant's name and that he's been charged.

Now, with prejudgment, that's a little trickier. There are two prejudgment rates, as you've indicated, and they're both -- they both produce the kind of information that courts, I think it's fair to say are interested in. They're both based on the same number who say either definitely or probably guilty. Actually definitely guilty is substantially more concern, and it works this way. The Court may want to know.

If I identify somebody who says they recognize the case, what percentage of them have already to some extent or

to a great extent have already formed an opinion about the guilt of the defendant. Obviously that's important, and what we find is that that's rounding off 61 percent, 60.6; but there's another piece of information that the Court actually is usually interested in, and that is of every prospective juror who walks through that door, what percentage of them, including both those who recognize the case and those who don't recognize the case, have already expressed some kind of opinion about the guilt of the defendant.

And what we find there is, of course, we've added to the bottom of the fraction, people who don't even recognize the case. So we don't even ask them the prejudgment question, and we find that rounding off 51 percent of everybody who walks through that courthouse door, assuming that this is a representative survey and tapped the right people and all the rest of it, that gives the Court some indication of how great the problem may be, because you could have a very high -- I've called these guilt 1 and guilt 2. Guilt 1 being the percentage of those who recognize the case who say the defendant is guilty, and the second one is about percentage of the community, the jury pool that thinks the defendant is guilty.

They're both valid, legitimate, important questions, and they yield slightly different results. Because if a very small percentage of the case recognizes it, you could have a guilt 1 of a hundred percent, but if only 10 percent of the community knows anything about the case, that's

almost surely not a number that the Court need to have any concern about.

Q. Okay. Now you've put your -- sort of done your comparative tabulation in Exhibit C with these rates; is that correct?

A. Yes.

Q. Is that C --

A. Those are California appellate decisions. The Court may have less interest in these as expressed.

MR. GRELE: Do you have a page number on that? I think we have a C -- one of the problems, Your Honor, is our Exhibit C has left off several pages. Ours ends at 7.

THE COURT: Mine ends at page 7 as well.

MR. GRELE: Yeah. I believe there's ten pages to the exhibit. Is that correct, Professor?

THE WITNESS: I think so. Let me check.

MR. GRELE: We'll fix that.

THE COURT: We'll fix it. Do you have those other three pages, Mr. Cassidy?

MR. CASSIDY: No, sir.

THE COURT: Before we go to that, let's take a look at that. If you can provide copies, we can make photocopies back there.

MR. GRELE: I'm seeing if we can get our hands on a clean copy.

THE WITNESS: You can use mine.

THE COURT: I'm saying Mr. Cassidy needs one. I need one.

MR. GRELE: I need one.

THE COURT: So if he's got one, we'll take a break and you can go back and make some copies.

MR. GRELE: Thank you, Your Honor.

THE COURT: Good place to stop.

(Brief recess. Proceedings resumed at 10:06 a.m.)

THE COURT: All right. Let's go back on the record. Everybody is present. We were talking about Exhibit C and the exhibit provided to the Court and to the People and also the one Mr. Grele is working on there for a while had only seven pages, but there's page 8, 9 and 10 of Exhibit C, and so we had copies made for everyone. What the Court's going to do is simply add pages 8, 9 and 10 to the existing Exhibit C in the Court's file. Is that acceptable?

MR. CASSIDY: Yes, sir.

MR. GRELE: Yes. Thank you, Your Honor.

THE COURT: Okay. Let's do it that way.

MR. GRELE: So that's -- I understand. Everybody ready for me to proceed?

THE COURT: Yeah.

MR. GRELE: Q. So, Professor, basically I don't want to go over this in detail. This is just rankings of published cases in terms of these types of numbers; correct?

A. Yes, if there was a survey at the trial level, and if the Court put it in its opinion.

Q. And if it was a published opinion?

A. A published opinion, that's correct.

Q. And then the last page is those Stanislaus County

cases. I don't think we need to talk about those.

Now, let's go on to -- does a high recognition rate necessarily mean that a defendant cannot receive a fair trial?

A. No. While it's -- in order -- without it, you don't probably almost surely don't have a problem, but with it there's no guarantee. But I've also used the example of Ellie Nessler. That was, I'm sure, almost total recognition. Everybody knew who she is. Okay. The --

Q. There was total recognition of the case, but the results of the survey were basically that the community sentiment was very much in support of the defendant?

A. I doubt there was any survey because certainly defense wouldn't want to move the case. She was a heroine. That's very unusual in a criminal case.

Q. Was this recognition rate that you found here, was it a stale rate because it was done 18 months ago or however many months ago it was done? Is it a stale rate?

A. Well, obviously it's old, dating it.

Q. Okay.

A. But we do have subsequent studies saying not only had it not gone down, I think my second one recognition went up, not appreciably, but a little bit, which was unusual.

Q. I wanted to ask you about that, if we could switch gears a little bit.

The second one was done in July of 2008, if I'm correct?

A. I think that's about exactly right.

Q. About seven months later; correct?

A. Yes.

Q. Then the third survey which has been done in this case, which in many ways mirrored your survey, was done in October; is that correct?

A. Yes.

THE COURT: That's October '08.

MR. GRELE: Thank you, Your Honor.

Q. So basically what we had was a spread over a ten-month period well after the incident of what the recognition rate was?

A. That's right.

Q. Okay. So was there anything that leads to you believe that, if we took a survey today, we wouldn't get the same thing?

A. Well, I don't want to speculate.

MR. CASSIDY: I would join in that request.

MR. GRELE: Q. This is pretty strong data this is a stable rate within this community, isn't it?

A. Yes, and it's unusual.

Q. And, by the way, just to give you a hypothetical. Suppose I was to say that prior to your second survey there was some media coverage about some procedural aspects of the case concerning a defense motion dismiss the indictment and some hearings that were held in that regard that were covered in the media as well as an incident where Mr. Allen was walked through the courthouse in shackles and jail garb and that was reported in one of the media papers. Could

that perhaps explain the blip you found in that survey?

A. Well, while it could and seems likely, I have no evidence as to the cause of that.

Q. All right.

A. Except to say that it's been in my past experience that that's a very unusual thing for recognition over a substantial period of time, not only doesn't drop. That's the way memory works. But a little bit -- not in a statistically significant way, but it went up.

Q. Okay. Now, we saw in Exhibit C where this one ranks, but in Exhibit B in your own cases, do you have a ranking in terms of prejudgment in Exhibit B?

A. I don't know if I included that. However I ranked these cases, I think I ranked it here by newspaper articles. I may have or I could have it ranked by prejudgment and recognition.

THE COURT: Exhibit B, Venue Cases Where Bronson Testified Ranked by Newspaper Articles.

THE WITNESS: That's right, Your Honor.

MR. GRELE: Thank you, Your Honor.

Q. So there's no particular ranking here?

A. I may have it actually in my materials, but they don't -- this case ranks around within a few points right in that 40 type area of all the cases I've done. In other words, isn't that what shows with this one?

Q. Well, if we look at Exhibit B, let's look at Exhibit B-10.

A. Okay.

Q. Is that what we're talking about here, this is a ranking in peace officer homicides, on page 11? I'm sorry.

A. Yes, but, of course, that's only police officer killings, and it includes many cases because I recommended against a change of venue, I didn't think there was enough where it didn't go to any decision by -- or even presentation of the evidence in court.

Q. Okay. Now, we have following that on page 12 and 13, we do have where you recommended against change of venue after completing the survey?

A. Yes.

Q. And you have some guilt -- are these ranked by the guilt, what you call the guilt 2 question?

A. Let's see. It looks like they're ranked by recognition. That isn't right. No, this would be ranking by guilt 2.

Q. Which is the walking in the courthouse door percentage that you're talking about?

A. That's right.

THE COURT: I'm not sure I'm following what you're talking about. Tell me what page 11, 12 --

MR. GRELE: Page 12 and 13, Your Honor.

THE COURT: 12 and 13.

MR. GRELE: Basically as I understand it, these are cases where Professor Bronson has recommended against the change of venue after completing the survey.

THE COURT: Right got that part.

MR. GRELE: Q. What it's done is rank by the G2 in

your opinion which is guilt 2; is that right, Professor?

A. That's right.

THE COURT: What's the G2 number?

MR. GRELE: The G2 number is the percentage out of the total sample who have a predisposition on guilt.

THE COURT: So, for example, on this first one, Nichols, does that mean it's an 82 percent recognition rate?

MR. GRELE: No, that's a -- the recognition rate in Nichols was 99 percent.

THE COURT: What's G9 mean?

MR. GRELE: G9 means the number of people who were surveyed who responded they believed the defendant to be either definitely guilty or probably guilty.

THE WITNESS: But it's important to realize that that included those who didn't even recognize the case.

MR. GRELE: Right, in the Nichols case there was nobody who didn't recognize the case. I mean it's the Oklahoma City bombing.

THE WITNESS: I think that's the retrial, the state case.

MR. GRELE: Right.

THE WITNESS: But if you'll notice the recognition was 99 percent, wasn't a 100. That's why there's a one-point difference in guilt 1 and guilt 2. Because everybody recognized it.

MR. GRELE: So if Your Honor wanted to translate that number in this case, that would be found, as I understand it, in the page 4-A --

MR. CASSIDY: Are we proceeding to argue now or continue with --

THE COURT: He's trying to help me find where this percent is. It's not an argument.

MR. GRELE: I can do it with questioning if the prosecutor wants me to.

THE COURT: No, it's not argument. I just want to find the stuff.

MR. GRELE: Q. Okay. So on 4-A Exhibit H, which is your survey data talking about guilt 1 and guilt 2, the response on the Q3 as to guilt 1 and the response on Q3 at the bottom is to guilt 2; is that correct?

A. That's exactly right.

Q. So here in this case it's a 50.8 percent which you call guilt 2?

A. That's right.

Q. That's of the total sample, whereas the 60 percent is of the sample that recognize the case?

A. That's exactly right.

THE COURT: Thank you.

MR. GRELE: Q. All right. That's how we can put this graph into context, Exhibit B?

A. That is right, although I understand the Court is reluctant to hear cases, but it would give some sense --

THE COURT: I'm reluctant to do it. I'll consider anything of any value.

MR. GRELE: Q. Now, in this case, we had a case that almost everybody believes should be a change of venue and

that was the Peterson case. Is that correct?

A. Yes.

Q. You're somewhat familiar with that case, taken a look at the information pertaining to that case; is that correct?

A. Yes, and in other ways.

Q. I'm sorry?

A. And in other ways.

Q. There were some numbers in that case that I understand there's been some dispute about how the numbers were done --

THE COURT: So why are we bothering with it?

MR. GRELE: Just as a comparative what the numbers they got in that case, Your Honor.

MR. CASSIDY: The numbers as counsel just stated are in question. Why are we going --

THE COURT: I don't understand. I worked on the Peterson case. Not up front, but I worked on the Peterson case because the Peterson case was going to be my case if it wasn't a change of venue. I'm familiar how the survey case was done, whether it was properly done. I know all about that stuff. If the allegation was it wasn't properly done, that doesn't have any relevance to me.

MR. GRELE: I understand that, Your Honor. I wanted to be up front about that with this question.

THE COURT: Go ahead.

MR. GRELE: Q. There were two surveys; is that correct?

A. There was three.
Q. One by Strand and one by Schoenthaler?
A. For the defense.
Q. For the defense.
A. Also by the prosecution.
Q. In terms of the defense one, the one in question was the Schoenthaler study?
A. That's correct.
Q. Not the Strand study?
A. That's right.
Q. The Strand study had a 90 percent recognition and a 40 percent guilt rate; isn't that correct?
A. Yeah 39.7.
Q. They used a slightly different methodology than you did?
A. Yes.
Q. So it's not actually transferable?
A. That's correct. I'm not sure what Schoenthaler had.
Q. We're not going to talk about what Schoenthaler used because that's the one everybody recognizes was not adequate.
Now, there's been some discussion -- by the way, did you familiarize yourself somewhat about with Mr. Ebbesen's work on this case?
A. Just a little bit. I got it a little bit late, at least the report.
Q. But there's an issue -- do you understand that

there's an issue about what we call a fair and impartial question?

A. Oh, yes.

Q. He feels that a fair-and-impartial question should be asked and takes you to task somewhat for not asking one. Are you familiar with that?

A. Oh, yes.

Q. Okay. Let's talk about the fair-and-impartial question. Why didn't you --

THE COURT: Hang on a second. I think I know what it is because I've reviewed it. Tell us what your understanding of a fair-and-impartial question is.

THE WITNESS: Well, you ask people if, despite what they may know or think or whatever, can you put that aside -- I don't remember the exact language he uses, but they're pretty much fungible -- and decide the case based upon the evidence presented in Court.

THE COURT: All right.

MR. GRELE: Let's just read it for the record. Is this the question, sir?

> "Now, suppose you were selected to serve on the jury in this case. Do you feel you could set aside anything you've heard about the case, listen to the evidence presented in during the trial, and come to a verdict based solely on the evidence presented in court?"

Q. Is that the question you're referring to?

A. Yes.

Q. Let's refer that to that as a fair-and-impartial question.

A. Okay.

Q. Some people refer to it as a set-aside question?

A. Yes.

Q. Why didn't you include a fair-and-impartial question or a set-aside question in your survey?

A. Well, there are several reasons.

Q. Well, can you explain some of them, because I think it's an important issue?

A. The first one is those guidelines we talked about. The ASTC, American Society of Trial Consultants, that was tasked with establishing questions for venue surveys, Your Honor, and the revised edition, nothing substantive in the editions, but these were in 2002, dealt directly with this in the section before, and I'll read it.

MR. CASSIDY: May I have a copy of what the witness is referring to? I haven't been given a copy again.

MR. GRELE: Are you referring to the standard?

MR. CASSIDY: No. We're on to a different area I haven't been given copies of.

THE WITNESS: This is the ASTC standards. That's the language I'm going to read, if I can just finish it.

MR. CASSIDY: (Reading.)

MR. GRELE: While Mr. Cassidy is reading --

MR. CASSIDY: (Reading.)

(Pause.)

MR. CASSIDY: I'm going to renew my request to have an opportunity to see, to have whatever materials the expert is going to be relying upon during this hearing. Previously -- I can bring in the e-mail if there's a question about it. I previously asked Mr. Grele for that, and I asked yesterday for a copy of the study that the witness was referring to, and in fairness, I've forgotten which study I specifically asked for because there was a number of things being referred to.

MR. GRELE: Okay. Your Honor, you know, experts get up and they testify based upon their knowledge about certain studies and certain data, and you don't necessarily produce all of it in court.

THE COURT: Counsel, any time you want an expert to make a reference to some documentation or something he referred to in forming his opinion, it's supposed to be brought to the defense.

MR. GRELE: To the other side.

THE COURT: Quite frankly, there's ways he can be objecting and not even be proceeding with that. He's not making that objection.

MR. GRELE: I understand. I will try to get my hands on this stuff and get it to the prosecution.

MR. CASSIDY: If I may, Dr. Bronson seems to have a whole outline of what he's using for his testimony. If he's going to keep referring back and forth to that, I'd like to have a copy of it. I'm entitled to at least examine it. We can stop on the various questions and briefly examine --

THE COURT: We can stop right now and make a copy of it.

MR. CASSIDY: That would be my request.

MR. GRELE: Your Honor, if I may, the outline is something Dr. Bronson and I have gone through in terms of questions and potential answers. It's not necessarily something he's relying on. This part he is.

THE COURT: We can take a break and you can look at it and see if there's anything not appropriate to give to Mr. Cassidy, you can let me know.

MR. GRELE: Maybe the professor has what he's talking about in his bag there.

THE COURT: Let me know when you're ready.

(Recess from 10:25 a.m. to 10:37 a.m.)

THE COURT: Okay. Lyn, back on the record.

Everyone's present. We're trying to figure out this paperwork issue, what's going on with this.

MR. GRELE: We found the one Professor Bronson is going to talk about. There were others we were going to talk about. There's others. It's going to take a little time to get all the studies. We can give the prosecution the citations. I don't think that's helpful, but it's a late stage and he'd much rather the actual materials themselves, I assume.

THE COURT: I don't know what he's going to be talking about, but if you follow the rules of evidence, the person on direct examination can refer to documentation he's basing his opinion on, but in discovery you're supposed to provide

it to the other side, so they can at least identify.

Do you have the ASTC standards now?

MR. CASSIDY: I have an article, from a magazine apparently called Court Call, an article on it. It appears to note a series of standards, so I have that. I'm looking at that right now. It has commentary attached, so I'm trying to look at it as quickly as I can.

THE COURT: Okay.

MR. CASSIDY: This, unfortunately, is not an isolated situation. Frankly, as I was up looking at the witness's notes referring to this, there are other studies. So I suggest to Mr. Grele, this is either going to slow down dramatically whenever I start asking to look at his notes that he's referring to during the course of his testimony or I can be made a copy of those notes and stop going back and forth.

THE COURT: Here's how it's going to work. Either he's going to testify basically without referring to his notes, or if he's referring to his notes, you're entitled to look at his notes. That's the bottom line on that. There's no secrets here, no attorney/client work product anything like that.

MR. GRELE: No. I mean we've put him on the stand, and obviously anything the expert is looking at the prosecution is entitled to. It's more of a logistic problem, and there's references in there to materials Mr. Cassidy wants copies of. We can get him copies of a lot of this material. It's just going to take a little bit of time to do that.

THE COURT: When an expert on direct examination testifies to some type of document he referred to or some study or something like that, the first thing that's supposed to be done is a foundation it's recognized in the his appropriate committee -- community, excuse me, community of people who do this type of social science work. If that's the situation, then they can rely upon it. If that's not there foundation-wise, then you have to figure out some other way to do it. That's the way the law states.

MR. GRELE: I understand it, Your Honor. We intend to do it. The only question is Mr. Cassidy has asked for actual copies of the studies to which the expert is going to refer to. Some of them we can get for him. It's just going to take a little bit of time to do it.

THE COURT: I still think the easiest way to do it is provide a copy of this gentleman's notes. That may show some of this stuff, and you can you can work with it.

MR. CASSIDY: That's the position I'm suggesting.

MR. GRELE: I don't really have a problem with that.

THE COURT: Dr. Bronson, do you have a problem with that?

THE WITNESS: No.

THE COURT: Let's do it that way. We'll go ahead and take a break again. And you guys can make the copies and we'll get started.

(Recess. Change of reporters.)

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(Proceedings resumed at 10:53 AM.)

THE COURT: Let's go back on the record. Everyone is present.

MR. GRELE: Thank you, Your Honor.

Q. Professor Bronson, we were talking about the American Society of Trial Consultants' standards. Do you recall that?

A. Yes.

Q. And what the standards say about the fair-and-impartial question. Do you recall that?

A. Yes.

Q. And now we've given Mr. Cassidy the -- you just happened to have in your briefcase the actual document itself; isn't that right?

A. Yes.

Q. Okay. And we've given him sort of your outline in preparation for your testimony that also refers to it; is that right?

A. That's right.

Q. Okay. Just to clarify that. And these are -- what are those -- these are the -- are these standards generally accepted standards within the community of survey researchers?

A. At least within the community, most of these have really general applicability. This is as applied to the case of venue surveys.

Q. But the question was, are the standards by the

American Society of Trial Consultants' standards generally accepted standards within the survey research community?

A. Well, the answer would be yes, at least based on my -- several things. My knowledge of what standards are, but also when I presented this to leading scholars at the American Association of Public Opinion Research and the Midwestern group, I had solid support. If fact, at least at those conferences, there was no --

Q. Professor, maybe I'm not being clear here. The standards themselves, are they published standards?

A. Yes.

Q. And who are they published by?

A. American Society of Trial Consultants.

Q. I'm not talking about your particular work on -- in preparing these standards. Okay. I'm just talking about whether or not in your opinion they're generally-accepted standards within the survey research community?

A. Yes, particularly as measured by who the -- what the leading public opinion research community said in response to the presentation of these standards to them.

Q. Okay. All right. Let's go to the leading -- the fair and impartial question and what these -- what the -- what the standards say about that.

A. This is section B4. Question wording.

"Leading questions (those that suggest the correct response) should be avoided. Such questions can generate invalid responses instead of eliciting respondents' real beliefs and attitudes.""

Q. Let me -- can I ask a couple of questions about that?

A. Sure.

Q. Now, when you say leading questions, are those questions that in some sense suggest the answer?

A. Exactly.

Q. Or suggest what a survey participant may interpret as the correct answer?

A. Correct.

Q. Okay. All right. Would a question such as, "The law says that you have to be fair and impartial. Could you be fair and impartial?" Is that the kind of question that would be called a leading question?

A. Yes, indeed.

Q. All right. And could you go on, please, about direct questions?

A. "Direct questions about a respondent's ability to be fair and impartial if called to be a juror in the case should be avoided. Such questions and others that inquire whether the respondent can set aside prejudicial information and reach a verdict based on the evidence at trial yield inflated estimates of this ability. Question wording that can create pressure to give answers of one kind or another or that seem -- seems to be required under the circumstances of the interview may cause ambiguous or invalid responses. Survey questions should be examined carefully to attempt to identify and eliminate such pressures on respondents. Also, the question should be carefully assessed to attempt to

determine the influence of the tendency to give socially desirable responses."

A footnote at this stage omitted.

"Efforts should be made to avoid context, wording, or other influences that raise the likelihood of responses due to social desirability or other response bias."

Q. Okay.

A. That's the end. The rest is some of my thought on it and another citation.

Q. Okay. Let's just talk about -- so is it your opinion that, according to these standards, the question that Mr. Ebbesen asked in his survey is not a generally-accepted question within the survey community?

A. That's right.

Q. Okay. Now, there's also a question about social desirability you have in here in the outline?

A. That's right.

Q. And I think we've talked a little bit about that, okay? How is it that a question like this, a fair and impartial question, is -- relates to that social desirability concept that you've referred to previously?

A. It's just what we've been talking about under the standards, that questions that most people would know that the correct civics 1 lesson is, will have difficulty in asserting that they're biased or they're -- they aren't fair or -- nobody wants to project that image, particularly in a public context such as in voir dire.

Q. Okay. But this is a survey context.

A. It's the same thing. While to some extent the anonymous quality of the survey, phone-type survey will to some extent ameliorate a little bit of that, but as I was talking about the other day, people will exaggerate the extent to which they read good books or other -- voted in an election or whatever it may be, simply because they just -- people ordinarily don't want to broadcast their deviance from those social norms.

Q. Okay. Now, if there's an invalid question, such as a leading or suggestive question, is that -- does that just call into question that particular question itself in the survey, or can it call into question the entire survey results?

A. Well, that's what's called order effects. That is, the placement of questions in a survey, you have to always consider to what extent is asking a particular question, either by giving them information or some other way telling them what they should say or any of that, can influence the response to other questions down the line.

Q. Okay. Now, I wanted to give you a particular example in this case, because I wanted to ask you if this is the type of thing you're talking about here.

And the survey that was designed by Ebbesen, he has this question after the recognition and bias questions; isn't that right?

A. I've looked at his survey, and almost surely those would be early questions, but I don't remember in detail what he asked.

MR. GRELE: Okay. Your Honor, that's People's Exhibit A is Ebbesen's survey.

THE COURT: All right.

MR. GRELE: All right. And there's, again, two parts to it, the initial part by Jennifer Franz, who conducted the survey, and then the actual survey results that follow.

THE COURT: All right.

MR. GRELE: And if the Court wants to, I believe it is --

THE COURT: I read it.

MR. GRELE: Okay. All right.

THE COURT: I saw the criticism by Ebbesen of the survey.

MR. GRELE: Q. Okay. All right. Now, are you aware of what question follows his set-aside question?

THE WITNESS: I don't remember. As I said --

THE COURT: Represent to him what it is.

MR. GRELE: Q. Okay. It's -- the question that immediately follows is, "And do you feel you would be very, somewhat, or not very or not at all prejudiced against Columbus Allen because he is black"?

A. Well, I think that would tend to influence -- that is, the previous question of telling them in effect you should be fair and impartial, you should set aside any opinions you have, the implied correct answer, and followed by are you a bigot, in effect, obviously exerts some pressure, knowing that that's not what you're supposed to say.

Q. Right. By the way, that question in and of itself, no matter where it's placed, has those kinds of problems in your opinion, doesn't it?

A. Oh, it's a very leading question. I kidded when I said are you a bigot, but that's the thrust of it. Most people would, without giving my usual college professor answer, is --

Q. Okay, the question before you, Professor, though, is, when you're talking about placement issues or order issues, this is the kind of thing you're talking about, isn't it?

A. Exactly.

Q. All right. Now, in your personal experience in surveys that you've done that -- are you aware of certain surveys that you've been involved in that have included this sort of set-aside question?

A. Yes, I've done one or two myself, and in another -- two in which I was involved.

Q. Okay. And did that support your -- the notion that such questions are unreliable?

A. Yes.

Q. Okay. And how -- just briefly, if you could, explain to us how that worked.

A. Well, there was one case, very terrible crime, two men who had been convicted of bombing and -- bombing Jewish community centers in Sacramento and then torching an abortion clinic, then came to -- and they were convicted of those as federal crimes, came to Redding where, because of

their religious convictions or their perceived view of what they should be, they snuck into the home of two prominent gay men and literally assassinated them as they slept.

And at a midpoint in the proceedings, while there was still time, I don't remember what the delay was caused by, the judge wanted me to include that kind of question, that fair-and-impartial type of question.

And what I did, as I was halfway through conducting the survey, I had 137 respondents who were left who said they could be fair and impartial. And I went through -- I -- this part just takes a piece of it, but it's interesting.

One person said they were -- said the defendants were definitely guilty, said they should get the death penalty, and who said a life for a life, they should be incarcerated for life or put to death. They took a couple of lives, they should give up a couple of lives.

Q. Now, what you're quoting there are comments by the participants that they're offered an opportunity to give at the -- at some point in the survey?

A. Like our question four. But I'm also -- these are -- and I just listed half a dozen of them, these are people who said definitely guilty to the guilt question, who said, when given the choice, as our question five does, on what penalty would be proper in this case, chose the death penalty, and then I'm listing what they said under their comments.

Q. Okay. So these -- but they're the ones who said they could be fair and impartial?

A. But then who said, "But I could be fair and impartial."

Q. And their comments seemed to reflect a sentiment that one would normally associate with somebody who definitely could not be fair and impartial; isn't that correct?

A. Well, I don't prove it, but that seems like a fair inference.

Q. Statements such as, quote, "No question, they are guilty," close quote, quote, "They should fry them," close quote, things of that nature?

A. That's right. And I've seen that in other studies, as well.

Q. And there was one that was done in the American Taliban case? The Lindh survey also included such set-aside questions; isn't that correct?

A. Yes, and I was a coauthor of that questionnaire with Mr. Vidmar, a very prestigious, much more than I, social scientist at Duke University.

Q. Okay. The effort there was to determine whether or not in fact such responses were unreliable; isn't that right?

A. In the same way that I did.

Q. Yeah. Okay. And the same type of result; isn't that correct?

A. That's right.

Q. Okay. Now, there's the issue about whether or not voir dire could be a sufficient safeguard on -- for pretrial

publicity. I think the Court itself has raised -- wants some discussion of that issue, and you took a look at some of this, as well, did you not?

A. That's right.

Q. Okay. All right. Now, in general, what is your conclusion about that in this particular case?

A. In this particular case, it would be very difficult, I won't say impossible, but it would be very difficult to provide the kind of evidence that one would like to have to guard against prejudice remaining in the panel. Or in the jury.

Q. All right. Now, in here --

THE COURT: Wait a second. That doesn't make any sense to this Court. Tell me what you mean by that?

THE WITNESS: Well --

THE COURT: You say it's difficult. Tell me why it's difficult.

THE WITNESS: All right. I'll be happy to. I hate to do it, but I'm going to cite another author.

THE COURT: Cite anything you want.

THE WITNESS: There's another very prominent guy who teaches at -- what's it called -- the John Jay Criminal Justice, New York. But he's very well known, and, in fact, was the expert in -- in the Oklahoma City bombing trial, part of the presentation for the co-defendant.

And what he did in this particular thing was he wrote a declaration on another case, has nothing to do with us, but a he wrote a fairly scholarly affidavit that he submitted to

the Court, and he summarized some of the evidence, so I wouldn't have to bring all those studies.

He said that --

Q. Well, I don't think we have to -- let me ask a couple of pointed questions so maybe we can get to -- so you don't have to just read the whole thing.

A. Fine.

Q. And maybe we can get to it a little bit quicker.

He call it PTP, which was pretrial publicity; isn't that correct?

A. Yes.

Q. Prejudicial pretrial publicity?

A. Yes.

Q. And what his discussion was, was about whether the assumption that jurors who could assert they can disregard PTP are capable of doing so and will do so; isn't that correct?

A. Yes.

Q. Okay. All right. And he says, "In such cases, it is likely that the challenges -- the cause challenges will turn upon a juror's own judgment of his or her impartiality."

Isn't that correct?

A. Yes.

Q. Okay. All right. And then the question was can such judgments be trusted?

A. Right.

Q. All right. And then he cites some data done by

others in some studies that they've conducted where mock jurors, but that just is not correct; isn't that right?

A. That's right.

Q. And you have in here I guess it is three different studies where that would -- that are cited for that effect; isn't that correct?

A. That's right.

Q. Okay. What --

THE COURT: I don't care about these studies right now. You've got that in there.

You tell me what you think the problem is. You don't have to give me a litany of what the studies say. You tell me what the problem is in your position.

THE WITNESS: Perfectly appropriate inquiry. It's really what we've already been talking about, that there's so much pressure on people, first of all, to assure the Court, you're sitting up there in your black robe and you represent the justice system, to tell you in effect, "I can't be fair and impartial." That's a very -- and, of course, in a survey, it's a little easier, but still, it runs against human nature to admit that you can't follow the law and be fair and impartial. That -- that's number one.

Number two, it asks people, and I suppose some can do it, to look within themselves and see how much bias they have and what's caused it, and then to estimate their ability to do what I think -- I think in one appellate case, to ignore the 800-pound gorilla, what you know.

And I've tested that in surveys where people are asked

to do it and they're told they should do it, and then you ask them could you do it in this case, ignore a confession that wasn't admitted, ignore a piece of evidence that they knew about, because it was irrelevant to the particular portion of the proceeding that dealt with that.

And I only had in the one approximately 50 percent who could even say they would after they had been instructed and given all those assurances and things, because it -- at least it seems to me -- now, I don't say these people are lying or anything like that. I think there's so much pressure not to put your -- to lie to the Court, to dissemble, but it runs against the way people react.

Particularly since somebody who said that during the voir dire, if it's an open voir dire, which is particularly problematic, gets fired, says -- asked to leave. Nobody wants to be in that position. It's embarrassing.

And when you look at voir dire, you see that it follows very -- I've looked at a bunch of these that the responses tend to resemble what passed judgment in the earlier stage of the proceeding. And by that I mean, if somebody gave that answer and it's the wrong answer and it obviously troubled the Court and the attorneys, and there's rehabilitation, and if they can't say the right thing, then they are asked to step down. That exerts even more pressure.

Q. What about, if I could, Professor Bronson, what about the idea of trying to detect bias by asking prospective jurors about the publicity in a manner that

could give us a true sense of what they've been exposed to and how prejudicial that is?

THE COURT: I don't understand your question. You said trying to protect bias?

MR. GRELE: Detect bias.

THE COURT: Oh, I'm sorry.

MR. GRELE: Q. In the voir dire situation, Professor, trying to detect bias from pretrial publicity, you're familiar with that?

A. Sure.

Q. And ask you the jurors what they've read or heard or said; isn't that correct?

A. Yes.

Q. Okay. Now, of course, if that's done in open court with other juror participants in the audience, that could create a problem; isn't that right? Obvious problem?

A. Yeah, that's mistrial stuff, depending on what they say, of course.

Q. In the case, for instance, if somebody stood up and said, "Yeah, I've heard this is one of five CHP officers that were killed during a two-month period of time and I've got a real problem with that," you're going to basically have to exclude the rest -- I'm not going to ask you to be the judge, but there's --

A. At least you're worried about it.

Q. There's a problem with the rest of the jurors who may not have been aware of that fact; isn't that right?

A. Yes.

Q. Okay. All right. But regardless of the feelings of the other jurors about what they've heard and assuming that, you know, you can do these at sidebar or sequestered in a manner that it won't expose other jurors to prejudicial information, what about asking the individual juror about information they may or may not have heard? Could that create a bias within that juror, in and of itself, that kind of process?

A. Well, the first most obvious problem is that that's a very difficult thing to -- for people, responding to an open-ended question like that, to recall all the things they know. Tell me everything you know about President Obama. You might forget. Or Bill Clinton. Some may remember an affair, some may remember something else. And to assume that that's the extent of their knowledge and even to recognize what may be prejudicial is a very dicey business.

Q. Okay. In the sense that what you're doing is basically reinforcing prejudicial information that they may not have originally thought of as prejudicial information?

A. The problem is you won't discover it unless you do that process. And you can't very well ask them directly, "Do you remember about the five other," using your hypo, "the five other officers?"

That's the problem, one of the problems with voir dire in cases where you think there's a fair amount of prejudicial publicity, is you can't ask the very questions that are the major source of your concern.

Q. Okay. Okay. Is there also something called the

social desirability pressure involved here?

A. Yes. I think we've pretty well --

THE COURT: We already talked about that.

THE WITNESS: -- covered that.

MR. GRELE: Q. Okay. And --

THE COURT: You're talking about still dealing with Ebbesen's issues; right?

MR. GRELE: I think I've covered that issue about social desirability.

THE COURT: You covered social desirability already.

MR. GRELE: Q. The only reason I raise it here, Professor, is because there is again, I think, and I think we've discussed it, it's a social desirability aspect of voir dire itself; isn't that correct?

A. Yes.

Q. And you've testified --

A. Which is going to be more pronounced because it's in front of your peers, in front of the judge, than it will be in a survey.

Q. Okay. All right. And, now, I asked you to review some of the proposed questionnaires in this case, didn't I?

A. Yes.

Q. Okay. And particularly the two that I asked you to review were the questions on racial character -- racial issues and characteristics, or I think it was called racial and ethnic issues aspect of the questionnaire, and then I asked you to take a look at nature of the crimes charged and pretrial publicity; isn't that correct?

A. That may be --

THE COURT: Well, he will represent that he did.

What exhibit is that?

MR. GRELE: It's not an exhibit. It's -- I could make it an exhibit.

THE COURT: No, it doesn't have to be an exhibit. I thought you attached it to -- some questionnaire to something.

MR. GRELE: I attached a portion of it to one of the pleadings, but I guess we should make it part of this record.

THE COURT: Is this the proposed questionnaire that I gave you guys two years ago, two-plus years ago that I haven't received any responses to as of yet?

MR. GRELE: Well --

THE COURT: The question as to the defense is yes. Mr. Cassidy gave me a couple of responses.

MR. GRELE: He gave you a couple of responses.

THE COURT: I just want to know what we're talking with.

MR. GRELE: That would be the one.

THE COURT: Thank you.

THE WITNESS: No implied criticism.

MR. GRELE: I thought it still might be worthwhile to get some testimony that might inform some of the issues --

THE COURT: I raised it the other day, if I don't grant your motion for change of venue, I'll see what this gentlemen has to say about it.

MR. GRELE: I thought we would do the two birds with one stone.

THE COURT: Thank you.

MR. GRELE: Should I make this an exhibit?

THE COURT: Probably a good idea.

MR. GRELE: Are we up to EE?

THE CLERK: I believe so.

(Defendant's Exhibit EE was marked for identification.)

THE CLERK: Exhibit EE is marked for identification.

MR. GRELE: I'll show it to -- let me show it to the Court, if I may.

MR. CASSIDY: May I interpose a question, if I may? Are those pages numbered?

MR. GRELE: Yes, they are.

MR. CASSIDY: Can you make reference to the page number whenever you question the witness on it, please?

MR. GRELE: Okay, the questions I'm going to be asking are on pages nine through 11.

MR. CASSIDY: Thank you.

MR. GRELE: Okay.

THE COURT: Hang on just a second.

MR. GRELE: And I really, truly hope I got the right one.

THE COURT: Well, let's do this. If you gentlemen look at your Exhibit Z, as in Zorro, there's a juror questionnaire, and I presume that's the one you're talking about. I knew I saw it when I reviewed all this stuff, and

it's an Exhibit Z towards the back of the exhibits, Z as in zebra.

I take it you can represent this is the one that I did the draft on and sent out?

MR. CASSIDY: My Exhibit C is a series of articles from the internet.

MR. GRELE: My -- I believe Exhibit CC that the Court is referring to?

THE COURT: No, Z as in zebra. That's where it comes, Z as in zebra.

I certainly didn't put this stuff together. I'm just telling you where it is. I just want you to be able to find it. And it's in Z.

MR. CASSIDY: Oh, okay. But in the copy I have, it's under tab CC.

THE COURT: Okay. We both got it, then?

MR. CASSIDY: I have a questionnaire under CC.

THE COURT: Mr. Grele, is that the one?

MR. GRELE: This appears to be the same one. As Your Honor knows, or maybe doesn't know, there were many drafts that were circulated, trying to --

THE COURT: The only draft that had any relevance to the Court is the one that I did, because the response I got was basically not a heck of a lot, make any difference, and I didn't get any response to the question areas that you got from Mr. Cassidy. All right?

So which questions you want to talk about?

MR. GRELE: Q. Let's talk, if we could, Professor

Bronson, if you could refer to pages nine through 11 on the questionnaire in front of you, which you have as DD -- or EE, which Mr. Cassidy and I have as CC, and which the Court has as Z.

THE COURT: All right.

MR. CASSIDY: If we could ask for more clarity?

THE COURT: I think we're all on the same page.

Question 45 says, "Do you know or have you read or heard anything about this case."

Is that where you are?

THE WITNESS: Yes, Your Honor.

THE COURT: Everybody on the same page?

MR. GRELE: Yes, Your Honor.

THE COURT: Go ahead and take it from there.

MR. GRELE: Q. Now, in general, Professor, you advocate the use of questionnaires in high-publicity cases; isn't that correct?

A. Yes.

Q. Okay. And because they can offer sort of an anonymous opportunity for people to respond in a sort of basic and sometimes perhaps superficial manner about issues that are of concern to the parties and the Court; isn't that correct?

A. Yes.

Q. And you get a lot more information than a group voir dire based on a questionnaire; isn't that correct?

A. I get a lot more --

Q. The parties and the Court can get a lot more

information about the potential jurors using this questionnaire; isn't that correct? Using a questionnaire?

A. As compared -- it will give you other -- I don't want to compare it to whether you get more information from a questionnaire or voir dire or a survey, but --

Q. Okay.

THE COURT: Well, everybody knows this. We don't need to spend a lot of time on this. The idea of a questionnaire is you get this information ahead of time, you can evaluate it. The people are doing it separately and apart from each other. Even though they're advised that it's not a private document, that it's going to be shared and they have to sign it and all those kind of things, but there's a better opportunity to get somebody's opinion or statement by themselves than in a collective setting; is that right?

THE WITNESS: That's essentially right. At least it alerts you to possible problems. Counsel can stipulate --

THE COURT: I think we all agree with that. All right.

MR. GRELE: Q. And I know it's not an issue with the Court's questionnaire, but it could become an issue if the People request it, I noticed in this questionnaire, and I think you remarked about this last night when we were talking about it, there's no preinstruction on the questionnaire?

A. No. And that's -- and by preinstruction, Your Honor --

THE COURT: I know what preinstruction is. I've already developed a preinstruction on this case. Thank you

very much.

THE WITNESS: I will not intrude.

THE COURT: I did that two years ago.

MR. GRELE: I understand, Your Honor. I was just trying to get out that that was a good idea not to have a preinstruction that tells the juror what are appropriate responses and what are not.

THE COURT: And I will go over that if we get to that point in this case, I will go over a preinstruction with you and give you a chance to comment on it and make sure we can all live with it.

MR. GRELE: Q. Okay. All right. And the problem with preinstructions is that, again, the social desirability issue; isn't that right?

A. Exactly. I've studied that.

Q. And if they're instructed that --

THE COURT: I'm not going to tell them there's any right or wrong answer. We're not going to do that.

THE WITNESS: That's great.

MR. GRELE: Q. And when I talk -- when I'm talking about preinstruction, because I assume the Court is going to do that, I'm talking about questions such as, "These questions are designed to determine whether you could be fair and impartial in this case."

A. Yes. Or sometimes you see, "The purpose of jury voir dire or the questionnaire is to be sure the defendant has a fair trial," that sort of thing.

Not that those are wrong. It's just that I think

they're wrong to give before somebody fills out a questionnaire or before you start voir dire.

THE COURT: Your position is don't put it in any preinstructions, don't put it in the questionnaire, and then based upon your answers, it may be an appropriate question for the Court or attorneys to bring during the actual voir dire process?

THE WITNESS: I wish I had said it that way.

MR. GRELE: Thank you, Your Honor.

THE COURT: That's why I have it set up that way.

MR. GRELE: I understand. I just want to make sure it stays that way.

THE COURT: It will. Okay. Fair enough.

MR. GRELE: Q. All right. Now, on the specific media questions that we're talking about here, some of them are fairly -- fairly straightforward; isn't that right? We talked about them?

A. Yeah. I mean, they're all in that sense straightforward questions for utility.

Q. All right. Now, by the way, when you ask somebody to detail what they remember about the case, are you necessarily going to get sort of a full response by somebody on a questionnaire about what details they do remember about the case?

A. No. I think I talked about that before. And particularly with written questionnaires there's a very strong tendency to not get much written. Now, some, of course, will go through --

THE COURT: Some will tell you more about the case than you know about it; right?

THE WITNESS: Yes, but most people --

THE COURT: Give general responses.

THE WITNESS: They give you some --

MR. GRELE: Q. Move on, they may say, "I heard the officer had the registration in his hand," and move on from there?

A. "It was a bad case," or something.

Q. A bad case or some sort of general platitude about it, the tragic situation?

A. It's a start and it may reveal, as His Honor was suggesting, very helpful stuff, but it's only that.

Q. Okay. All right. All right. And then there's some questions about whether they've heard comments by people in the case and things of that nature?

A. Yes, although with 45, to ask people where they read about it or heard about it, that's something that people used to put in venue surveys, how many articles have you read with respect to that or where did you first hear about it or that kind of thing. People don't remember. I mean, who remembers if you read something a year and a half ago or you heard it, and you don't remember. Was that on television? Was that in the newspaper? People don't -- they usually underestimate exposure with those questions. So I've left them out of all my surveys.

Q. Okay. All right. Not because they're necessarily bad questions, but they just don't reveal the information

you're looking for?

A. Exactly. Not very helpful.

Q. Okay. And there's a question here, 49, "If you've heard about this case, what are your attitudes, opinions or thoughts about the case before you came in this morning based on what you had previously heard?"

Do you see that question?

A. Yes.

Q. Now, we have -- and we will get to that with regard to the Ebbesen survey, but is there some difficulty with that type of question in asking jurors to sort of parse out in their minds what they've heard before and what they've heard today?

A. Yes, although that can lead to very -- I've been involved in cases where, "We were talking about it in the jury room," or, "The newspaper was there with today's coverage of this case." Sure, that's important to know.

THE COURT: You think question 49 is an inappropriate question?

THE WITNESS: Oh, I don't think it's inappropriate. I just don't think it's as helpful as it might -- as sometimes it will be, but as a general indicator to remember when you formed your opinion, or if there's something the Court said or somebody said, I don't know -- I'll stop there.

THE COURT: All right.

THE WITNESS: I think the point is clear.

MR. GRELE: Q. Okay. What you're saying is, in and of itself, it's an appropriate question, but there's --

A. Sure.

Q. But there's additional features of information about what they've heard that may be even more salient, such as if they've -- when they came into the jury assembly room and everybody was talking about it and they overheard people talk about it or what they said; isn't that correct?

A. That's correct.

Q. That's not covered by 49, is it?

A. Oh, it well may be, because it said before you came in this morning. So if they're talking about it -- that happened in the Polly Klaas situation. It's happened in other cases.

Q. What happened in that situation?

A. That's -- there was a huge discussion, "What are we doing here? This guy has already confessed."

THE COURT: People started talking in the jury room.

MR. GRELE: Q. They started talking in the jury room, right. And that was after they had come into court that day?

A. Yes. That's why I say --

Q. And 49 only asks them to talk about what they heard before you come into court that day; isn't that right?

A. That's -- that's right.

Q. Okay.

THE COURT: Well, that's not correct. It says "before you came in this morning." Where are you coming to? To the jury assembly room or to the courthouse? To the court? It could be either way.

MR. GRELE: It could be --

THE COURT: I understand that, and I'm the one that wrote this thing.

Now, is there something -- you have any particular questions on this area that you think I ought to add to this? That's the kind of stuff I'm looking for.

MR. GRELE: I'm trying to get to that, Your Honor.

THE COURT: Let's ask him.

MR. GRELE: Q. What about the idea of trying to figure out if they've heard of information when they got -- when they got to court that day?

A. Well, I don't think there's any -- that's -- that may well be very helpful.

Q. Okay. And my question is, 49 may cover that or could be interpreted in a manner that wouldn't cover that; isn't that correct?

A. Yes. And, of course, it can be explored, as Your Honor is suggesting, when you get to the voir dire if anything looks interesting there.

Q. Maybe it might be better, though, the type of thing you would want in a questionnaire because you don't want jurors standing up and snitching off on other jurors about what they said; isn't that right?

A. Yeah, that could be.

Q. Now, questions 50 and 51 are pretty straightforward; isn't that right?

A. Yes.

Q. Okay. All right. Now, 52 and 53 are ones that I

want to spend a little more time on.

A. By the way, 51 is a particularly good but unusual question. Most courts are reluctant to ask them. I think this is good.

THE COURT: Did you have some comment about 52 as being a problem?

MR. GRELE: I'm sorry, Your Honor?

THE COURT: That's okay. I'm simply asking the question.

THE WITNESS: I've got to review it.

THE COURT: Anything about 52 that causes a concern or problem with 52?

THE WITNESS: I don't know if there are any order effects. Yes, there are, so that's the preinstruction type of thing.

MR. GRELE: Q. That's because right here they're told, in order to decide the case, they must be able to say they can set aside their opinions; isn't that correct?

A. That's exactly right.

Q. So that's a preinstruction type of --

A. In the context in which we've used that phrase.

Q. And I don't think we need to go through all the reasons why, again, that could be problematic.

THE COURT: You think 52 should be involved in the questionnaire at all?

THE WITNESS: Let me see. I think it would be better just to remove it.

THE COURT: All right. Go ahead.

MR. GRELE: Q. And then 53?

A. Same kind of issue.

Q. Okay. All right. And that's basically -- this, by the way, it sort of mirrors Ebbesen's question on his survey; isn't that right?

A. I think so.

Q. Okay. And for the same problems that you've identified with Ebbesen's question, you would think would be -- it would be inappropriate to have that type of question in a questionnaire?

A. Yes.

Q. Okay. And that's the social desirability issue and the preinstruction issue; isn't that right?

A. Right.

THE COURT: Have you ever seen any case in court or otherwise that didn't have these type of questions in a questionnaire or voir dire by the Court or the attorneys?

THE WITNESS: I think -- I've given this, as you may guess, this lecture a few times. And, for example, in the last, most recent cop-killing case that I did just a year ago, less than a year ago, the agreement by the prosecutor and the defense, there I said if these things could be done, we will go through the list, then I don't think there's any need to move venue. So --

THE COURT: I'm talking voir dire. We're talking voir dire. Now, have you ever seen a case where these type of questions, 52 and 53, were not part of the questionnaire or the voir dire by the Court or the attorneys in court? Have

you seen that?

THE WITNESS: That was exactly what this, the issue was, because --

THE COURT: All right.

THE WITNESS: And the District Attorney -- now, that doesn't mean it doesn't come up, but particularly at the end of voir dire.

THE COURT: I'm asking about during voir dire. That was my question.

THE WITNESS: But it's the end, not the beginning.

THE COURT: I don't care about the order. I'm simply asking whether the question -- have you ever seen any case where these kind of questions were not asked?

THE WITNESS: All -- since I didn't see the eventual voir dire, but in court, both the DA and the defense attorney, once I said my little thing, agreed that they could work out a solution that -- based on these things, so I'm assuming they followed through and --

THE COURT: I appreciate that, but that's not answering the question.

THE WITNESS: Well, I don't know if they did what they said they did.

MR. GRELE: Let's clarify this, then.

THE COURT: He doesn't know. Let's proceed.

MR. GRELE: Q. Well, the reason he doesn't know is I think important, Your Honor, is because you helped develop the questionnaire in that case; isn't that right?

A. I went through these same things in the way that

His Honor is or that we're doing here today.

Q. And it was your impression that they were not included as part of the questionnaire; isn't that correct?

A. That's right.

Q. Okay. They may have been part of the voir dire; isn't that correct?

A. That's right. And if so, I don't know where -- it does make a difference if they're at the beginning or at the end because of the order effects.

THE COURT: The question simply was have you ever seen any case that you were involved in or published opinion or something to that effect where these kind of questions weren't asked when they talk about voir dire and things of that nature and they go through, for example, challenges for cause and things of that nature. Ever seen a case where these type of issues were not discussed?

THE WITNESS: Since I'm never in a position -- college professor, it's tough to sit through voir dire.

THE COURT: Well, you know the case law. You've been citing case law to me, as well. I certainly haven't found any case where these types of issues --

THE WITNESS: I haven't either. Or at least I don't remember any.

THE COURT: It comes up every case.

MR. GRELE: Your Honor, I think it's important to distinguish between cases where this issue comes up versus cases where these particular questions are asked at the outset of jurors.

THE COURT: I understand that. I'm just simply -- these questions come up in every case that I've ever read or seen, on a death penalty case or any other kind of case, particular death penalty cases, about these things. They come up.

Now, they may not come up in the order and there's no discussion about whether they're asked in questionnaires or the beginning of voir dire or what have you, and I doubt if either one of you have ever seen a case where these type of issues or questions haven't been asked by either -- in a questionnaire, by the judge or the attorneys.

MR. GRELE: Okay. All right.

THE COURT: That's all I'm getting at. I wanted to see if there's anything -- you disagree with that?

THE WITNESS: Oh, I'm -- I am almost positive that I don't know of any exceptions other than the one or two I've cited.

MR. GRELE: Q. When we talk about the somewhat imprecise description, "these types of questions" --

THE COURT: 52 and 53.

MR. GRELE: Q. And perhaps 54, which we haven't gotten to yet --

THE COURT: Right.

MR. GRELE: Q. What about questions that just basically ask what people's impression was based upon what they've -- what they've heard about the case?

A. Well, that's pretty standard, sure. I mean, that's --

Q. All right. As opposed to saying to them, "You will be instructed that you must base your decision only on the evidence presented in court, not anything else, do you think you can do that?"

Those are two different dichotomies; isn't that correct?

A. It's true. My only problem is not so much including them, except for the order effects. It's placing strong reliance on the response, because so many people overwhelmingly will have the programmed answer to it.

Q. And you're not necessarily getting a reliable response?

A. That's right.

Q. Okay. All right. Okay. Okay. All right. So, yeah, they might have been in a lot of cases, but you don't know in that particular situation they got a reliable response?

A. Well, I don't trust those results. I mean, as His Honor points out, in many of the major cases, you'll say, yeah, everybody knew about Harris is the best California example, where there's a whole line of cases based on that. In today's modern world, it's expected that people will know about major events in their community, even if they have an opinion, so long as the Court is satisfied that they can be set aside. Those are all post-conviction cases.

Q. No. I understand that, Professor. But the question there is, the Court is making a qualitative judgment about whether the jurors can set aside their

opinions?

A. Absolutely.

Q. You're not necessarily asking the jurors themselves to make that opinion and then rely on it?

A. Well --

THE COURT: Is that true?

THE WITNESS: Pardon?

THE COURT: Is that correct? Is that a correct statement he just made?

THE WITNESS: Your Honor will test it as best you can, test their credibility, see what else they say, look at their body language, all the things that -- and assure yourself --

THE COURT: Isn't part of the questionnaire to make certain, to get some qualitative responses from the jurors to see what they have to say about things? Some of these questions, don't you expect the jurors, they'll answer these questions and tell you what their biases or prejudices are?

THE WITNESS: Some will.

THE COURT: All right.

THE WITNESS: The problem is, if you have an unreliable response, that some unknown percentage are not reliable, and while they may help some, the down side is relying on them as opposed to really being sure that even people who vehemently say, "I can be fair and impartial," that that indeed is -- they are not going to be contaminated, because they're looking -- they're trying to assess their own prejudice, how they will behave. People in general

overestimate that ability. I've tried to test that in little ways, but --

MR. GRELE: Q. Let me ask another question.

Is this the principle the United States Supreme Court is talking about when they say, quote, "No doubt each juror was sincere when he said that he would be fair and impartial, but the psychological impact requiring such a declaration is often its own father"?

A. That's *Irvin*.

Q. Right. That's one of the fundamental cases on pretrial publicity; isn't that correct?

A. Sure. I'm absolutely sure that -- not absolutely, but overwhelmingly believe that nobody who made that assurance to the Court was consciously lying, "I'm going to get this guy."

Q. Right.

A. But that assumes that they know what their own biases are, how it will affect their decision-making.

Q. Okay. In that case, the question was -- they were -- and we're going to get to this later. The question there was because they were having to make that sort of declaration before their own fellow jurors; isn't that right?

A. And the judge.

Q. All right. That was my point.

Now -- and we will talk about voir dire, other voir dire procedures, but I wanted to focus only on the questionnaire at this point?

THE COURT: Was there anything else that you thought that the Court should be aware of of this proposed questionnaire that you suggest to the Court before we leave that area?

MR. GRELE: Thank you, Your Honor. If we could --

THE COURT: I want to find out maybe there's something else he thinks that would be -- you know, I don't care if it's criticism or not, that you think ought to be in or out of the questionnaire. I'd like to hear that.

THE WITNESS: Well, 56 is -- I guess the -- there's nothing that's pernicious about most of these questions.

THE COURT: Well, I feel good about that.

THE WITNESS: I don't mean to be patronizing.

THE COURT: I apologize. I'm just being -- we're both having a bit of fun with this.

THE WITNESS: Yeah. I guess the concern is where they -- I hate to go back to this again -- where they're placed in such a way that they prejudice later responses is problematic.

THE COURT: Most of these questions are open-ended questions, aren't they?

THE WITNESS: That's right. But that doesn't mean --

THE COURT: Isn't that what your standards want you to do, is get as many open-ended questions as --

THE WITNESS: Open-ended is great. I like that.

THE COURT: All right.

THE WITNESS: The problem is --

THE COURT: You don't like the placement.

THE WITNESS: The placement problem.

And also, as I've said, maybe too many times, relying on the assurances that you get, whether open-ended or closed-ended, that you can be fair and impartial, that you can set aside opinions you have, and all of that.

MR. GRELE: Q. In fact, if you get that earlier on, isn't there a greater likelihood that that attitude will harden the prospective juror and it will be more difficult to voir dire that prospective juror in order to determine any underlying bias of which the juror may or may not be aware?

A. Absolutely.

Q. Okay.

THE COURT: So what are you suggesting, that any Court on a voir dire should go out and spend thousands of hours and have jurors going through psychological evaluations and all these things?

THE WITNESS: No.

THE COURT: From a practical standpoint, is there anything better than doing a jury questionnaire, having someone come into court and be -- come into court and asked those questions by the Court and examined by the attorneys? Is there anything better that you're aware of?

THE WITNESS: I hate to say it, but a change of venue.

THE COURT: I'm not talking change of venue.

THE WITNESS: Well, what I'm saying is --

THE COURT: I'm talking about general voir dire.

THE WITNESS: Oh, general voir dire in an ordinary

case, no problem.

THE COURT: We're not talking change of venue when we ask about this voir dire stuff right now.

THE WITNESS: Well --

THE COURT: That's what I'm asking right now, in that general context. Is there anything better that you're aware of?

THE WITNESS: No, but that's like -- it may be the best we have, but --

THE COURT: You can respond in as far as this particular case. I'll let you do that. I just was asking in general conceptual terms.

THE WITNESS: No, it's the best tool we have, as long as it's conducted in ways that enhance the ability to get accurate, helpful responses.

THE COURT: Is there anything you want to say about the voir dire process that you haven't already said insofar as the pretrial publicity in this case that you want to add to me about this?

THE WITNESS: Well, I had this list of changes that I would suggest that might be useful, but I don't know if this is the time to do it.

THE COURT: Mr. Grele, is that where you want to go?

THE WITNESS: The whole procedure --

THE COURT: I don't want to take away from what you're doing.

MR. GRELE: I understand that those are some of the core questions for the Court, whether it can fashion an

alternative that would perhaps ameliorate some of the difficulties that have been spotted by the survey and the coverage. I understand that.

THE COURT: That's one of the things I'm supposed to look at.

MR. GRELE: And I agree, Your Honor.

THE COURT: Only thing I'm asking is if you want to do it now or you can save it for later. It's your examination. I didn't mean to --

MR. GRELE: I understand that. I understand that.

There are a couple of issues I'd like to cover if we could --

THE COURT: Let's do that.

MR. GRELE: -- before we get there because --

THE COURT: We can always come back to it.

MR. GRELE: Obviously part of the answer is based upon some other issues that we need to cover.

Q. Now, we talked about the prejudgment rates in this survey. Would it make it difficult for Mr. Allen to obtain a fair trial in Stanislaus County?

A. Yes.

Q. Okay. All right. Now, there's the question about sort of whether or not this -- the prejudgment reflects a general disposition to be sort of very conservative about law and order issues, or is reflective of the exposure to information? Do you understand that debate?

A. Sure.

Q. Okay. And what do the studies generally show about

that question?

A. That while of course preexisting attitudes affect opinions that flow from those opinions, but the major -- the first and major study on this issue by Ed Constantini at Davis showed that while both had some impact, as you would expect, that the major determinant -- and he did it very sophisticated, and there are others who followed this up, and I may have that article, I'm not sure -- show that knowledge was the biasing factor.

Q. Okay.

A. In my studies I showed, in this venue study there's some impact of people who are arch law and order people, obviously more likely to vote for guilt. But while that's interesting, those people are going to be anywhere. Every community has a segment that's arch law and order. And change of venue is not addressed to that.

Q. Okay. All right. You also asked a penalty question; isn't that correct?

A. Uh-huh.

Q. Okay. And could you briefly describe the results of, and it's in Exhibit H, I think it's question five?

A. Yes. It's very straightforward.

Q. Page 5A, I believe, Your Honor.

A. The question is on page 5.

Q. Page 5, right.

A. It's a balance question, because sometimes people will do surveys for other things that just ask them if they support the death penalty, and that's very different for

asking them to choose.

So this question is simply, "The District Attorney is seeking the death penalty for Allen. Let's assume the jury finds him guilty of first degree murder. Then there will be just two possible sentences, either the death penalty or life without possibly of parole. Based upon -- based on what you know about the case and the defendant from the media, which sentence do you believe the jury should select for Allen, the death penalty or life without possibility of parole?"

The data on page 5A, it shows that 50.4 percent of the respondents -- now, these are those who recognize the case, including those who didn't say guilty. In other words, they -- I think Professor Ebbesen only asks that question of those who prejudged.

Q. Right. That's not entirely fair to do that, is it?

A. I don't think that's proper.

Q. Okay. All right.

A. But I don't want to make too much out of that.

Q. Okay. All right. But the result here is that 50 percent of the people believe -- that were surveyed that recognized the case believe that Mr. Allen should be sentenced to death?

A. That's right.

Q. Okay. All right. Now, there's also some numbers in here about people who believe the death penalty should always be given for first degree murder and for killing of a police officer; isn't that correct?

A. Yes. But I will -- I should say that those questions are not case specific to this case. It's part of an ongoing research project that Professor Ross and I have had done, presented results on, simply trying to determine -- I don't know if you want to hear the -- but the major thrust of it is whether people who say that -- you get a response to the death penalty question, and they say something like, "Well, I'm even. I could go either for life or death," to what extent does that delude you?

And so what I was trying to find out here was -- and here one is attempting to identify the extent of what are called the ADPs, Your Honor, the people who are automatic death penalty people, so that included within the people who say they can be fair on the death penalty, who don't have an opinion, are a number of people who really are ADPs but whose answer is likely to lead to a conclusion that there's no reason to ask any more questions. And that's the ideal juror, presumably, on penalty: I'll vote for it in some cases and I won't in others.

So what I was attempting to do was to see what that really meant, because on occasion, a defense attorney has ignored that initial response and has asked the follow-up question, "And what are some of those cases where you wouldn't vote for the death penalty?"

And that's where the -- I think I call them shadow ADPs, where you get people saying, "Well, if I wasn't sure he was guilty, or if it was self-defense," a number of things that indicate that that's not a case where you're

going to have that decision to make. So are they really going to always vote for death if it's a righteous penalty phase?

Q. Okay. Now, you also did -- in B, in Exhibit B, page 11, you did a ranking sort of based on this death penalty percentage response of cases that you've done involving officer homicides?

A. Yes. And what page is that?

Q. It's B11?

A. Yes. I've got it.

Q. Is it fair to say that officer homicides often involve issues of -- potential issues of change of venue?

A. Almost always.

Q. Okay. All right. And these are --

A. Not officer involved --

Q. I'm sorry. Officer homicides.

A. Of the officer?

Q. Professor, a homicide of the officer.

A. Right.

Q. Okay. Now -- and Mr. Allen's ranks four out of nine on that scale; isn't that correct?

A. That's right.

Q. Okay. And the ones where they say "rec no COV," that's where you did not recommend a change of venue?

A. That's right.

Q. Now, there's some questions in here, in the survey on -- in the 6 series; isn't that correct?

A. Yes.

Q. Okay. The 6 series involves -- and we have briefly gone over it before. It's on Exhibit H, page six, Your Honor.

THE COURT: All right.

MR. GRELE: The 6A through F series.

THE COURT: We talked about these yesterday.

MR. GRELE: We talked about these yesterday.

Q. Now, as I understand it, you asked these after you asked question four, which is an open-ended sort of "how did you -- what are your feelings about the case" kind of question; isn't that right?

A. Yes, and after the recognition and guilt question.

Q. And after the recognition question, after the guilt question, after the feelings question that allows some sort of comments by participants, and after the death penalty question; isn't that right?

A. Yes.

Q. Okay. Now, what's the purpose of asking these types of questions?

A. Well, first, with respect to the order, I don't want to affect responses here by any -- or affect other responses by getting this additional information.

Q. Okay. Now, beside that, why is it -- not the order of these questions. Why is it that you ask these type of questions? That's what I want to know.

A. There are several reasons.

Q. Let me just point out one of them.

THE COURT: You want to testify or what?

MR. GRELE: Q. Is one of the reasons you ask these types of questions so that you can get some internal validity for the study?

A. Yes.

Q. Okay. All right. Can you explain that for us, please?

A. Yes. We want to see, Your Honor, among other things, is whether the extent of knowledge, not even prejudicial knowledge, these serve as a sort of way of getting a feeling for how much a person knows. It doesn't tell us everything, by any means, whatever they know, but at least we know that people who have read about this or heard about it, they know more. And they may know a lot more.

So we want to see if that first of all relates to media exposure. So we will see what's called a cross tab. Do people who are -- who say they are more exposed to the media, are they more likely to remember more facts? Not just these facts, but, by definition, other facts.

Second, we want to see if more knowledge is related to guilt, so we can see, is it true that the more people know about a case in general, the more likely they are to say guilty.

So we do that, and that's what's called a validation check, to see if the survey -- our theory of what -- of what a venue -- when a venue motion is required, whether it makes any sense.

Q. Okay. Now, if we could skip to Exhibit I, please?

THE COURT: Well, it's the noon hour.

MR. GRELE: Okay.

THE COURT: 1:30.

MR. GRELE: Thank you, Your Honor.

THE COURT: We're going to wrap up with him fairly quickly so Mr. Cassidy has a chance to ask some questions?

MR. GRELE: I'm going to try and go as quickly as possible, Your Honor. I should note that I have approximately five more pages, so we're in good shape.

THE COURT: Fair enough.

All right, see you after lunch.

(Recess at 12:01 PM.)

July 23, 2009 -- 1:35 p.m.

AFTERNOON SESSION

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THE COURT: Okay. Let's go back on the record. Everyone's present.

Mr. Grele?

MR. GRELE: Thank you, Your Honor.

Q. On the fact recognition questions, the 6-A questions in Exhibit H, Professor Bronson.

A. Yes.

Q. Is one of the objectives here to ask a variety of questions rather than the same question in two or three different renditions?

A. Oh, yeah, obviously.

Q. Explain why that is.

A. Well, how many ways do you need to prove to say you want a full range? I mean, these questions serve as sort of a surrogate, not just for the things asked about but for -- based on the assumption that, if they know some of these facts, they're likely, as you would expect, to know other facts. So to keep repeating the same one is going to -- even in a variation, is going to not be very helpful and it may prejudice other stuff.

Q. For instance, if you asked essentially the same question in two different ways, are you likely to get a second endorsement just because you're asking the same question two different ways?

A. Sure. In other words -- I won't expand. That's

obvious.

THE COURT: Hang on a second.

Are you Dr. Ebbesen?

DR. EBBESEN: Yes, I am.

THE COURT: Welcome, Doctor. Let's go ahead and proceed.

MR. GRELE: Q. Now, you did some cross-tabulations based upon this survey; correct?

A. Yes.

Q. And that's in Exhibit I, report number 3; isn't that correct?

A. Yes.

Q. What that is, let's go through that report just briefly, if you could. You did the first -- pages 1 through 7, I believe. I'm sorry -- I stand corrected. Pages 1 through 11 are a series of comments that were offered by those respondents who felt comfortable offering comments?

A. I don't know about -- they responded to the questionnaire with what they were -- the general question is on the first page.

THE COURT: What I don't understand in these things, why did you pick out these particular comments for people? That's what I couldn't figure out. I have, for example, Juror Number 340 says, "It was a tragedy." 349 says, "On the officer's side."

Why did you pick those particular type of comments?

THE WITNESS: Oh, I didn't pick anything. I just put down everything.

THE COURT: This is totality of --

THE WITNESS: Yes. In response to question 4 in the survey.

THE COURT: Okay. Fair enough.

MR. GRELE: Question 4 is, quote:

> "What are your feelings about the Defendant Columbus Allen, the victim Earl Scott or the case?"

THE WITNESS: Right.

THE COURT: Okay. I'm with you now.

MR. GRELE: Q. I notice there are some gaps. I suppose some people declined to give --

A. Some declined. The people who didn't recognize the case, you wouldn't ask them what their feelings are about it.

Q. Now, more importantly, starting on page 12 is some of the data that you've gleaned from the surveys. This one is the cumulative number of additional facts recognized in the first survey; is that correct?

A. Yes.

Q. And basically what this shows us, and correct me if I'm wrong, is that the more -- at least 83 percent recognized one or more additional facts of the 6-A facts.

A. Yeah, this is not a big thing. It simply shows the people who recognized the case in general knew other things about the case, starting here. By the way, notice that this is for both my first survey and the second. The second one is down below here.

Q. And you wouldn't expect everybody to be able to endorse the majority of facts, would you?

A. To endorse them?

Q. I mean to be able to recognize them.

A. No.

Q. The nature of human memory being what it is, people could remember certain facts and not others?

A. Particularly under the time pressure of a phone call.

Q. Now, we have a series of what you call cross-tabulations beginning at page 15 and I think lasting through page 21 of this exhibit?

A. That seems about right.

Q. Okay. And from those cross-tabulations, just briefly, basically what you're doing there is you're taking two or more aspects of the information that's conveyed in these surveys and sort of correlating them and seeing how they match up; isn't that right?

A. Yes, see if two variables relate to each other in some way.

Q. Okay.

A. Based on the issue that, if the survey and what we do in these cases makes -- if it makes sense overall, that you would expect certain things to be true.

Q. Okay. Let's start with the first one then on page 15, the recognition by media penetration. That means those who have high media penetration apparently are much more likely to recognize the case; isn't that correct?

A. Yes, the people who regularly watch electronic media and read the newspapers, definitions down below, are much more likely to recognize the case.

Q. And I want to point out one figure here. That is even with low media penetration, you have 56 percent of those folks recognize the case; isn't that correct?

A. Yes.

THE COURT: Let me ask you a question. I was trying to figure out what this was when I looked at it. If you look at the boxes under there. X square equals 70.697. Is that supposed to be chi, C-H-I, square?

THE WITNESS: Yes. That's the symbol for chi.

THE COURT: Right. That's what I'm trying to figure out. What test did you run?

THE WITNESS: Chi square.

THE COURT: Chi square test?

THE WITNESS: That's all there is.

THE COURT: That's what I thought, wanted to make sure. Been a while since I did statistics. I thought that's what it was. Thanks.

MR. GRELE: Q. Okay. And then the next one is prejudgment by media penetration?

A. Same relationship.

THE COURT: Thank you.

THE WITNESS: That I've noticed.

MR. GRELE: Q. What we're talking about there, is those who have been more exposed the media apparently correlates with those who have some prejudgment about the

case?

A. Yes.

Q. Even then we have low penetration has 48.9 percent prejudgment in your view; isn't that correct?

A. Not in my -- that's what the data from the survey show.

Q. Right. Let me ask you a question about this.

Is this -- the number here that you used, is that the number of folks who -- I'm sorry. That would be a bad question. I'm not going to ask it.

The next one is prejudgment by additional facts recognized?

A. Yes.

Q. Now, this is the 6-A or 6 series of questions we've been over several times; is that right?

A. Yes.

Q. So you have folks who recognize one or more fact and what their prejudgment rate is, and this is what you would expect in a case such as this; isn't that right?

A. Well, if you didn't find this kind of relationship, you would have serious questions as to whether the survey is doing anything.

Q. The survey is supposed to measure potential prejudgment?

A. Yes.

Q. And whether it's related to media exposure?

A. Well, that's what the comparison does.

Q. Okay. All right. And what's the difference

between the one on page 17 and the one on page 18?

A. Let me look.

Prejudgment by additional facts. Oh, their the first survey and the second survey.

Q. Okay. All right. And in the second survey, you didn't give them a full range of six additional facts?

A. I think they just got two -- that was just a checkup because of the time lapse, and I think there were only two additional facts provided.

Q. And on page 19, additional facts recognized by media penetration?

A. Yes.

Q. Tell us what that means.

A. It just means that the more likely you were involved in the media, the more likely you were to recognize more facts. Once again, not too profound.

Q. This next one on page 20 is prejudgment by recognition of the defendant's race?

A. Yes.

Q. Okay. And there, again, you found a slightly higher percentage for those who recognized the defendant's race?

A. Yes. This one combines both the first and second survey.

Q. Both surveys. Okay.

THE COURT: The number's 513.

THE WITNESS: Yes.

THE COURT: It would have to be both.

MR. GRELE: Q. Okay. Let me ask you a question. Professor, you are aware that in the Ebbesen survey they have a different cross-tabulation on this; right?

A. Yes. Seems to me, if I recall correctly, that that's only -- or a different result is what --

Q. Yeah, he has a different --

A. Yeah, that's peculiar. I've done many of these studies and I don't ever remember seeing that. They usually, as a prejudgment goes up as people recognize -- and I only ask that question if it's a minority defendant. So, yes, I'm sure he reported the data accurately and surprisingly it showed a different result.

Q. And then there's again on page 21, prejudgment talk, talked about the case with others.

A. Yes.

Q. Here again, the results are what you would have expected?

A. Yes.

Q. The more somebody's talked about the case with others --

A. The more likely they are to know about the case, more likely to hold stronger feelings. It's a factor to consider.

Q. Then the final page is just a survey results by sort of demographic information just to check to see if it's close approximately to general demographic information; is that correct?

A. Not general. Jury pool information. Because you

don't expect as many minority folks to -- as in the census. Hispanics will often include non-citizens or more children often. So we don't know the exact demographics of the jury pool. We just want to see if there's anything outrageous that makes no sense.

Q. Okay. Let me ask you about the second survey just a little bit. That is Exhibit K. In Exhibit K I think you found that the recognition rate and the guilt rate all went up?

A. Yeah, surprising.

Q. What?

THE COURT: What page are you on, Counsel?

MR. GRELE: I'm sorry, Your Honor.

THE WITNESS: I think 4-A again.

THE COURT: Part two on page four, 4-A?

MR. GRELE: 4-A, that's correct. It's Exhibit K.

THE COURT: Got it.

MR. GRELE: Q. They went up slightly from the first survey?

A. Yeah, slightly, two or three percent. What's surprising is that they went up or even held the same.

Q. Okay. All right. Going into the survey, you kind of expected some sort of leveling off or drop in the data?

A. Yeah, forgetting type thing, time.

Q. And I offered you a hypothetical about supposing that there was some increased media coverage around that time period, could that have contributed to these results?

A. It might have. But when data are that relatively

close, you can't draw too many inferences from a two or three-point difference. But I --

Q. You've got a four-point difference in the guilt 2 number, though, those walking in the door as potential jurors. It's no longer 50 percent but 54 percent?

A. Yes, but the sample size was smaller.

Q. I understand.

THE COURT: It's the difference between being a 300 hitter in the majors and a 250 hitter for the season is 20 hits.

THE WITNESS: That's right, Your Honor.

MR. GRELE: It would depend on the number of at bats.

THE COURT: Well, normal season.

So these numbers as far as -- I think the professor's agreeing with me. They're not -- three or four points higher, lower, one point higher is not that significant?

THE WITNESS: No, although the surprising factor is they didn't go the other way, so it makes it larger. Excuse me.

THE COURT: So you anticipated to going down, but a couple of points --

THE WITNESS: Not earth-shaking. Interesting but not earth-shaking.

MR. GRELE: Q. Okay. And consistent with the Ebbesen survey?

A. They're all in the same ballpark.

Q. Okay. Now, I wanted to ask you a question here about this. Have you had an opportunity to examine sort of

the ebb and flow of pretrial publicity in high-profile cases and whether or not there's an increase in publicity as the trial approaches in the few weeks before the trial?

A. That's sort of standard.

Q. Okay.

A. Community interest grows. Media gets more interested.

Q. Okay. You traditionally get the full-page Sunday spread the day before jury selection on Monday?

A. Yes.

Q. Fairly common, isn't it?

A. Yes.

Q. Again, obviously your survey, and the Ebbesen survey can't really measure that phenomenon and what effect it would have?

A. No.

Q. Okay. Again, we have the idea that the higher the media penetration, the more likely -- the more folks endorsed the prejudgment questions?

A. That's true unless you're somehow connecting it to your prior question.

Q. Right. Okay.

A. Yeah.

Q. Now, we talked a little bit about questionnaire remedies, and you had an opportunity to review during the break the judge's preinstruction to the jury; isn't that right?

A. Yes.

Q. Okay.

A. There wasn't anything in there much on point that we're talking about. It was a very straightforward thing.

Q. It didn't have any of those questions about you must be fair and impartial to sit as a juror?

A. No, nothing at least that 30-second review.

Q. That's the kind of thing you're talking about what you want when jurors walk in the door and those kinds of things; isn't that right?

A. Yes.

Q. Okay. Now, there's some other alternatives that are often discussed and that we have to consider, and that is voir dire alternatives. Are you familiar with those, what the alternatives are in voir dire?

A. I hope so, at least a lot of them.

Q. You've testified about some of them and some circumstances and things of that nature; isn't that right?

A. Yes.

Q. Okay. Now, you're not an expert in racial demographics, and the sociology and psychology of race, are you?

A. I have a smattering of ignorance, but I hope it's a little beyond that. I've done compositional challenges and other things.

Q. I understand that. I understand that. And you took a brief look at some of the, for lack of a better term, race questions in the questionnaire that was offered by the judge two years ago and never responded to by the defense?

A. Right.

Q. Is that sort of an area in which again -- and I know this is a little far afield from the venue issue -- but we need to be somewhat careful about in the circumstances we find ourselves here in this case?

A. Do we need to be -- I'm not sure what you're --

Q. Okay.

THE COURT: He's asking do we have to be careful in about the selection about the race issue in this case?

THE WITNESS: Obviously.

MR. GRELE: Thank you, Your Honor.

Q. And one of the reasons is it's highly unlikely, given today's social environment, that anybody's going to endorse or do anything but refute a question that would expressly or impliedly ask them to identify themselves as racially prejudice?

A. Yes.

Q. And so the question such as, could you be fair if the defendant is black? would race in any way affect your decision-making process? and those kinds of questions, are they considered valid questions?

A. If by that you mean, will they reveal information that the Court can rely on, I think obviously not. But even I think Professor Ebbesen did ask about that a little bit and he still got what surprised me, seven and a half or eight percent of people who couldn't tell the Court that they would decide a case free of any racial bias.

Q. When you say "couldn't tell the Court," couldn't

tell the survey examiner?

A. In that case, yes.

Q. One would imagine, would it not, that it might be a little different to stand up in a court of law and answer that question in the negative?

A. Oh, I think it obviously would be much more difficult the under those circumstances to admit bias.

Q. Okay. You would need to do a wide range of information or inquiry about racial issues if you felt racism was a particular problem in a particular case?

A. Yes, and it's not easy to do. I'm not suggesting there's some magic bullet or litmus test can say aha. It's a very difficult job, typically involves indirect questions, and it's done in a whole bunch of different ways. But a conclusory or leading question I think is not very helpful.

Q. So you have the exhibit in front of you, for instance, D, I believe it is EE all the way to your upper left, Professor.

A. EE?

Q. Keep going. There it is right there.

A. Oh, I'm sorry. Got it.

Q. If you can turn to page 8.

A. I'm there.

Q. See questions 39 through 43?

A. Yes.

Q. Now, 39, 40, 41, 42, are the types of questions that you sort of ask indirectly of folks to get some gauge of where their experience is with other races; isn't that

correct?

A. Yes.

Q. And the inference there is those who have more experience with folks of other races are perhaps less likely to harbor racial animus; is that fair?

A. Yes. That's one indirect way of getting at it.

Q. They've invited somebody from another race over for dinner, play dates with children, and things of that nature?

A. Sure.

Q. Not necessarily their work environment; is that correct?

A. Not necessarily.

Q. All right. Now, the question I wanted to ask about, though, is 43:

"Would this affect your ability to serve as a fair juror in this case?"

I assume that that refers to 42 above it?

A. That seems fair.

Q. Okay. Now, 42 is:

"Have you been exposed to racial, sexual, religious and/or ethnic prejudice?"

Now there's some ambiguity in that question; isn't there?

A. More than some.

Q. Meaning some people interpret that to mean have they been affected by racial prejudice?

A. Yes.

Q. And some people may interpret that to mean have

they --

A. Seen others.

Q. -- seen others affected by racial prejudice?

A. Yes.

Q. So that's something we need to clean up a little bit?

A. Yes.

Q. So the question as it's phrased seems to -- 42 and 43 when taken together seems to attempt to identify folks who are racial minorities who may feel because they've suffered prejudice would affect their ability to be fair in this case?

A. That would be one group.

THE COURT: I don't know if you can make that assumption. I can see where you can make changes to the question. But just because a person's a minority does not mean they're not subject to prejudice. I can see where you can say we can do a better job on 42 and 43.

THE WITNESS: Yeah, that's it.

MR. GRELE: Q. But the fact that you can ask somebody whether their race or the race of the defendant or the race of the victim would affect their ability to be fair and impartial in that kind of sort of leading manner is what you've identified as problematic?

A. That's all. No more.

Q. And, by the way, racial bias against one particular race group is not limited to white Americans, is it? Meaning, there's racial bias that goes cross-racially; isn't

that correct?

A. Oh, yes.

Q. And there have been some studies about that recently, particularly with the relationship between Hispanic and African-American communities; isn't that correct?

A. That's the main one that comes to mind, particularly in communities, and I have no idea whether that's true here, where there's some tension running for office, other bad, problematic experiences but in some instances indicate that Hispanics have problems with blacks and vice-versa.

Q. Okay. Now, in terms of what we call remedies and potential voir dire remedies, what about sort of boilerplate -- what we've called boilerplate voir dire procedures, you know, a rote outline of what questions are supposed to be asked for any particular juror or group of jurors?

A. What about it? I mean that's standard.

Q. Okay. Is that a problem? Is that something that's going to identify and attempt to ameliorate pretrial publicity exposure?

A. Oh, no, no.

Q. Why is that?

A. Well, I don't know that occupation or age or prospective juror or his or her spouse.

Q. Uh-huh.

A. I mean, it may -- it may get some information, but

not typically.

Q. So those are the kinds your -- that's the kind of procedure you want to avoid; is that right?

THE COURT: Avoid what? Boilerplate?

MR. GRELE: Avoid boilerplate voir dire type of procedures.

THE COURT: I don't understand that.

MR. GRELE: Okay.

THE COURT: Do you understand that?

THE WITNESS: My answer would be no. That's essential.

MR. GRELE: Q. Okay. What other areas of voir dire have you considered to determine whether or not voir dire procedures can be crafted in this case that would ameliorate the effect of pretrial publicity?

A. Well, that's a whole different topic. I think it's preferable to have attorneys as opposed to the Court.

Q. Why is that, Professor?

THE COURT: Have attorneys as opposed to the Court do what?

THE WITNESS: Deal with some of those issues.

THE COURT: Oh.

THE WITNESS: The non-boilerplate sorts of things.

MR. GRELE: Q. Why is that, Professor?

A. Well, people are more willing to disclose to people that they view as a similar social status and that they can relate to. Unfortunately, the Court, even very friendly and good court sitting up here talked to -- sitting up here in the bench in a black robe and is the, by far, at least in

the courtroom is the highest status person here. So it's a little more difficult to self-disclose. And it's one of the reasons why attorneys will often self-disclose certain things. You know, this happened to my mother or this happened to me, because it makes it easy or more comfortable for prospective jurors to reveal information.

Q. All right. Now, we've already talked about the preinstruction question, so I'm not going to go there.

The preinstruction issues we talked about in terms of the questionnaire, do those apply to the voir dire process as well?

A. Oh, sure.

Q. By preinstruction, informing, either explicitly or impliedly, what an appropriate answer either to remain or to not remain on the jury?

A. Yes.

Q. That would be with a variety things covered in voir dire, that exposure to publicity, presumption of innocence, those kinds of issues; isn't that right?

A. Sure.

Q. Okay.

A. That's where His Honor was talking about emphasizing there are no right and wrong answers and that sort of thing, which is classically good.

Q. What about time limits on voir dire?

A. Well, I realize the tension that creates on courts, but where you have artificially small time limit, it varies tremendously from county to county, but where you have a

very short time, whether you're talking about identifying ADP's, whether you're talking about identifying people that might harbor some racial animus, whether it's talking about people who appear to know something about the case that may or may not be prejudicial. If you ask typically -- the only way you can -- either you don't ask about some of these things, if you have certain low time limit, or if you ask about them, you do so in a very summary question, often leading, and you get a yes or no answer, and you end up giving the appearance of exploring some of these issues, but not the reality of it.

Q. Okay. What about -- you talked about leading questions, such as, could you be fair and impartial? could you put aside your previously held opinions and decide fairly on the evidence? et cetera, et cetera. Those are -- what you're talking about as leading questions; right?

A. Yes.

Q. And that's again, we talked about in terms of survey, in terms of the questionnaire, now, voir dire, is something to be avoided; correct?

A. Yes.

Q. It's your opinion you're just not going to get a reliable determination of whether or not somebody's been exposed to pretrial publicity or harbors racial animus in response to the questions such as that?

A. Well, at least you -- I'm not saying you don't get any information, but at least you're not able to explore how that might affect the ability that you're -- to be, if you

like, fair and impartial or free of some of those values that are not appropriate.

Q. Okay. And let's -- last one I wanted to talk about is the concept of individualized and sequestered voir dire. I know that's a lightning rod, but I just wanted you to discuss, if you don't have that, are you less likely to be able to determine whether or not the exposure to pretrial publicity has prejudiced the jury such that the defendant can't get a fair trial?

A. Yes, and as *Hovey* specifically dealt, which is the case, as you know, dealt with that, it there was great concern, and for a while at least it was mandated on death qualification, and I won't go through all the --

THE COURT: Let's don't, because we don't need the history lesson.

THE WITNESS: Thank you, Your Honor.

MR. GRELE: Q. I'm not talking particularly about death qualifications, which goes certainly the given the survey results. I'm talking more specifically now about publicity and race issues, and we've talked about before when you do those in a group voir dire, you're not likely to get the information you really need to get in order to make --

A. People are seeing how the process works. There's an education process going on just with hardships, which I'm sure Your Honor is totally familiar. You hear an excuse that works and, lo and behold, you hear it again and again. And here if it's clear that the Court or attorneys

disapprove of what may be a candid answer, you're educating jurors to be less candid if they harbor a sentiment or an opinion or knowledge that got somebody else, as I've used the term, fired or kicked off the jury.

Q. I'm more concerned, Professor, with the -- with the individuals that, for one reason or another are uncomfortable with or are unable to provide us with full disclosure, because I think we're a little more concerned about that group of jurors. And is it your opinion you can't really get at those types of jurors on issues such as publicity and race in this case without individualized sequestered voir dire?

A. I think that's true that the people are less comfortable in front of an audience. Even in sequestered, you have the attorneys and Court present, and self-disclosure of attitudes that are perhaps not so good like racial bias or things like that are much more difficult to -- just as the Court allows on most questionnaires, I don't know in this case, to mark private or some other things so they don't have to talk about it.

I'm not saying instances like previously been raped in a rape case, but it's the kind of information that people realize is not the "right," in quotes, knowledge or attitude to have that doesn't readily get disclosed in open voir dire.

Q. Isn't that true and survey data has showed that many people don't recognize their own biases, and if they do, they overestimate their ability to deal with them?

A. Oh, yes.

Q. And let me ask you. Given all the procedures we've discussed and all your survey data -- let me strike that question.

First of all, looking at the survey data itself, does the survey data support your opinion that a change of venue is required in this case for Mr. Allen to receive a fair trial?

A. Yes.

Q. Given the survey data and your examination of the media in this case and all the things you've talked about over the past day and a half, have you formed an opinion as to the likelihood Mr. Allen could begin his trial here in Modesto with the burden of proof properly in place?

THE COURT: Reasonable likelihood.

MR. GRELE: Q. A reasonable likelihood, that's correct.

A. Yes.

Q. What is that opinion?

A. It is, as you might expect, that I would say that I believe that the -- one of the things that would be most clearly shown is that at the least his presumption of innocence is in serious jeopardy.

Q. Okay. And have you formed an opinion as to the reasonable likelihood he can obtain a fair trial in Stanislaus County?

THE COURT: Same question.

MR. GRELE: No, first question was about the burden of

proof.

THE WITNESS: Okay. Got it.

MR. GRELE: Second question is whether he can receive a fair trial in Modesto.

THE WITNESS: Well, since I define a fair trial, maybe that's just peculiar to me, with the defendant beginning the trial with his presumption intact, the answer is the same.

MR. GRELE: Q. I wanted to back up one question. The Court pointed out in the questionnaire about how it seemed -- at least the implication from the questioning was that almost all the courts that we're aware of ask those types of questions, could you put aside what you've heard and be fair? Do you remember that line of discourse --

A. Yes.

Q. -- with the Court and with counsel?

Is that the kind of questioning that's going to get a much better result if there's a lower degree of exposure to publicity and a lower degree of publicity in a case?

A. Oh, yes.

Q. You would expect people to better judge their capacities in that regard?

A. These kinds of issues in the overwhelming percentages of cases that go to trial are not issues that are particularly troublesome.

Q. But it is in this case; isn't that correct?

A. Yes.

Q. And is in your opinion that -- what's your opinion as to the reasonable likelihood of him obtaining a fair

trial in Stanislaus County?

A. I think it's in jeopardy. I don't know what else -- I don't know what different from what I've said before.

Q. Is it your opinion he can possibly receive one or --

THE COURT: Counsel, I'll object to the form of the question any time you say the word "possibly." You know the answer to that question.

MR. GRELE: Okay.

THE WITNESS: Indeed.

THE COURT: Restate.

MR. GRELE: Q. Given these voir dire procedures and the questionnaire procedures we talked about, such as attorney conducted, sequestered voir dire, and open-ended questions, in this particular case are reasonably likely to ameliorate the effects of pretrial publicity and race we see in this case?

A. Clearly they will help some, but if they are enough to adequately protect the fair trial rights of the defendant, given all the things we've talked about, the answer is no.

MR. GRELE: Okay. Thank you, Your Honor. Thank you, sir.

THE COURT: Okay. Why don't we go ahead and take a quick ten-minute break, and then we'll start with Mr. Cassidy's cross.

Okay. Ten minutes.

MR. CASSIDY: Thank you.

THE COURT: Pick it up at 25 after.

(Recess from 2:16 p.m. to 2:25 p.m.)

THE COURT: All right. Let's get back on the record. Everyone's present.

Mr. Grele, you're finished with your direct questioning?

MR. GRELE: Thank you, Your Honor, yes.

THE COURT: Mr. Cassidy?

CROSS-EXAMINATION

MR. CASSIDY: Q. The good thing is I'm not going to ask you anything about questionnaires and voir dire.

But I do want to ask you about the opinions that you've offered to the Court on your analysis of the factors that appellate courts have laid out for the trial courts to consider, and I'm going to follow your analysis that's included in Defense Exhibit F.

A. Yes.

Q. So let me invite you to turn to page two and try to march through that a little bit.

A. Okay. You want me to go to F for this?

Q. I invite you to do that, yes.

A. Thank you.

Q. Defense Exhibit F, page two.

A. I'm there. What page?

Q. Page two.

You've -- in answer to a question that Mr. Grele posed

I think it was yesterday, you raised doubt as to whether or not you could offer opinion as to a scientific certainty?

A. Just based on the newspaper articles.

Q. And my question to you, sir, is what scientific mechanisms do you bring to bear on determining what constitutes an inflammatory material?

A. I -- what standards do I use? I look at the kinds of things that the Court, I remember particularly *Williams*, talks about, as being inflammatory. I also look at social science article by Professor Carrol as to what they -- when they found the inflammatory publicity, I don't remember what that was anymore.

Q. Ordinarily in scientific inquiry, correct me if I'm wrong, there is a hypothesis offered and then an inquiry is done?

A. Yes.

Q. And then you come up with a conclusion; is that correct?

A. Correct.

Q. And so you have your own hypotheses as to what constitutes inflammatory material; is that correct?

A. That's right, though it varies from -- I have to make a decision when I find something in a case. Now, if it's standard, like using language that I call inflammatory, it's pretty straightforward, or at least I think. If -- I hope that is ordinarily informed by the sorts of examples that the courts have used or that some of the experimental work might be helpful.

I don't -- but if I look at a word "horrible" or "this is terrible," how do I know that that's inflammatory? That's sort of -- I hope I don't insult anybody.

We used to -- there was game when I was growing up where you would say you are obese -- not you are, but first: He is obese. You are overweight. I am pleasingly plump. In other words, where you can express some idea either in a fairly neutral, straightforward way or in a much more, if I may use the term, inflammatory way.

So as I -- I may have used the example. You can talk about a homicide. You can talk about a killing. That's a pretty neutral way. You can talk about murder. That becomes a loaded term, and you can talk as the Court in *Williams* talks about a rape murder or a cop killing maybe.

Q. Is there a -- let me ask that question a different way.

Is there a scientific method you use to bring to bear in determining what constitutes inflammatory material?

A. Well, other than court decisions and my own --

Q. Okay. Start there then.

A. Yes.

Q. Court decisions. What court decisions have you relied upon -- I'm looking at Exhibit F, page two. What Court decisions have you rely upon to identify that the word "horrific" is an inflammatory term?

A. There it's my judgment, my common sense, as it were, my understanding of what -- of what adjectives and similar phrases are likely to be. Because notice I do give

a bit of a definition: Elements of sensationalism, inflated, emotional or loaded language. Now, we can quarrel about whether "horrific" is one of those things, but I don't know if you really need much science to say at least with that type of term that's inflated.

Q. Has any science been applied in order to come up with identifying these terms as inflammatory?

A. No more than the *Williams* court did when it said that a rape murder is inflammatory types of language.

Q. That's not really my question, sir. I'm not asking what the Court in *Williams* did. I'm asking you what science you brought to bear in determining, if any, that these terms are inflammatory?

A. No more than described to you.

Q. Now, in offering a definition for inflammatory, what source did you use for that definition?

A. I don't know that they're defined as such anywhere, but I'm comfortable with saying, if you call somebody a creep or a ruthless thug, et cetera, et cetera, that that is inflated language.

Q. Well, you're comfortable using the internet; right?

A. Yes.

Q. You've used the internet quite a bit in order to research this case?

A. Yes, for the newspaper articles.

Q. Have you looked up Dictionary.com?

A. No.

Q. It's a website that brings together various

dictionaries.

A. Sounds very interesting. So I'll use it.

Q. We have dictionary definitions of "inflammatory" as being fiery, incendiary or provocative. They cite Random House Dictionary.

Does that sound consistent with your understanding of the word "inflammatory"?

A. It certainly is a valid definition. I've defined it a little more broadly, which you may not agree with.

Q. They cite the American Heritage Dictionary of the English Language offering the definition of "inflammatory" as being incendiary, incitive, instigative, rabble-rousing or seditious.

Is that your understanding of the word "inflammatory"?

A. It certainly would be important -- it's a different type of definition, perhaps a little broader than the previous one, but consistent.

Q. They cite Merriam-Webster's Dictionary of Law as defining "inflammatory" as tending to cause anger, animosity or indignation.

A. I certainly wouldn't quarrel with that. Certainly I've tried to make clear how I've more or less defined it.

Q. Essentially the definition is just your own; is that right?

A. To a large extent, I think that's true, but I --

Q. Yesterday you offered to the Court that you don't really need a social scientist to say what is inflammatory?

A. Not with some of these things that I've listed.

Q. In any of the terms looking at Exhibit F, pages two to three, there are 24 entries you've offered there.

A. Yes, whatever it is. I take your count. That sounds --

Q. In any one of those, did you use any sort of scientific means of defining or determining whether or not they constitute inflammatory, or was it just your own personal opinion?

A. I think it's primarily that but informed by --

Q. I gave you a choice. What is primarily that? Is it your personal opinion or is there some scientific method to determine if it is inflammatory?

MR. GRELE: I'm going to object, Your Honor. It could be neither.

THE COURT: Well, he can respond to the question.

MR. GRELE: Okay. Thank you.

THE WITNESS: By science, do you mean that social scientists have defined these terms and identified a list of terms that are inflammatory, no, that's never been done.

MR. GRELE: Q. So in these terms that you offered as constituting inflammatory, these are all what you would identify, you would personally identify as being inflammatory?

A. Particularly if you include yes, and particularly if you include the notion of inflated language, an emotional way of characterizing something or other that may do many of the things that you listed.

Q. On the third page of the exhibit you have "tragic,"

"tragedy," and you have a number of entries there.

A. Yes.

Q. Do you think "tragic" or "tragedy" would in any way be inflative of what's being discussed here?

A. I think that's certainly towards the low end of what I might have included. It's certainly evocative of an emotional reaction, not inaccurate by any means, but that's not the test.

Q. Going on in your possibly inadmissible material that appears at the bottom of page 3 and goes onto page 4, you include a number of things reflecting defendant's criminal history and in particular him being a felon. That information you offer as being possibly inadmissible?

A. Yes.

Q. Are you aware that he's being charged with felon in possession with a firearm?

A. Yes, I think I am.

Q. So do you think that he's a felon would be admissible evidence as to that?

MR. GRELE: Objection. Calls for a legal conclusion. May be all kinds of reasons why that --

THE COURT: Stop, stop. Objection's sustained.

MR. GRELE: Thank you.

THE COURT: He's not going to opine, as I indicated yesterday, what is admissible or not admissible. It is only related as to publicity.

MR. CASSIDY: Q. We're continuing to discuss the nature and extent of news coverage, and on page 5 of your

exhibit, you have presumption of guilt.

A. Yes.

Q. And you cite the *Williams* case for the fact that:

"Even factual accounts can -- even factual accounts . . ." indicating an omission, "can be potentially prejudicial. 'A reasonable likelihood of unfairness may exist, even though the news coverage was neither inflammatory nor productive of overt hostility.'"

A. Yes.

Q. Now, the presumption of guilt information that you phrase it there referring to the *Williams* case, and I think it's also indicative of the *Corona* case and possibly -- I've blanked. What did we say with *Williams* and *Corona*? The appellate decisions on those cases were reflective of the fact that there was a great wealth of information that was being published regarding those criminal acts; isn't that right?

A. There certainly was in *Corona* with the 24 victims or whatever there was. In *Williams*, I just don't know how extensive it was. Certainly, as I understand it, having read the case -- I wasn't involved in it -- there was certainly a fair amount that was a black on white. There were a lot of distinguishing factors.

Q. You're familiar with the case of *People versus Coffman and Marlow*, appears at 34 Cal.4th, page one.

A. Yes, I testified.

THE COURT: He did the survey on that, if I remember.

THE WITNESS: Yes.

MR. CASSIDY: He did.

Q. On page 46 of that opinion it refers to the *Williams* case, characterizing that as:

> "The case involved the county, Placer, a very small population where media coverage of the offense was continuous up to the time of trial and where the victim and her family had long, extensive ties to the community. Such a substantial proportion of prospective jurors acknowledged that they knew the victim, her family, and her boyfriends; and a smaller but still significant number knew the prosecutor, his investigators or deputy sheriffs who were to testify."

Does that sound like a fair characterization of the *Williams* case to you?

A. Yes.

Q. In this case we have no -- there's no evidence as published in the media, no direct evidence of the defendant's guilt; isn't that right?

A. Well, I guess there's no confession as such. That seems to be the case, although there are -- we talked about admissions and things like that. But there's nobody going on and saying he's already confessed and that sort of thing.

Q. Are you aware of anything being published wherein he is identified as ID'ed, recognized as being the shooter?

A. No.

Q. So there's no direct evidence that's been published in any media that the defendant is responsible for this; it is all circumstantial evidence?

A. Oh, in that sense, you're certainly correct.

Q. Whereas, in the *Williams* case, there was substantial direct evidence of that defendant's responsible for the crime?

A. I don't have any independent recollection, but I'm certainly willing to concede that your characterization is accurate.

Q. It was a situation where *Williams* and his brother were both charged with the rape and murder of a woman; is that correct?

A. Yes. I do remember that.

Q. And the person who is not subject to that opinion, his trial went to -- his matter went to trial first?

A. Yes.

Q. The matters were severed?

A. Yes, that I remember quite clearly.

Q. And the appellant in *Williams* went to trial subsequently?

A. Yes. There were two -- as you suggested, there were two appellate decisions, one for each brother.

Q. Well, we're just worrying about this *Williams* we've made reference to, appearing at -- I've given the citation earlier?

MR. GRELE: I'm going to object here. Do we need a

real exogenous as to what the actual Superior Court facts are? We all can look at them.

THE COURT: He's only using that to set the stage for his next question. I'll allow him some latitude on that. The professor is familiar with *Williams*. He's indicated he used *Williams* for language.

Mr. Cassidy, proceed.

MR. CASSIDY: Thank you.

Q. Similarly in *Corona*, there were eight deaths for which the Appellant Corona was charged with; isn't that right.

A. I don't remember how many he was charged with. The big thing is I remember about the opinion. Didn't the Court talk about many more, 24, something like that, how many bodies they found.

Q. There's a huge amount of evidence being published in the local papers regarding *Corona* and his responsibility for those homicides; isn't that right?

A. Yes. Oh, yes.

Q. In this case there was no such evidence that's been published, no such body of evidence that's been published; is that correct?

A. Well, I can't measure -- I know as a general matter that there was a lot of material published in the local papers, but how it compares to this case, I'm in no position to assess.

Q. Oh, but you have, sir. You have, haven't you? In fact, in the next subsequent pages, at pages, 6, 7, 8, you

have sought to point out every single fact that has been published in The Bee and try to identify it as being -- rising to a presumption of guilt?

A. Oh, as I -- what I said was, or I hope I said, was that while I know more or less what was here, I don't have any way of comparing it to what was in *Corona*. That's all I meant by that.

Q. You, as I think was discussed in your introductory comments, authored with another fellow the chapter on change of venue --

A. Yes.

Q. -- for the California Criminal Law Procedures and Practice book published for a number of years by the California Bar Association?

A. Yes. Not -- it's CEB, the University of California that publishes it.

Q. Oh, thank you for the correction.

A. Oh, minor.

Q. And that role as the author of that article, as would be the role of the author of any of the other articles in this book, it's required that you remain unbiased and neutral in your presentation of the law regarding this?

A. Absolutely.

Q. And in the article in which you -- excuse me -- the chapter which you wrote, at page 378 -- I'm looking at the 2008 version of this publication, the 2009 hasn't come out yet, has it?

A. Yes, it has.

Q. Oh, it did. I'm behind the times. Bear with me.
A. No big changes.
Q. In the 2008 edition at page 378, you write:
"The *extent*," highlight being yours, "of news coverage is quantitatively measured by items like the number of articles (and electronic coverage), their pattern, their prominence, and other factors, such as the number of pictures, editorials and letters to the editor. The *nature*," emphasis yours, "of publicity is qualitatively measured. If coverage has been inflammatory or sensational in nature, a venue change is more likely to be granted."
And then you cite the *Corona* case?
A. Yes.
Q. In the next paragraph you note it's highlighted:
"The nature of publicity. The *nature*," again emphasis yours, "of the publicity focuses on the analysis of its content. Major problems arise when the coverage is, first, inflammatory involving emotionally charged inflammatory language, such as execution-style killing," citing the *Williams* cases.
Then you say:
"See *Williams* case for best examples of inflammatory and prejudicial publicity."

Is that right?

A. If that's what I said, that's what I said.

Q. Now, I'd like to go back to your Exhibit F.

A. Yes.

Q. Guilt-oriented evidence. In what case supports the supposition that that's a factor for the Court to be considered in this change of venue?

A. Well, it's a two case -- at least the two cases that we talked about.

Q. All right. And that's in a situation like in *Williams* and *Corona*, given the body of evidence that otherwise non-inflammatory information could give rise to a prejudicial effect on the population?

A. Yes.

Q. Motive. I'm looking at page 7 of Exhibit F, motive.

A. Yes.

Q. You cite that in your analysis as the case that supports the idea that motive is an issue that could be grounds for a change of venue?

A. Oh, that -- that's what I believe that evidence that goes toward establishing the guilt of the defendant that's published in the media, which could be fingerprints or motive or a whole lot of other things, will be, to the extent that evidentiary stuff that tends to show guilt, is prejudicial.

Q. Is there any published case -- and you've offered the Court a very substantial body of cases. Is there any

published case that you're aware of that lists motive as being a factor to be considered by the Court in a possible change of venue motion?

A. I'd be hard pressed to come up with that depth of knowledge. The real issue for me is --

Q. That's not the question. My question is, sir, do you have a case supporting the use of motive in this fashion?

A. No.

Q. In your next entry you have damage to credibility of possible defense witnesses. Is there any published case that supports the Court considering that in a change of venue motion?

A. No, and to the extent that one takes the view that these are not things that tended to show guilt, I'm willing to -- of course, more than willing to talk about them.

Q. Your next entry is exculpatory coverage and some rebuttals. Now, there are cases that measure the appearance of exculpatory information in the media; isn't that right?

A. Exculpatory.

Q. Didn't-do-it stuff.

A. I'm willing to concede they may exist. I'm not an encyclopedia, but that's put in to examine why it isn't guilt-oriented, that is the impact of the pretrial coverage is not or at least partially is not to show the kind of thing that we get from *Corona* and from *Williams*.

Q. Going back to your article in the CEB book in 386, you give a checklist of factors that might be considered in

coming up with or in support of a change of venue motion; is that right?

A. Yes.

Q. Your first entry is "nature and gravity of the offense." We're not dealing with that, so we'll go on to the next category.

That's "nature and extent of news coverage." The first checklist item you offer is:

> "Prejudicial publicity is pervasive throughout the community."

And you cite the *Corona* case for that proposition?

A. Yes.

Q. There you recall that this information about *Corona* was pervasive -- prejudicial publicity was pervasive?

A. That's what the courts said, sir.

Q. Your next entry is:

> "News coverage has been inaccurate and biased against the defendant," citing the case of *People versus Gomez*, 1953 case, 41 Cal.2d, appearing at page 150.

Do you identify any information in this case of that nature that's been inaccurate and biased against the defendant?

A. The -- the characterizations of the defendant, which is listed separately often are pretty venomous.

Q. That's not the issue, though. I'm asking for inaccurate and biased against -- or venomous, you offer. I'm sorry.

Now, is that news coverage or are you talking about letters to the editor and blogs?

A. I don't remember if I cite under -- let me quickly look at status of the defendant. See what -- oh, yeah. Some of these I can tell you offhand may come from letters to the editor or the editorials or the like, but that's still media.

Q. What page are you on, please?

A. Pardon?

Q. What page are you on?

A. I'm on page 16. Status -- I'm sorry. Roman numeral VI, status of the defendant, where we talk about hostile, negative characterizations, where I talked about it.

Q. Excuse me. Those are 11 entries in there; right?

A. If you say that.

Q. I just counted them. If you come up with a different number --

A. That's fine. I'm not quarreling with them. I'm happy to accept your count. That's good. Although there's some that were multiple times, but that wouldn't increase it a few, not a lot.

Q. "Creep," for instance?

A. Pardon?

Q. "Creep."

And then you cited I think you cited there were 144 articles that you relied on in your initial --

A. In the initial one. It's expanded to 150, but

that's not a major change.

Q. You have 11 entries here that you would rely upon to suggest that there might be bias against the defendant from the 144 --

A. Hostile characterizations, yes.

Q. Going on in your chapter in the CEB book, page 387:

"Although news coverage is accurate, it is engendered a feeling that the defendant must be guilty," in citing the *Corona* case.

A. Yes.

Q. Again, the *Corona* case dealt with a huge body of evidence against the defendant? I'm sorry. I think you said you were unsure about that. So I'll withdraw that.

A. I'm not quarreling with you. I just don't recall that much.

Q. I appreciate that.

"Inadmissible evidence has been reported."

There was one piece of inadmissible evidence that I need to acknowledge straight up. That was the testimony of the defendant's wife at the grand jury proceedings, and you point that out in your work.

During your survey work, did you ask any of the respondents if they had any idea as to whether or not the wife had in fact testified against -- at that grand jury proceeding?

A. No.

Q. In question 4 -- never mind that didn't work on question 4. The question 4 wasn't asked in the second

survey, was it?

A. No, the first survey.

Q. And it was the second survey that happened after the grand jury proceedings?

A. Yes.

Q. So aside from that, are you aware of any comments in the up to 150 publicity cases that you've reviewed in The Modesto Bee and other sites that have made reference to the defendant testifying?

A. No.

Q. Going on with your list:

"News coverage has continued unabated."

Would you characterize this as news coverage having continued unabated?

A. Well, depending on how you define "unabated."

Q. I'm asking you to.

A. I'm distinguishing between this case and *Odle*, where the Court reported that there had been virtually no coverage from the first two weeks until the time of the venue hearing. Clearly that is not true here. You define how many does it take every week.

Q. When is it "to abate"?

A. To abate?

Q. Uh-huh. You used the term "unabated." Let's look at it positively. How do you define the term "to abate"?

A. Gone away, more or less. I don't mean necessarily totally.

Q. I think you've told the Court yesterday that during

year 2009 up to today, July 23rd, there have been seven articles in The Modesto Bee that you were able to account for?

A. That's correct.

Q. That sounds like an abatement to me.

MR. GRELE: Objection, Your Honor. It's argumentative.

THE COURT: He doesn't mean it to be argumentative. But he can do a better job of phrasing of the question.

We're going to get back to that in a minute because I'm going to make a reporter switch.

(Brief recess. Change of reporters.)

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(Proceedings resumed at 3:00 PM.)

THE COURT: Let's go back on the record. Everyone is present.

Mr. Cassidy, ask your next question, please.

MR. CASSIDY: Thank you, Your Honor.

Q. Dr. Bronson, if we can return to the area I was asking you about on the question as to whether or not coverage had been abated, and we discussed and I think we agreed on seven articles published in the year 2009?

A. That's correct.

Q. And that would seem to me to have been an abatement of the flow of coverage that had otherwise characterized this case?

MR. GRELE: I'm going to object, Your Honor. Obviously he's defined abatement, and Mr. Cassidy may have a different definition, but I don't think Mr. Cassidy's definition is necessarily relevant.

THE COURT: Well, your objection is going to be overruled. Abatement has a pretty much common sense understanding what it means, and the professor here is able to respond to the question whether he agrees or disagrees that appears to be a, quote, "abatement," close quote.

Proceed.

THE WITNESS: Well, I guess, particularly in view of His Honor's comment, it depends -- and the objection, it depends, if by abatement you mean it's gone away, the answer would be no abatement. If by non-abatement, you mean as heavy as it was in the early days of the case, of course

it's reduced.

MR. CASSIDY: Q. Your next entry on this checklist is news coverage is limited to the community where the crime was allegedly committed. There has been little or no publicity in other counties.

That one seems to work for you on this case, doesn't it?

A. Yes. This is -- you might say is the opposite of Peterson.

Q. You had -- there's been some coverage in San Joaquin County, and I don't know if you're aware of coverage in Merced County, but not substantial.

A. I don't know about Merced. I do know that there was some in The Stockton Record.

Q. And your next entry is publicity concerning the place where the defendant was arrested has dominated the news media for several years and is prejudicial to defendant's case, citing the case of *Steffen vs. Municipal Court*?

A. That's the case where there was a part -- dirty movie place that was being prosecuted.

Q. But it's not applicable -- that checklist item is not applicable in this case, is it?

A. Well, the problem is here, the location of the crime that so many local people drive by, and I think there's a little memorial there, and the question was that creates problems, people -- that adds salience, to at least some people. I don't want to exaggerate anything, but it's

some problem. Like so much, it depends on how much and what the ultimate test is.

Q. But that's not what you put in your checklist here, is it? You said publicity concerning the place. So define the place for us.

A. Highway 99.

Q. Have you seen much publicity in here concerning the place has dominated the news media for several years?

A. If you say "dominated" --

Q. That's what you're saying here, isn't it?

A. That's, I think since I've got the assignment for next year's book, an inartful phrase. That has been prominent or frequently mentioned would be better.

Q. Has the -- the location -- not Highway 99. That covers all up and down the state; right?

A. That's right.

Q. But the location where this killing occurred, just north of Salida, has that location been publicized in the paper?

A. I would have to look at more recent publicity, but my sense is that often in the later discussions where they rehash the case --

Q. With all due respect, I don't want your sense. I want your recollection as to whether or not that publicity about that location has dominated the news media for several years and is prejudicial, another fact we have to discuss, is prejudicial to defendant's case?

A. On dominated, I readily concede that that somehow

has been the key factor, as it was in that *Steffen* case. It doesn't reach that level. But it has continued to be there, and is, as I've suggested -- I'll go -- I won't -- I promise not to give my usual professorial lecture.

But where the location contributes to what's called salience -- that is, people can relate to it, this is something, a place that they know and drive by and might lead to their rehashing in their own mind, ah, that's where the killing was or that's --

Q. Did you find in your surveys anybody identified the location of this survey?

A. No. Not that I remember at all. I didn't ask them about that.

Q. Isn't this something rather similar to what happened with you in *Bledsoe*, the *Bledsoe* case?

A. I made the same argument in *Bledsoe*, yeah. That was Highway 70, which ran through, Your Honor, the downtown area. And I think -- I'm not quarreling with the judge's decision there, but it's the same kind of factor.

Q. The -- essentially the Court was dismissive of your trying to identify the salience of Highway 70 whenever it has no part in your prior work except until you got on the stand; isn't that right?

A. Oh, salience is a major part of what I talk about.

Q. I talked about Highway 70?

A. No. Highway 70 is not a big --

Q. But you sought to testify about the salience of Highway 70 in the Bledsoe case and the Court --

A. Not generally, but in Marysville, where this hearing was held. Just like Highway 99 is not mentioned in any other cases that I know of. Maybe it is.

Q. I'm reading from the opinion, the decision of that case wherein it reads at the fifth page, "Dr. Bronson testified that Highway 70 is a place that the jury venire may drive by and relate to as a place which, for their good fortune, could have resulted in their own deaths due to the alleged actions of defendant Bledsoe. The prosecutor argued that the only reason for the late inclusion of this feature during Dr. Bronson's testimony was because the prosecutor had previously contended that the death of two small children, alleged drunk driver, and three generations of family killed would conjure up the same emotional impact no matter where the trial was held. This, quote, 'new,' close quote, theory pertaining to Highway 70, however, could be specific to Yuba County only. The Court does not find the opinion surveys specifically considered the issue of salience with regard to Highway 70, and thus the Court places little, if any, weight on this opinion by Dr. Bronson."

A. Yes, this is not the first time a trial court judge has disagreed with my characterization of evidence, I'm sure won't be the last.

But I think that where you have a very busy highway through the heart of the town, that many, many residents are driving by, where this was a horror, because, as you said, there were six people killed by this really callous drunk

driver with a suspended license and much worse, was particularly troubling.

And I know when I drive by places where -- if I know there's a place where a murder was committed, that gets me thinking about it, if I drive by where Dorothea Puente in Sacramento had all these bodies buried in her front yard, and that's a pretty normal reaction.

Q. Let me go back to my earlier question, or the tone of my earlier question. That is, what scientific evidence do you have to support that, or is that your own personal opinion you're offering to the Court?

A. Well, we're generally talking about the quality of salience, which --

Q. No, that does not answer my question, sir. I'm asking what scientific evidence you have to support what you just offered to the Court, or is it just your personal opinion?

A. Well, in the sense that there aren't any studies of how the fact that a particular event affects me or the like, what essentially you're asking me to say, has there been a study on everything that seems to contribute to potential, real or unreal prejudice? And unfortunately social scientists do a limited number of studies.

Q. Well, I'm just actually asking you about what scientific evidence supports what you offer to the Court, and that is you've just now offered to the Court that the location on Highway 99 is now of import. That was not included in your survey; isn't that correct?

A. That's correct.

MR. GRELE: Objection, Your Honor. The first question, the survey mentioned Highway 99.

THE COURT: Well, there is reference to Highway 99 in the survey.

MR. CASSIDY: Q. Is there any inquiry in your survey about Highway 99? Is there any question posed regarding Highway 99?

A. No. If your question is to me is there any evidence in the survey or social science literature that says that whether a crime happened on Highway 99 or some other local place of note, I don't know of anybody that's ever studied that or many other factors in what I do.

Q. So it's just your personal opinion that you offer to the Court?

A. Well, I hope it's more than that. That is, I hope that my general theory of how salience affects jurors or community members is -- Court can either accept that, that if I pass by a regular place or if somebody I know was involved, that the general notion of salience, the closer crime hits to me, whether I or my spouse was -- is unaffected by the fact that the body of a victim was brought into the hospital, I think those things -- some things sort of have to rely on common sense, particularly when you don't -- you bring your evidence into court, you discuss it, and the Court and parties will assess that's a reasonable argument to make, because every case is different. You would have to do millions of experiments to look at

everything that might affect the case.

Q. Is there anything else you want to offer on that topic?

A. About all I can say.

Q. Your next item on your checklist is the broadcast of defendant's confession was so prejudicial that it requires a change of venue, citing the case of *Rideau*, R-I-D-E-A-U, *vs. Louisiana*, a 1963 case from the Supreme Court at 377 US 723.

A. That is certainly the classic case for that principle.

Q. And that's not a part of this case?

A. Well, there are admissions. There were comments about police denied that the defendant actually confessed. But -- and so it's somewhat marginal. Whether you consider admissions or false claims or whatever as -- seems to me that that's prejudicial. Not as prejudicial as Rideau's case, where he was recorded on television and broadcast in the local community.

Q. I want to leave now the area of the nature and extent of public -- publications and go to the nature of the crime.

The nature of the crime is such that it's a homicide of a police officer and -- that does lend weight to the change of venue motion; right?

A. Yes. And many related things, where he was shot --

THE COURT: We don't need more on that. We all agreed on that.

MR. CASSIDY: Q. Status of the victim.

A. Okay.

Q. And what you've published with CEB, this appears at page 381, you relate the consideration to be, quote, "The status of the victim in the community can arouse community passions against the defendant, arguing in favor of a change of venue," with citations to a number of cases. "For either the victims" -- this is the second paragraph on this page. "For either the victim's or the defendant's status to weigh in favor of a change of venue, the status factor must be unique to the county of original venue so that its effect would not be present in a different venue."

Isn't that correct?

A. That's correct.

Q. And there you cite the case of *People vs. Pride*.

A. Yes. I don't remember -- oh, yeah, the Supreme Court version.

Q. Let me give you the citation, if I may. It's --

A. No, no.

Q. Okay. And you also further on in that article discuss the *Odle* case, *Odle vs. Superior Court*, 32 Cal.3d 932.

And the *Odle* case had a number of similarities to this case, didn't it?

A. Well, there was a police officer victim.

Q. There was.

A. Obviously that's the -- the key similarity.

Q. Substantial amount of publicity regarding the

killing of that officer?

A. Yes.

Q. The killing of the officer as he tried to apprehend the defendant, who had killed a young woman days earlier?

A. That sounds -- I didn't remember the full impact of it. I certainly accept that.

Q. And in that case, the Court looked at whether or not the victim's status as a police officer would give rise to his being characterized as prominent; is that right?

A. Yes.

Q. And they looked at his, quote, posthumous celebrity that arose, decided that did not give rise to the change of venue motion.

A. Well, there is, as I dimly remember, some discussion of whether the fact that he became such a prominent figure after his death, there are a couple of places where they talk about that in the opinion. But I can't -- and the -- at least my recollection is that what it -- the fact that he became prominent after his death was a factor, but I won't say that -- they certainly say that he didn't become that until afterwards, and they questioned whether one needs that.

Q. Let -- I'm sorry, were you finished?

Let me read to you from page 942 of that opinion.

The Court introduces the discussion of the status and prominence of the victims. Reading, "The trial court found that, quote, 'the victims were essentially private persons and could not be classified as prominent as the term is used

in the case law,' close quote. While this characterization is correct as to both victims before their deaths, it fails to take in consideration that the slain officer, by virtue of the events and media coverage after the crimes, became a posthumous celebrity, at least in the western portion of the county where the crimes took place."

A. Yes.

Q. And that it noted that his funeral brought in over 1,000 officers from all over the state.

A. Yes. You're now talking about the part that I remembered.

Q. And that there was a fund established? There was a $50,000 fund from contributors from all over the state. You mentioned a fund in this case, didn't you?

A. Yes, but there --

Q. Who held that fund?

THE COURT: Who held it?

MR. CASSIDY: Q. Yes, sir. The fund is itself held by a particular entity.

A. I have no recollection. Usually it's a bank or something, but I don't know.

Q. How much was in that fund, do you know?

A. I have no recollection.

Q. Do you know who contributed to it?

A. No, I don't.

Q. Do you know if it was members of this county or outside of this county?

A. As I say, I just -- I don't remember other than

that little piece of fact.

Q. So it's just there, you're not really aware of its circumstances?

A. Exactly. Although the newspaper did -- I think, if I'm recalling right, did either encourage or at least tell people where they could contribute, and so that that was publicized, but I'm not even absolutely positive of that.

Q. But the more significant issue, Dr. Bronson, is were there any contributors from this county, and if so, how many?

A. I of course have no idea of that. But they were certainly in the media.

Q. Who was in the media? You said they were in the media. I'm not sure who you mean. Who is "they" who were in the media?

A. The newspaper article that listed where you would send your contribution to -- see, I don't know if you want me to look that up or --

Q. That's not really the issue in *Odle*, is it? They were using the fact there was a fund set up for the victim officer in *Odle*, which drew upon members of the community; right? That was the significance of that, an outpouring of support from the community for the officer's family?

A. That at least is no doubt the case. I don't remember what they exactly said, but that's the general thrust of it.

Q. And so within that context, the fund for Officer Scott or his family, the issue is, is what support, if any,

came from this specific community and what was its nature; right?

A. Well, that's I think part of it, and a big part. I don't quarrel with that. But -- and I have no idea where the funding for the fund came from.

Q. My point exactly.

MR. GRELE: Objection, Your Honor. Is that a question?

MR. CASSIDY: It was an attempt to end this so we can move on to the next question.

THE COURT: Objection sustained.

MR. CASSIDY: Q. So with this recitation of facts at page 941, the Court concluded, "In sum, the effect of the status and prominence of the two victims on the issue before us is inconclusive."

A. I'm sure that's what they said.

Q. Neither added to or took away from the change of venue issue?

A. That -- I think that certainly is accurate and it's -- it doesn't suggest that it's not -- that their status didn't contribute to the need for a change of venue. It's simply to say it isn't, I think, as powerful as it would have been.

Q. Do you have offer any information to the Court that Officer Scott was a public person prior to his death?

A. Prior to his death? No. Well, small percentage of the community, but not much.

Q. His friends?

A. His friends, whoever else might have known him.

Q. So do you -- so, again, do you offer any information to the Court that he was a public person?

A. Other than the fact that he held a public role as a Highway Patrolman, but not to indicate that somehow he was well known by any -- by other than a relatively small percentage of people in the community.

Q. Status of the defendant. How do you offer to the Court -- what evidence do you offer the Court as to what the status of the defendant is as defined in your article at page 481?

Let me withdraw that, if I may.

In your article -- excuse me, in your chapter at page 381, you cite that if there's something about the defendant that makes him or her peculiarly subject to the hostility of the local community, venue is more likely to be changed."

A. Correct.

Q. And there you cite the *Williams* case, wherein it's discussed that the defendant was a nonresident and an African-American. Only 402 of the county's 117,000 residents were African-American.

And then you also refer to the *Frazier* case. Case comes out of I think Santa Cruz talking about hippies and so on?

A. Yes.

Q. You then go on to read, "However, the fact the defendant is a member of a minority group or a resident of the county does not always weigh in favor of a venue change. The court also considers how the community reacts to these

factors."

How do you offer -- what do you offer the Court as to what the community's reaction to the fact that the defendant lives -- is from Stockton?

MR. GRELE: I'm sorry, Your Honor, I don't follow the question. I think it's a --

THE COURT: Well, let's read the question back and see if --

(The record was read.)

THE COURT: You can respond to that.

THE WITNESS: Not as much as I'd like to have.

MR. CASSIDY: Q. What do you mean by not as much as you'd like to have?

A. Well, I'd like to have evidence that people in Stanislaus County somehow despise or resent or have hostility to people from the county to the north. I think the fact that he's an outsider in the sense that he doesn't -- he's not local is a factor by definition.

Q. Really? Excuse me. I withdraw that.

The Court asked you yesterday, I think it was, about the term outsider.

A. Right.

Q. And that was a term I think you responded to the Court that was of your offering, it was not part of any of the media coverage of this case?

A. Well, other than continuously -- I take it that by saying again and again and again that he was -- the defendant is from Stockton, that that -- I take it most

people know that's somewhere else, makes him an outsider. I'm not -- I don't want to go beyond that. He's not local.

Q. What's the distance from where he lived in the middle of Stockton to where this crime occurred in the north end of Stanislaus County?

A. Oh, physically, obviously, he lives pretty close. Under 50 miles, I assume.

Q. About 20 miles?

A. That may well be true. I haven't measured it exactly.

Q. And aside from your assumption regarding the characterization of being an outsider, have you read anything in your perusal of these 150-some articles about what a vile place Stockton is and about the people living in Stockton?

A. No.

THE COURT: I think, Counsel, yesterday we discussed the idea that he used the term outsider, he was not using that term in a pejorative context in his survey.

MR. CASSIDY: I think that has changed now and I think the witness now offers that as indeed being a pejorative status.

THE COURT: Well, then go ahead and get some clarification. Maybe I misunderstood what he's saying.

MR. CASSIDY: Q. So you're offering to the Court that, as you characterize him as being an outsider, is indeed a fact -- an alienating fact for the members of this community?

A. Well, the Court decision, including the Santa Cruz case, he was not only a hippie, but he was an outsider. Not that they necessarily used that exact term, Your Honor, but they captured that.

Q. On page 381, your reference to *Frazier* includes your analysis of the status as widespread distrust of hippies.

A. Well, that was much more powerful. That was a big factor in that case.

Q. So aside from your own reference to him being an outsider, again I would ask if you can offer the Court anything as to what the community's response has been to him being a resident of San Joaquin County?

A. Not in any direct way, but it was --

MR. GRELE: Objection, Your Honor. That mischaracterizes The Bee coverage. He doesn't say resident of San Joaquin County. They call him a Stockton man.

THE COURT: Well, with that clarification, he can respond to the question. He's either a resident of Stanislaus County or a Stockton man. He can respond.

MR. CASSIDY: Q. Sir?

A. Only that that means he's not one of us, together with his race and other things about him.

Q. And not being one of us, is there any court decision that you would like to cite the Court to that holds that as being a factor in considering change of venue?

A. I'm trying to think of other cases besides the one that -- the Santa Cruz case where the whole notion is that

he's not one of us. That comes across pretty clearly in *Frazier* with the hippie thing. He's defined in a different way. That could be his race, it could be -- it comes from he's a foreigner, he's -- but I can't remember offhand, off the top of my head, other cases that make that even clearer.

They do talk, while I can't remember cases, but about the fact that somebody was also local as a -- something that was -- would make the prejudice less severe.

Q. So, in summary, you cannot offer the Court any other decision that establishes that as being a factor to be considered in a change of venue motion?

A. Well, what I've said.

Q. What you said is no? In a long sort of way?

A. Other evidence, no, but that doesn't mean there's no evidence.

Q. Your -- move on, then, to the discussion of the size of the community. At the bottom of page 17 in bold type is "Stanislaus County as a small community."

And I think your -- one of your exhibits establishes that Stanislaus County has an approximate population of 526,000 people; is that right?

A. Yes.

Q. And the decisions have pretty uniformly established that 526,000 is not a size that would support a change of venue motion? It's sufficiently large that a jury pool could be selected from that?

MR. GRELE: Objection, Your Honor. Calls for a legal conclusion. I don't think that it's necessarily what the

court decisions say.

THE COURT: Well, it doesn't call for a legal conclusion. He's aware of the cases and he has the populations, and you made reference to that yesterday.

And I don't know of any appellate court that says that if you have more than 250,000 people equals X or under 250,000 people equals Y, because the case law doesn't state that. The case law talks about a change of venue could be in any type of case regardless of the population, whether it's San Francisco or LA, Bay Area, Southern California. Depends upon the nature of the case.

Is that right?

THE WITNESS: That -- as you know, there are two of the venue cases where a change was granted from Los Angeles, which -- and as I remember, I think I had that exhibit, that back in -- now, it's true, it was a while ago, the appellate courts, maybe there were three or so such cases. Now, admittedly Stanislaus was in the 350 range or whatever, said that the size was not sufficient to dissipate prejudice publicity.

THE COURT: This is one factor that Courts always look at when we do an evaluation of change of venue, we always look at numbers of the population in the community.

MR. CASSIDY: Q. But the things they don't look to are the characterizations you offer under sub A, titled general, and you are characterizing the nature of the community by actions that occur within it.

A. Well, I think that's -- it's a valid thing to look

at how the community responded, because one of --

Q. But that's not my question, though. My question was what cases support your suggestion? What case law can you offer that supports your suggestion that the actions within the community can go to determine the appropriate size?

A. Well, let me explain it this way, and I hope this is responsive.

When you get cases like *Tidwell*, for example, early cases, the Court in that -- in those cases and others, like *Williams*, explains sometimes in one piece, sometimes in another, why it is that small population is prejudicial. And there -- and they explain why. In other words, it's -- and it's a common notion that in a small community, people respond in a certain way, very different from a very large community that's -- impersonal response to cases. But in small communities, everybody sort of joins together.

Now, is this irrefutable proof that when -- I don't remember how many it was here, a couple of thousand people or I don't remember how many showed up for the funeral, that that is the kind of thing that you expect, or who contribute, and I admit that I don't know how many contributed to his fund, that that's some -- an illustration of how, in certain specific cases, people respond like a small community, or more like a small community.

Q. You sought to offer that same evidence in the *Pride* case, didn't you?

A. I have no direct recollection of that case. It was

many years ago.

Q. Let me read to you, if I may at page 224, the *Pride* case at 3 Cal.4th 195.

"The record indicates that when defendant moved to change venue, Sacramento had a total population exceeding 875,800, and was at least the seventh largest county in the state. Defendant claimed Sacramento County is unusually, quote, 'homogeneous,' close quote, and, quote, 'isolated,' close quote, in a cultural sense, but the trial court found no credible evidence to support this claim. We rejected similar challenges to trial in the same locale," citing *Ainsworth*, 1988 case, 45 Cal.3d 984, and *People vs. Bean*, 1988 case, 46 Cal.3d at 919.

Does that sound familiar?

A. Well, those other cases, I was not involved in them, so I don't know what evidence was offered.

I can tell you at least a few of the things I remember in those early days in Sacramento that I did offer to the Court. It is certainly true, as you indicate, that the Court rejected that, though it doesn't mention much of it.

In those days, Sacramento was a very different place. It's much more cosmopolitan now and diverse, but in those days, it was dominated by people who worked for government overwhelmingly. There was not very much racial diversity and other qualities.

Q. But that's not really the point, though, is it? The point is that the Court said it's not going to go there. It's not going to go there with characterizing the county.

It's interested in what the population is under this criteria?

MR. GRELE: Objection, Your Honor. Mischaracterized what the Court said. The Court said there wasn't sufficient evidence offered on that point.

THE COURT: Well, under 352, this Court is not particularly interested in what Sacramento County did some years ago in their particular case. I'm interested in my case.

So let's proceed.

MR. CASSIDY: Q. Going back to your Exhibit F at page 18, you have other topics you've entitled memorials for and tributes to Earl Scott, local funeral, other local memorials, evidence you've typed under the heading a year later, two years later, and so on.

Are there any cases you can offer the Court that support the thought that the Court should be considering that under size and character of community?

A. I suppose you could put it under some other classification, but surely what the community -- how the community is reacting to this particular case a year and two years later, to say nothing of the early response, is certainly some indication that there is a fair amount of remaining special emotional reaction to what happened here.

Q. That's not really the answer to my question, though, is it? I asked you if you can refer the Court in that group of cases you brought with you and offered to the Court as an exhibit, are there any cases there or any others

that you can cite for the authority that these factors should be considered under the size of the community?

A. I'm trying to think, since we already talked about the one, and I will readily confess I'm not sure, I've read all these cases, but sometimes 20 years ago.

The *Steffen* case, which was -- is that Santa Clara County, perhaps? San Jose? Where there was this -- in those days, the movie theater downtown, and everybody talked about how familiar everybody was with it, and even though there was a big community, that there was special concern. And even though it was I think a misdemeanor charge, the change of venue was ordered. Or how the community reacted in the Rodney King case.

Q. Was there anything else you want to offer on that, sir?

A. Nothing of importance or significance.

Q. Finally, at page 29 of your exhibit, you offer political or controversial elements. Did I say that -- political or controversial elements. I'm not sure if I pronounced it correctly. Sorry.

A. Was that a question?

Q. That situation that is described on page 382, you offer in your chapter that, at the appellate level, these factors may be seen in such matters as one of the trial attorneys running for office, citing the *Maine vs. Superior Court* case, the kind of political controversy surrounding the beating of Rodney King, citing *Powell vs. Superior Court*, or media reports of the cases imposed a heavy

financial burden on the community.

Now, it seems like those cases you cite there in your article all are involved with the case, going to the merits of the case and how the case itself is running. Is that a fair characterization?

A. How the case itself? I'm not sure what you're driving at.

Q. Well, I'm trying to figure out how you make this leap, quite frankly, so the cases you cite to in your chapter here are part and parcel of the case itself; isn't that correct?

A. Oh, I see what you mean. Or at least have some direct relation.

THE COURT: Participants have a direct involvement.

THE WITNESS: Yes, I understand.

Those three certainly are. And I do need to point out, maybe save some time, that I readily conceded that this factor is of de minimis value in this particular case, although there were --

MR. CASSIDY: Q. Then I won't belabor the fact.

MR. GRELE: May the witness be allowed to continue his answer, Your Honor?

THE COURT: Did you complete your answer?

THE WITNESS: Well, I just want to say very simply, Your Honor, I think all of these are a bit problematic as we see in comments that are made by people, like one of these areas is delay and how much upset there was over that.

But I don't want to -- the share of selection I think

is very peripheral. I mean, it involved this case, but I don't want to say that that somehow made it difficult or impossible to get a fair trial.

MR. CASSIDY: Q. I'd like to go -- and forgive me, I don't recall what the exhibit numbers are, what was offered by Mr. Grele yesterday, it's a content analysis of readers' e-mail comments? It's something that you just recently generated?

MR. GRELE: F-1, I believe, Your Honor.

THE WITNESS: Yes. Or F-2.

THE COURT: F-1 or F-2.

MR. GRELE: Just for the record, D-1, which we have not been able to yet accumulate for the Court, is the actual articles themselves. D-2 is Professor Bronson's -- where he wrote out the comments so that they're easier to read. And F-1 is the content analysis.

THE COURT: All right.

MR. CASSIDY: Q. Before we go there, I'd like to ask a clarification of you, Dr. Bronson, what you see your role as here. Are you offering yourself as an objective expert or as an advocate? What is your role? What are you offering yourself as?

A. I hope, as best I could be, I'm a human being, of being an objective expert.

Q. In your content analysis of readers' email, do you offer that as an objective analysis of the comments that you've dictated in the other --

A. Yes, in the same way that I offered my content

analysis of the media and of the comments in response to the survey.

Q. At page one of content analysis, you have written out those comments that you offer as being inflammatory comments; is that right?

A. I'm trying to find the exhibit. Here it is. Yes.

Q. What was the point of your writing it out separately on this document?

A. On the content analysis?

Q. Yes, sir.

A. Just to include those comments that I thought, just as I did with the other content analysis, show that emotional overload, the strong characterizations, what we talked about before.

Q. So highlight it for the Court?

A. Yes.

Q. And some of these analyses of these 66 comments, they appear multiple times within your content analysis, don't they?

A. There are some, because some comments might be inflammatory, they might be also about the defendant, they fit under more than one category.

Q. But on the sixth page of that document, you have something entitled due process?

A. Yes.

Q. What is that?

A. Well, we're -- there were a few. Let's see where that is. I did that on the survey responses, too.

Where somebody says, "I would have to see the evidence," or -- and with particular reference to this document, something like you haven't even heard -- somebody writes in that he's guilty or he ought to die or something like that, and somebody else would respond, there were just a few of them, I think, four or five, that everybody is entitled to a trial, or you haven't seen the evidence yet, how can you say these things.

But compared to the guilt comments --

Q. But compared to the content analysis you did on the other things, why did you choose not to write those out and offer those to highlight those for the Court?

A. This was a last -- you implied with your earlier question, this was a last-minute job. I hope I said there were four or five. Maybe it was just with my discussion with Counsel.

Q. You have --

A. Oh, yes, I did put it down, on page six, due process. And there are one, two, three, four, five, six of the 66 said -- I don't remember exactly what they said, we could look at the number, but that -- the kind of remarks that I was just talking about.

Q. Those are the marks that were -- the remarks that were in neutral or encouraging others to take heed, take a moment to think about what's going on and not offer exclamatory statements; is that right?

A. Yes.

Q. Wait for the process to run its course?

A. Yeah. Everybody is entitled to a trial, those kinds --

Q. They're not supportive of a change of venue motion, are they?

A. Oh, no. Quite the opposite.

Q. And, as a result, you didn't type them out and bring them to the Court's attention?

A. I sure did. It's a category in the content analysis, and every one is numbered so you can go back and look at what they said.

Q. And so for those topics that were supportive of your change of venue action, you wrote those out separately for the Court, didn't you?

A. Where they were very powerful, yes.

Q. How about when they weren't so powerful? You still wrote them out?

A. Only -- I'm not sure what you're referring to. Sometimes did I, sometimes --

MR. GRELE: If we can have an exhibit number, Your Honor? I'm not sure what exhibit we're on. Are we on D-1 or D-2?

MR. CASSIDY: Content analysis of readers' email. There's sufficient confusion that I can't offer you --

MR. GRELE: Okay, the content analysis is F-1, Your Honor.

And my question is, Mr. Cassidy is asking him whether he wrote out responses in F-1 or asking if he wrote out responses in D-2, which is where he typed up the responses?

I'm not so sure.

MR. CASSIDY: I've only been referring to F-1.

MR. GRELE: Oh, okay. Thank you.

MR. CASSIDY: Q. So for those comments, even if it's a single word or a sentence fragment or a paragraph, for those comments that are in support of the change of venue, you have written them out in your content analysis; isn't that right?

A. Yes, I've either written them out or maybe cited them, because they -- they're essentially the same as others, so I might list two or three numbers after the quote or the phrase.

But these are -- those are straightforward comments that say the kinds of things we talked about.

Q. Except for the due process, that category which is not in support of the change of venue motion, you haven't offered a single word to the Court?

A. No, no, but -- we didn't get to this in our direct, but I would have if we had -- for whatever reason, we didn't get to it, of course, I would have explained them.

Q. Can we change topics now, please, and discuss the idea of the surveys?

A. Yes. Of course.

Q. The surveys were done by you and duplicated by me at my direction to try to get a feel as to the sentiment of the community and their ability to give a fair trial to the defendant?

A. Yes.

Q. Again going back to the concept of scientific approach to an understanding of a body of information, the scientific approach would be to offer a hypothesis, then do research as to the topic and come to a conclusion; isn't that right?

A. Yes.

Q. And then the conclusion would be weigh it against what actually happens in real life?

A. Against -- I don't understand what you --

Q. Sure. You have a hypothesis, you have an idea that this certain situation gives realize to a certain conclusion. You offer that hypothesis?

A. Absolutely.

Q. You go out and do a body of experimentation to determine whether or not that's accurate and will normally bring you to a conclusion.

A. Yes.

Q. Most importantly, you want to then compare it to real life as you know it to see if that conclusion is valid.

A. As long as you account for all the other factors that may influence things in real life, absolutely.

Q. Okay. So that -- that's the general process of scientific inquiry, isn't it, hypothesis, research, conclusion?

A. As long as you've controlled things so that your conclusion is -- in other words, to be more directly responsive to what I think you're driving at, you do a survey, and the question is whether there's a reasonable

likelihood of prejudice. That's what I'm asked about.

Now, can you simply see what the verdict is and test the hypothesis, which is what I assume you're driving at? And the answer is no, because the fact that the defendant is convicted or acquitted is not by any nature, or even close to it, related to whether or not there was pretrial publicity, because I take it every expert testifying on this issue would concede that the facts, the evidence, the skill of the prosecutor and the defense lawyer and such, are the major things.

Here all we're doing is looking at whether the -- what the balance is. In other words, while you can't say this is 20 percent due to the pretrial publicity and 40 percent due to the fact that the defense counsel was not very skilled, or the like, there's much more involved.

If that's what you're driving at. I'm sorry to jump, but I thought I could get to what your point was.

Q. Are you familiar with the publication Judicature?

A. Sure.

Q. What is that, please?

A. That's a publication put out by -- this is a group primarily composed, although I'm a member, so I'm certainly not a judge, but of judges to talk about issues that come before the Court, whether it's funding or certain procedures, just -- it's a long list. I'm sure His Honor is more than familiar with it. But it's a professional journal that publishes scholarly articles and opinions and other things.

Q. And they frequently deal with the issues of jury trials, jury mechanics, and picking of juries?

A. Picking juries, that may well be. I don't remember any articles on picking juries, but I'm not say there haven't been. I've read it for years and years, and I just don't offhand remember that. But it would certainly be a reasonable thing for them to have dealt with. They talk about trials in Europe. They run the gamut.

Q. There's an article in 1984 by Norbert, N-O-R-B-E-R-T, Kerr, K-E-R-R, entitled "The Effects of Pretrial Publicity on Jurors."

Would you happen to be familiar with that article?

A. Not off the top of my head, no.

Q. Let me read this to you, if I may.

"The most direct way to examine the question of whether juror prejudice survives remedies the Court applies would be to associate the occurrence of pretrial publicity with actual jury verdicts. Is the conviction rate higher in cases receiving prejudicial pretrial publicity? Without such data, it's not possible to establish whether there's an association between the amount or type of pretrial publicity and the jury verdict. Apparently no one has yet collected the appropriate data to answer the question."

MR. GRELE: Your Honor, I'm just going to make a foundational objection here to this. There's no foundation that this is a peer review journal, a journal that has any kind of -- status, particular status in the survey field. For all we know, it's a letter to the editor in the journal.

I mean, I don't think it's -- we just don't have any sense of the scientific --

MR. CASSIDY: I'd like to finish my question and then invite the Court to rule.

MR. GRELE: I'm sorry. I thought the question was finished.

THE COURT: I thought you were done with the quote, as well. Go ahead and finish the quote and then you can respond.

MR. CASSIDY: That's the end of the quote. Now I wish to pose to the witness, sir, is this not an issue that is raised in your field?

Now do you want to entertain the objection? That's the end of my question.

THE COURT: Okay.

MR. GRELE: No, I'll withdraw the question. He's not offering it as a authoritative text on the issue, just whether or not that's an issue.

MR. CASSIDY: Q. Is that an issue in your field, sir?

A. It's rarely considered an issue, mainly because of the way, at least for me, I define the need for a change of venue. It's the reasonable likelihood of prejudice if a change of venue is not granted.

THE COURT: I guess I must be missing something. Then why did you provide me with all these comparisons as to where this case relates and the ones that were granted change of venues and weren't granted change of venues? That's basically what he's talking about. You're kind of

doing that analysis yourself in this case, aren't you?

THE WITNESS: Of --

THE COURT: What that comment just said?

THE WITNESS: I think -- I don't know if you want --

THE COURT: Maybe I missed it.

THE WITNESS: If you want the lecture on it, I mean, too long a response.

It is clear that in many cases where there's been extensive pretrial publicity, juries acquit. I'm not quarreling with that. And at least as I understand the law, that may be what happened, and looking at prejudice of the jury and things like that, that's something that the courts often look at in post-conviction appeals. But that's not the issue before you, as I understand it.

THE COURT: I'm only asking the question as to why did you give me all this stuff, because you gave me this stuff the other day, you said, "Look at this, Judge, this case is here, and they had this type of recognition factor, conviction," and things of that. Isn't that pretty much --

THE WITNESS: I don't think so.

THE COURT: Okay. Go ahead, Mr. Cassidy.

THE WITNESS: And if I could explain just briefly?

THE COURT: Go ahead.

THE WITNESS: Because nowhere in my data do I analyze, because I just don't know how many of these -- unless it reaches the appellate court, which means of course that there was, at least in a post-conviction appeal, a conviction. That's going to be -- in other words, if the

defendant is acquitted, you're not going to have any of these appellate decisions we've talked about.

And I don't know how much you want me to belabor it, but I don't know how you would do that kind of -- I mean, you might look at those numbers, but that would not be very helpful to me. The fact that whatever happened at the trial happened, whether conviction or acquittal, would be -- you can't know the things that might have influenced it.

THE COURT: Okay.

THE WITNESS: I mean -- I don't know how else to explain it.

MR. CASSIDY: Q. Yesterday, or maybe it was today, I apologize -- no, it was yesterday, you testified about a meta analysis of 44 empirical studies -- subject -- which concluded, quote, "Subjects exposed to negative PTP," which you offered is pretrial publicity, "were significantly more likely to judge the defendant guilty compared to subjects exposed to less or no PTP," close quote.

Do you remember that testimony yesterday?

A. Yes. And that is on point.

Q. Well, we'll see.

MR. GRELE: Objection, Your Honor. Is that a question, "We'll see"?

THE COURT: Well, I'm going to allow it. We will see. Proceed.

MR. CASSIDY: Q. Those studies that you make reference to, were any of them compared to real life?

MR. GRELE: Objection, Your Honor, what compared to

real life means. It's an imprecise --

THE COURT: Oh, I think you understand what compared to real life means. Do you understand what he means by that?

THE WITNESS: Sure I do.

THE COURT: Go ahead.

THE WITNESS: No, they were controlled studies, and as you may remember, when some alternatives were -- was it 1962 that somebody eavesdropped, got permission to eavesdrop jury deliberations? Those things are impossible to do. I -- obviously, the ideal way to really test what you're talking about would be to have one jury over here that had not been exposed to pretrial publicity over here, and then to have another jury that had been exposed and see -- and see if it had any effect.

MR. CASSIDY: Q. Or, alternatively, another survey that could be done is to take a body of cases --

MR. GRELE: Objection, Your Honor. He did not permit the witness to finish the answer.

THE COURT: Are you -- you want to finish?

THE WITNESS: Oh, I don't need -- I made my general point.

MR. GRELE: Thank you.

MR. CASSIDY: Q. Alternatively, another survey that could be done is to take a body of cases under a controlled definition and then analyze what pretrial publicity those cases were subject to.

A. Well --

Q. And then determine --

A. Excuse me.

Q. -- whether or not, in a real life situation, pretrial publicity had any effect on those cases.

A. Well, we've been talking about that a lot. It would very much depend if you had a voir dire that was -- didn't identify people --

Q. No, we're looking at a way of trying to find out whether or not the pretrial publicity --

MR. GRELE: I'm going to object. I'm sorry, I'm going to object, Your Honor. He again interrupted the witness' --

THE COURT: I think he was going to respond to something that Mr. Cassidy is trying to provide a clarification as to what he's asking about. So let's make sure that he and Mr. Cassidy are on the same page.

You want to clarify again?

MR. CASSIDY: If I may.

Q. What I'm asking about, Dr. Bronson, is whether or not there is any correlation between these studies that were offered that you made reference to, the 44 empirical studies, and actual trials.

A. There's a general -- I'm sure you could show some possibly -- I'm not even sure I want to say this, some possible association. I mean, the whole idea of having simulations is to try and, as much as you can, have a real trial. But the kinds of strength of cases, skill of attorneys, the quality of voir dire, there are just so many variables that you have to deal with, that it would be very problematic.

Q. I gave you a copy of an article called "Relationship Between Pretrial Publicity and Trial Outcomes" earlier today, didn't I?

A. Yes.

Q. And it was just after lunch, and I apologize for not giving you it earlier on. And it appears to be authored by two gentlemen by the name of John Bruschke, B-R-U-S-C-H-K-E, and William E. Loges, L-O-G-E-S. I don't know if you know the pronunciation --

A. I never heard of either one, or that article. And I haven't had time to review it. I mean, I looked at the front page a little bit, but that was about it.

Q. Would you -- while you're -- do you have it with you there still?

MR. GRELE: I'm going to object, Your Honor, without adequate foundation, where this is published, whether or not it's a journal that's peer reviewed or relied on by others in the field, such that he can be cross-examined.

THE COURT: Your objection -- you made your objection. Your objection is sustained. He hasn't reviewed it, he's not familiar with it, and you can't go into it unless you lay that foundation. And he hasn't considered it to form an opinion in this case.

MR. CASSIDY: Okay.

Q. Are you aware of any studies that have tried to draw a correlation between the pretrial studies, pretrial publicity studies that have been done and what correlation, if any, they have to actual cases?

A. I'm aware of none.

THE COURT: Now, since you looked at your watch, I'll ask you how much longer you're going to be. You don't have to wrap this up. We've been going for a day and a half. You've only had an afternoon. If we have to go into the morning, we will go into the morning.

MR. CASSIDY: Oh, we will be into the morning, Your Honor.

THE COURT: Why don't we go ahead and wrap it up for the day. It's a little bit after 4:00 o'clock. Everybody has had a long day. The witness has been on the stand. So let's just go ahead and wrap it up this afternoon.

See everybody at 9:30 tomorrow morning.

MR. GRELE: Thank you, Your Honor.

MR. CASSIDY: Thank you.

THE COURT: We are going to just -- we are going to wrap up Professor Bronson, Dr. Bronson, tomorrow morning before lunch.

MR. GRELE: Thank you, Your Honor.

THE COURT: I think you can handle that, because he's not going to have a whole lot of redirect.

MR. CASSIDY: I will --

THE COURT: I'm not cutting you off. I'm just saying we should be able to do that.

MR. CASSIDY: If I may, for scheduling purposes, I think I will be done easily inside of an hour.

THE COURT: Now, are you going to be calling your other witness or are we going to go to the People's witness?

MR. GRELE: We're going to go to the People's witness, and it depends on what the testimony is from the People's witness whether or not Mr. New will testify. And I've provided a resume to the prosecutor of Mr. New.

THE COURT: And so tomorrow I want you gentlemen to bring your calendars with you because, assuming we get done with all this tomorrow, hope springs eternal, if we get done with this, we can talk about some other issues.

See you tomorrow.

(Proceedings concluded at 4:04 PM.)

DECLARATION OF SERVICE BY ELECTRONIC MAIL

RE: *People v. Columbus Allen Jr. II*, Case No. 1222451

I, Samuel Plainfield, declare that I am over 18 years of age and not a party to the within cause; my business address is 149 Natoma St., 3rd Floor, San Francisco, CA 94105. On the date stated below, I caused the following document(s) to be served:

COLUMBUS ALLEN'S MOTION FOR CONSTITUTIONALLY-EFFECTIVE VOIR DIRE RE RACE, PRE-TRIAL PUBLICITY AND DEATH QUALIFICATION AND REQUEST FOR EVIDENTIARY HEARING IN SUPPORT OF MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE [& EXHIBITS]

on the following by electronic mail pursuant to an agreement by the parties:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 23rd day of July, 2010, at San Francisco, California.

SAMUEL PLAINFIELD

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, Respondent, v. MATTHEW ALEX ERICKSON, Petitioner.	No. 93408-8 En Banc Filed JUL 06 2017

OWENS, J. — In 2013, Matthew Erickson, a black man, was charged in Seattle Municipal Court with unlawful use of a weapon and resisting arrest. After voir dire, the city of Seattle (City) exercised a peremptory challenge against the only black juror on the jury panel. After the jury was empaneled and excused from the courthouse with the rest of the venire, Erickson objected to the peremptory challenge, claiming the strike was racially motivated. The court found that there was no prima facie showing of racial discrimination and overruled Erickson's objection.

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), guarantees a jury selection process free from racial animus. Yet, we have noted that our

Batson protections are not robust enough to effectively combat racial discrimination during jury selection. We have repeatedly signaled our desire to better effectuate the equal protection guaranties espoused in *Batson*. However, we had not yet found the opportunity to do so. Now, by explicitly asking this court to amend our *Batson* analysis and squarely briefing the issue, Erickson has provided that opportunity. As a threshold matter, we find that Erickson's *Batson* challenge was timely. We further adopt the bright-line rule first espoused by the dissent in *State v. Rhone*, 168 Wn.2d 645, 652 n.5, 229 P.3d 752 (2010) (plurality opinion). We amend our *Batson* framework and hold that the peremptory strike of a juror who is the only member of a cognizable racial group constitutes a prima facie showing of racial discrimination requiring a full *Batson* analysis by the trial court.

FACTS AND PROCEDURAL HISTORY

In June 2013, Officer Kevin Oshikawa Clay observed Erickson near Westlake Park in Seattle, Washington. He testified that Erickson was walking down the sidewalk backward and with a knife drawn, followed by several other individuals. Clay and his partner followed Erickson into the Pacific Place shopping center, drew their weapons, and ordered Erickson to drop the knife. Erickson complied, but refused to follow the officers' instructions to lay facedown on the floor. After a prolonged physical struggle throughout which Erickson refused the officers' commands and resisted their physical efforts to restrain him, the officers subdued him

and took him into custody. He was charged in Seattle Municipal Court with unlawful use of a weapon and resisting arrest.

After voir dire, each party exercised three peremptory strikes. The City used one of those strikes against juror 5, the only black juror on the panel, and Erickson made no objections at the time.[1] The six-person jury was subsequently seated, the rest of the venire excused, the jury sworn in, and the jury dismissed for the day. Erickson then objected to the striking of juror 5 pursuant to *Batson*, noting it was the first opportunity he had to do so without being "directly in front of the jury." 1 Verbatim Report of Proceedings (VRP) (Oct. 21, 2014) at 180.

Erickson argued that the City violated *Batson* when it struck juror 5. He claimed that the striking of the only juror from a cognizable racial group made a prima facie case that the juror was struck based on race. The City rebutted that Erickson had waived his right to a *Batson* challenge, claiming the objection was brought after the venire had been dismissed and the jury excused for the day, thereby making the objection untimely. It further argued that Erickson had not made a prima facie case of discrimination because *Batson* stands for the "proposition that there

[1] The trial court noted it could not conclude with certainty that juror 5 was the only black individual in the venire. However, the trial court and the parties could specifically remember four other "people of color" who were seated on the panel as well as another in the venire; they identified none of them as African American. 2 Verbatim Report of Proceedings (Oct. 22, 2014) at 193-95, 206-07.

needed to be a pattern or practice of discrimination." 2 VRP (Oct. 22, 2014) at 200-01. It claimed the act of striking a single juror could not constitute such a pattern.

The municipal court found that Erickson had not waived the *Batson* challenge. However, it also found that Erickson had not presented a prima facie case for discrimination. Though juror 5 may have been the only black juror, there were a number of other jurors from "constitutionally cognizable groups" who remained on both the panel and venire after juror 5's strike. 2 VRP (Oct. 22, 2014) at 206-07. The court and the parties specifically identified five other individuals as "people of color," but did not explicitly speculate about those individuals' racial backgrounds or identities. *Id.* at 193-95, 205-07.

The court conceded that striking a single juror of a particular race could, under certain circumstances, rise to the level of prima facie discrimination. However, the court noted that it saw no such circumstances in this case. Because the municipal court ruled against Erickson on the first step of the *Batson* analysis, it terminated the analysis and allowed the trial to move forward. Erickson was convicted on both counts.

Erickson appealed the municipal court's decision to King County Superior Court. The superior court affirmed the municipal court, finding that the circumstances surrounding the challenge did not raise any inference that the juror was stricken because of his race. The judge did not address whether Erickson's motion was timely.

Erickson then petitioned the Court of Appeals for discretionary review, which it denied. His motion to modify the commissioner's ruling was similarly denied. He finally petitioned this court for discretionary review, which was granted. *City of Seattle v. Erickson*, 187 Wn.2d 1008, 386 P.3d 1098 (2017).

ISSUES

1. Did Erickson waive his right to a *Batson* challenge when he objected after the jury was empaneled and both the jury and venire excused?

2. Did the trial court err in finding that Erickson did not make a prima facie showing of racial discrimination when the City struck juror 5?

STANDARD OF REVIEW

On one level, this case hinges on a procedural question about the appropriate timing for a challenge to a peremptory strike under *Batson*. On another level, this case represents the struggle to defend our equal protection guaranties and to continue fighting against racial discrimination in the jury selection process.

Batson created a three-part test to replace the "'crippling burden of proof'" previously required when attempting to prove a racially motivated strike. *State v. Saintcalle*, 178 Wn.2d 34, 43-44, 309 P.3d 326 (2013) (plurality opinion) (quoting *Batson*, 476 U.S. at 92). First, the defendant must establish a prima facie case that "gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94. Second, if a prima facie case is made, the burden shifts to the prosecutor to provide an

adequate, race-neutral justification for the strike. *Id.* Finally, if a race-neutral explanation is provided, the court must weigh all relevant circumstances and decide if the strike was motived by racial animus. *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (quoting *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam)).

Though the United States Supreme Court provided this framework, it left the states to establish rules for the "particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Batson*, 476 U.S. at 99. These local rules can define when an objection is timely. *Ford v. Georgia*, 498 U.S. 411, 423, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991). A trial judge's decision under the original *Batson* test is entitled great deference and will be reversed only if the defendant can show it was clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). However, this court has great discretion to amend or replace the *Batson* requirements if circumstances so require. *See Saintcalle*, 178 Wn.2d at 51.

As a threshold matter, we first must decide whether Erickson can bring a *Batson* challenge after the jury is empaneled and the rest of the venire excused. We then decide whether the municipal court erred when it found that Erickson had not established a prima facie case of racial discrimination in violation of equal protection. WASH. CONST. art. I, § 12. We find that Erickson's objection was timely and that the

municipal court erred when it failed to infer racial bias from the dismissal of the only black juror on the jury panel.

1. Erickson Did Not Waive His Right to a Batson *Challenge When He Objected to the Striking of a Juror after the Jury Was Empaneled but before Testimony Was Heard*

As noted above, the United States Supreme Court has left it to state courts and legislatures to determine the procedure surrounding *Batson* challenges. *Ford*, 498 U.S. at 423. This court has not yet ruled on when a defendant may bring an objection under *Batson*. However, objections must generally be raised "at a time that will afford the [trial] court an opportunity to correct [the error]." *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979) (citing *State v. Fagalde*, 85 Wn.2d 730, 539 P.2d 86 (1975)). In the past, this court has reviewed a *Batson* challenge brought after the jury was empaneled, though we declined to review the timeliness issue. *Rhone*, 168 Wn.2d at 652 n.5. We now choose to address it.

Several state and federal jurisdictions allow *Batson* challenges even after a jury has been selected and sworn in. Virginia has developed a statutory rule that allows a challenge after the jury has been sworn "with leave of court." *Lewis v. Commonwealth*, 25 Va. App. 745, 749, 492 S.E.2d 492 (1997) (citing VA. CODE ANN. § 8.01-352). Texas, too, has developed a rule allowing a defendant to bring a challenge after the jury is empaneled if the claim is "so novel" or the law "so well

settled" as to require it. *Jones v. Martin K. Eby Constr. Co.,* 841 S.W.2d 426, 428 (Tex. Ct. App. 1992).

A number of federal courts also allow *Batson* challenges after the jury has been sworn. In *United States v. Thompson*, the Ninth Circuit upheld a *Batson* challenge as timely even though it came after the swearing-in of the jury, noting the objectionable action "might not have been apparent until the jury was selected." 827 F.2d 1254, 1257 (9th Cir. 1987). That court later clarified its ruling, indicating that *Batson* challenges can be proper after a jury is sworn, but "must occur as soon as possible." *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 534 (9th Cir. 1991) (citing *Thompson*, 827 F.2d at 1257). The Seventh Circuit similarly allows *Batson* challenges after the swearing of a jury if it is the party's earliest opportunity. *United States v. Williams*, 819 F.3d 1026, 1029 (7th Cir. 2016). In contrast, the Eight Circuit gives deference to the trial courts in determining whether a *Batson* challenge brought after jury selection is appropriate. *See Reynolds v. City of Little Rock*, 893 F.2d 1004, 1009 (8th Cir. 1990).

We have not ruled on the timeliness of *Batson* challenges. However, finding the above approaches persuasive, we now hold that Erickson's *Batson* challenge was timely. Read together, the above decisions have adopted rules requiring that a *Batson* challenge be brought at the earliest reasonable time while the trial court still has the ability to remedy the wrong. These cases recognize that judges and parties do not have instantaneous reaction time, and so have given both trial courts and litigants

some lenience to bring *Batson* challenges after the jury was been sworn. This is in line with our own jurisprudence. Objections should generally be brought when the trial court has the ability to remedy the error, and allowing some challenges after the swearing in of the jury does not offend that ability. *Wicke,* 91 Wn.2d at 642.

In this case, Erickson did not bring his objection until just after the jury had been excused for the day and the venire dismissed. He noted that this was the first time the parties had been out of the presence of the jury. As the municipal court acknowledged, this limited the court's remedial options, but it did not remove them completely. Had the challenge been brought sooner and had the judge sided with Erickson, the judge may have placed the stricken juror back on the panel or dissolved the venire and called a new jury pool. Though these options were unavailable once the jury was sworn in, the judge could still declare a mistrial to address any error on the prosecution's part. When Erickson made his challenge, no other motions had been filed, no testimony heard, and no evidence admitted. The timing was not ideal, but the challenge was raised when the trial court still had an opportunity to correct it. We find that even though Erickson brought his challenge after the jury was empaneled, the trial court still had adequate ability to remedy any error. Therefore, Erickson made a timely challenge and we continue to the second issue for review.

2. *The Municipal Court Erred When It Found That Erickson Had Not Provided a Prima Facie Case of Racial Discrimination in the Removal of Juror 5*

As noted above, the United States Supreme Court has left it to the states to provide *Batson* procedures. *Ford*, 498 U.S. at 423. Washington trial courts have traditionally given great discretion to findings of prima facie discrimination under *Batson*, and we review such traditional findings for abuse of that discretion. *State v. Hicks*, 163 Wn.2d 477, 490-91, 181 P.3d 831 (2008). However, we also have the power to determine, under appropriate circumstances, whether the traditional *Batson* analysis should be amended or replaced to ensure the promise of equal protection. *Saintcalle*, 178 Wn.2d at 51.

A. This Court Has Not Foreclosed the Possibility of Adopting a Bright-Line Rule under *Batson*

This court recognized a trial court's discretion in finding prima facie discrimination in *Hicks*. There, the trial court found a prima facie showing of discrimination after the sole black jury member was struck. 163 Wn.2d at 491. We found that the trial court was "well within [its] discretion" to make such a finding, noting that *Batson* affords broad leeway to trial courts when it comes to prima facie showings. *Id.* at 490-91. We reaffirmed this holding in *State v. Thomas*, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009).

We later signaled that this rule could be subject to change under particular circumstances. In *Rhone*, the defendant made a *Batson* challenge after the State

struck the last remaining African American member of the jury panel. 168 Wn.2d at 648-50. Five justices held that the trial court did not err in not finding a prima facie case when the sole black juror was struck. *Id.* at 655-56. In so doing, we declined to adopt a bright-line rule that the striking of the sole member of a particular race is a per se prima facie showing of discrimination. *Id.* at 653.

However, four dissenting justices and one concurring justice suggested that a bright-line rule would be appropriate. *Id.* at 661 (Alexander, J., dissenting), 658 (Madsen, C.J., concurring). The dissent reasoned that such a rule would not only lead to greater protection from racial discrimination, but would help effectuate Washington's elevated right to a fair jury trial. *Id.* at 661 (Alexander, J., dissenting). Those justices disagreed with the lead opinion that such a rule would change "a shield against discrimination into a sword cutting against the purpose of a peremptory challenge." *Id.* at 654 (C. Johnson, J., lead opinion). Rather, they believed it would "merely require the State to offer a race-neutral explanation for its peremptory challenge." *Id.* at 662 (Alexander, J., dissenting). Then Chief Justice Madsen's concurrence added that although applying such a rule would be inappropriate in the case before her, it could legitimately be applied "going forward." *Id.*

Justice Madsen clarified this statement in *State v. Meredith*, 178 Wn.2d 180, 306 P.3d 942 (2013). She reasoned that because the parties were not on notice of a bright-line rule in *Rhone* itself, it was inappropriate to apply such a rule under

Rhone's facts. *Id.* at 186 (Madsen, C.J., concurring). However, she explained that "this alternative method of establishing the prima facie case [i.e., the bright-line rule] should be available once trial courts, prosecuting attorneys, and defendants and their counsel are on notice that this rule may be followed." *Id.* at 186.

This court also used the majority opinion in *Meredith* to clarify the *Rhone* decision. 178 Wn.2d at 184. We stated that despite the chief justice's concurrence expressing intent to adopt a bright-line rule going forward, it did not provide a binding, five-justice (or more) precedent. *Id.* We did not foreclose the possibility of eventually adopting such a rule. Rather, "[u]ntil [at least] five justices agree to actually adopt such a bright-line rule, the previous rule remains in effect." *Id.*

We most recently declined to alter the *Batson* framework in *Saintcalle*. There, the lead opinion noted that although this court has power to alter or replace the *Batson* framework, it ought not to do so when "[n]either party has asked for a new standard or framework" and when the trial court and the Court of Appeals did not consider such an argument. *Saintcalle*, 178 Wn.2d at 55. In this case, however, Erickson does ask for a reworking of *Batson*. He requests that we alter the standard framework to adopt a bright-line rule. Though this court declined to do so in *Saintcalle*, *Meredith*, and *Rhone*, the possibility of altering *Batson*'s framework is not closed to us. Erickson's case presents the circumstances *Rhone* alluded to, allowing us to amend our *Batson* analysis.

B. We Adopt the Bright-Line Rule First Articulated in the *Rhone* Dissent

We now follow our signal in *Rhone* and adopt a bright-line rule. The purpose of *Batson* is to ensure that jury selection proceedings are free from racial discrimination. To create a prima facie case of racial discrimination, a defendant must first demonstrate that the struck juror is a member of a "cognizable racial group." *Batson*, 476 U.S. at 96. Though a pattern of striking multiple jurors may demonstrate racial animus, "'[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)).

Here, the trial court erred in the first step of its *Batson* analysis. The court noted that it could not discern a pattern of discriminatory strikes in part because other people of color remained on the jury. It found further that because there were other people of color, the jury was "diverse." With these findings, the court ruled Erickson had not provided a prima facie showing of discrimination.

The trial court improperly applied the first step of the *Batson* analysis. First, it is misguided to infer that leaving some members of cognizable racial groups on a jury while striking the only African American member proves the prosecutor's strike was not racially motivated. *Batson* is concerned with whether a juror was struck because of his or her race, not the level of diversity remaining on the jury. *Saintcalle*, 178

Wn.2d at 42. In addition, a *Batson* violation can occur if even one juror is struck. We have noted that "'[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.'" *Hicks*, 163 Wn.2d at 491 (alteration in original) (internal quotation marks omitted) (quoting *Batson*, 476 U.S. at 95). Though a pattern is informative, it is not necessary.

In addition, Erickson made his prima facie showing of discrimination. He challenged the prosecutor's peremptory strike based on the fact that juror 5 was the only black juror on the panel. The municipal court should have followed the example of the trial court in *Hicks*, at the least finding a prima facie case out of "'an abundance of caution.'" *Id.* at 484. This single strike, absent other circumstances showing legitimate grounds, was enough to trigger a prima facie finding. The trial court improperly relied only on the absence of a pattern and the presence of other nonwhite jurors to come to its conclusion. We find the trial court erred in its first step of the *Batson* analysis and Erickson properly made a prima facie showing of racial discrimination.

In light of these errors, we have broad discretion to alter the *Batson* framework to more adequately recognize and defend the goals of equal protection. *Saintcalle*, 178 Wn.2d at 51. In the past, this court has provided great discretion to the trial court when it comes to the finding of a prima facie case pursuant to a *Batson* challenge. To

ensure a robust equal protection guaranty, we now limit that discretion and adopt the bright-line *Rhone* rule. We hold that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury. The trial court must then require an explanation from the striking party and analyze, based on the explanation and the totality of the circumstances, whether the strike was racially motivated. *Batson*, 476 U.S. at 94; *Saintcalle*, 178 Wn.2d at 42.

This alteration does not change the basis for a *Batson* challenge. The evil of racial discrimination is still the evil this rule seeks to eradicate. Rather, this alteration provides parties and courts with a new tool, allowing them an alternate route to defend the protections espoused by *Batson*. A prima facie case can always be made based on overt racism or a pattern of impermissible strikes. Now, it can also be made when the sole member of a racially cognizable group is removed using a peremptory strike.

This court has long discussed a change to the *Batson* framework. In *Rhone*, we signaled our intent to change our analysis, putting both courts and parties on notice of that change. In *Meredith*, we declared that once at least five justices agree, a bright-line rule could be adopted. In *Saintcalle*, we lamented the inadequate state of our *Batson* inquiry but declined to alter it because neither party had raised the issue. Here, the circumstance is different. Erickson explicitly advocates for a change to the *Batson* test. Both parties have briefed the issue and placed it squarely before us. We

are not hampered with the same constraints that weighed us down in previous cases. We first find that Erickson has made a prima facie case of discrimination. We further take this opportunity to alter the *Batson* framework and adopt the bright-line rule described in the *Rhone* dissent.

3. Remand for a New Trial Is the Appropriate Remedy

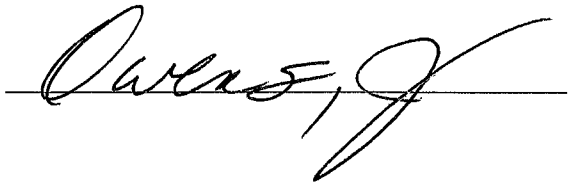
Traditionally, the remedy for this error would be to remand to the trial court for a complete three-part analysis as the United States Supreme Court did in *Batson* itself. 476 U.S. at 100. But Erickson urges that if we adopt a new bright-line rule and find a prima facie case of discrimination, we should remand for a new trial. We agree. The trial court's in-person examination of the credibility and demeanor of the prosecutor and jury is essential in a *Batson* analysis. *Hicks*, 163 Wn.2d at 493. Here, the passage of time since the ruling would make this analysis problematic. Erickson's presiding judge has left the Seattle municipal bench. Even if he had not, he heard the original challenge in October 2014, two and a half years ago. It would be unreasonable to require the trial court to recall and evaluate the prosecutor's demeanor and credibility after that passage of time, let alone recall and evaluate the jury. It would also be inappropriate to dismiss Erickson's charges outright. *See State v. Grenning*, 169 Wn.2d 47, 60, 234 P.3d 169 (2010) ("[O]utside of reversal for insufficiency of the evidence . . . , outright dismissal is rarely granted."). However, remand for a new trial is generally appropriate when other rights, including trial rights, have been violated.

See id. at 61; *State v. Brightman*, 155 Wn.2d 506, 518, 122 P.3d 150 (2005); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991); *State v. Russell*, 101 Wn.2d 349, 354, 678 P.2d 332 (1984). Because of the unavailability of the original trial judge and the stretch of time since the original challenge, we remand the case for a new trial.

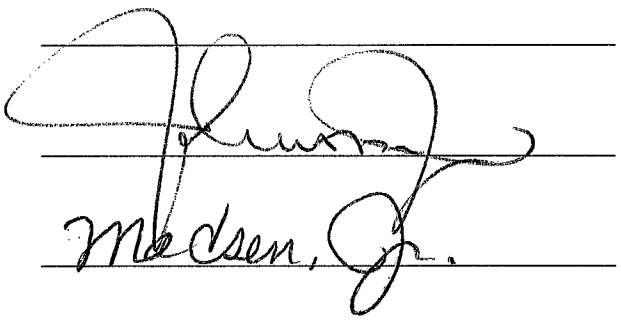
CONCLUSION

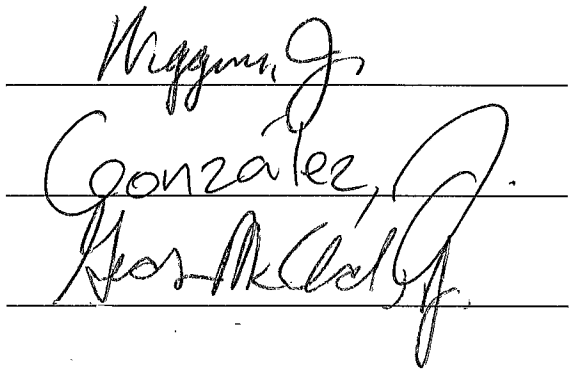
We have repeatedly recognized that *Batson* is a particularly difficult hurdle to overcome. As Justice Wiggins noted in *Saintcalle*, "*Batson* . . . appears to have created a 'crippling burden,' making it very difficult for defendants to prove discrimination even where it almost certainly exists." 178 Wn.2d at 46. This underscores the need to amend our procedures and ensure that jury selection is more secure from the threat of racial prejudice. As a threshold matter, we find that Erickson's *Batson* challenge was timely. More significantly, we adopt *Rhone*'s bright-line rule. We hold that the peremptory strike of a juror who is the only member of a cognizable racial group on a jury panel constitutes a prima facie showing of racial motivation. The trial court must ask for a race-neutral reason from the striking party and then determine, based on the facts and surrounding circumstances, whether the strike was driven by racial animus.

We reverse and remand to the trial court for a new trial.



WE CONCUR:





93408-8

STEPHENS, J. (concurring)—I find myself once again sounding "a note of restraint amidst the enthusiasm to craft a new solution to the problem of the discriminatory use of peremptory challenges during jury selection." *State v. Saintcalle*, 178 Wn.2d 34, 65, 309 P.3d 326 (2013) (Stephens, J., concurring). I continue to believe "there are better avenues than judicial opinions" for addressing this problem. *Id* at 69. While I have no opposition to the majority's decision to embrace the bright-line rule articulated in the *Rhone* dissent,[1] it is neither necessary nor particularly likely to transform the *Batson*[2] analysis into a useful tool for combatting racial bias in jury selection.

The majority's new rule is unnecessary because Matthew Erickson made a prima facie showing of intentional discrimination under the first prong of the *Batson*

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[1] *State v. Rhone*, 168 Wn.2d 645, 658-64, 229 P.3d 752 (2010) (Alexander, J., dissenting).

[2] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

analysis by proving "'*something more*' than a peremptory challenge of a member of a racially cognizable group." *State v. Rhone*, 168 Wn.2d 645, 653, 229 P.3d 752 (2010) (plurality opinion) (emphasis added). Indeed, reversal under the traditional *Batson* framework was the sole argument raised in Erickson's motion for discretionary review.[3] *See* Mot. for Disc. Review (July 25, 2016) at 10-11 ("Because Mr. Erickson has shown 'something more'—that Juror 5 was stricken from the venire for sharing a relevant life experience steeped wholly in racism and racial tension—he has made the prima facie case for discrimination necessary to satisfy the first prong of *Batson*."). He further demonstrated that the trial court erred by considering his challenge in light of "whether there were members of *any* constitutionally protected group on the jury." *Id.* at 11.

Not only is the majority's new rule unnecessary to the resolution of this case, it is also unlikely to significantly reduce racial bias in jury selection because the ultimate inquiry under *Batson* remains whether the peremptory strike against a sole member of a constitutionally protected group evidenced *intentional* race discrimination. Both the majority and Erickson recognize that presuming

[3] Erickson first asked the court to embrace the *Rhone* dissent's approach in his supplemental brief after review was granted. Suppl. Br. of Pet'r at 16-18. Amici also advocated for this approach. Br. of Amici Curiae Am. Civil Liberties Union of Wash., et al. at 15-16.

discrimination under the first step in the analysis is relatively unambitious. *See* majority at 11 (quoting *Rhone* dissent that its rule "'merely require[s] the State to offer a race-neutral explanation for its peremptory challenge,'" 168 Wn.2d at 662); Suppl. Br. of Pet'r at 18 (noting "such a bright-line rule does not create a substantial burden to any party" because "it would merely eliminate the first step of the *Batson* analysis"). Considering the range of justifications that have traditionally been recognized as race-neutral reasons for striking a juror under the second step of *Batson*, taking the first step may not represent much progress. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 & n.16, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (noting peremptory strikes based on juror experiences disproportionately affecting minority groups remain race neutral absent a showing of pretext); *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (accepting bilingual status as race-neutral reason for striking Latino juror). We are unlikely to see different outcomes unless courts are willing to more critically evaluate proffered race-neutral justifications in future cases.

Pending before this court in our administrative rule-making capacity is a proposed court rule that would alter the method for evaluating claims of race-based peremptory challenges so that the intentional discrimination that must be proved under *Batson* is no longer required. *See* Proposed General Rule (GR) 37 (Wash.

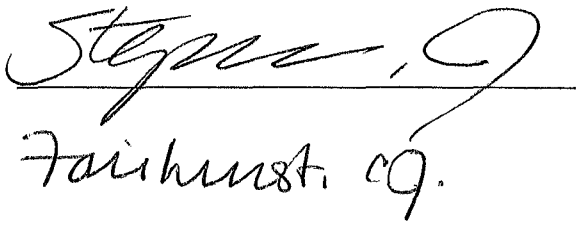
2017),[4] http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=537 [https://perma.cc/YB3Q-U4ZK]. In addition to moving away from *Batson*'s intentional discrimination inquiry, the proposed rule also recognizes that many frequently proffered race-neutral reasons for striking jurors "have operated to exclude racial and ethnic minorities from serving on juries in Washington." *Id.* at cmt. 4. It would therefore create a presumption against the validity of justifications such as "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling," or "not being a native English speaker." *Id.* at cmt. 4(b), (g). The proposed rule was formally published for comment from November 2016 through April 2017, and numerous individuals and organizations have commented on the rule. *See* Comments for GR 37[5] (Wash. 2017), http://www.courts.wa.gov/court_rules/?fa=court_rules.commentDisplay&ruleId=537. The comments address not only the merits of the proposed rule, but also possible modifications, expansions or alternatives to the rule, and practical challenges to implementation. The debate has been robust and informative, and has underscored two truths: (1) *Batson* has largely failed in its promise to eliminate bias

[4] The rule was published as GR 36, but was renumbered as GR 37 due to the court's adoption earlier this year of a court security rule numbered GR 36 (effective April 25, 2017).

[5] *See* note 4.

in jury selection and (2) finding a meaningful solution goes well beyond simply tinkering with the first prong of the *Batson* analysis.

The court has convened a work group to carefully examine the proposed court rule with the goal of developing a meaningful, workable approach to eliminating bias in jury selection. That process will be informed by the diverse experiences of its participants and will be able to consider far broader perspectives than can be heard in a single appeal. Unconstrained by the limitations of the *Batson* framework, the rule-making process will be able to consider important policy concerns as well as constitutional issues. It would be unfortunate if today's decision adopting the *Rhone* dissent's bright-line rule were perceived as somehow signaling that the court has "fixed the problem." I hope instead that our decision sends the clear message that this court is unanimous in its commitment to eradicate racial bias from our jury system, and that we will work with all partners in the justice system to see this through.



No. 93408-8

YU, J. (concurring) — I concur with the majority's effort to address the equal protection concerns expressed in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and I applaud the adoption of a bright-line rule. However, I write separately because I am concerned that our solution assumes too much and falls short on ensuring that no juror is removed solely because of race, gender, sexual orientation, or religious beliefs. I am unable to say with certainty that every peremptory challenge by the State against a person of color is motivated by racial animosity, and adopting a bright-line rule that does not extend to members of other cognizable groups does not address discrimination on any basis other than race.

In my view, the basic framework of *Batson* does not work, and the record in this case demonstrates the awkwardness and impracticability of the so-called *Batson* challenge. Thus, I now join Justice González in calling for the complete abolishment of peremptory challenges. *State v. Saintcalle*, 178 Wn.2d 34, 69-118,

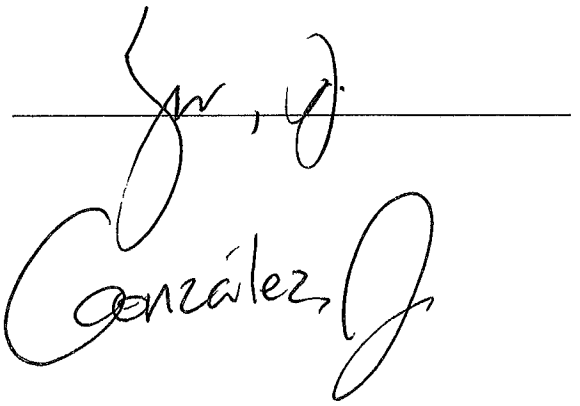
309 P.3d 326 (2013) (González, J., concurring). Too many qualified persons are being excluded from jury service for no reason at all, and tinkering with court rules or issuing incremental decisions a decade at a time are unsatisfactory solutions. As Justice González wisely stated in his concurrence in *Saintcalle*,

> [T]he use of peremptory challenges contributes to the historical and ongoing underrepresentation of minority groups on juries, imposes substantial administrative and litigation costs, results in less effective juries, and unfairly amplifies resource disparity among litigants—all without substantiated benefits. The peremptory challenge is an antiquated procedure that should no longer be used.

Id. at 69-70 (citation omitted).

We should assume that all members of the public who adhere to a summons to appear for jury service are qualified to hear a case unless otherwise shown. Our system of jury selection provides a meaningful method for any party to remove a juror "for cause" when there is a showing that a particular juror cannot be fair or impartial. *Id.* at 77. Because jury selection is such an important part of trial, it may be time for us to require that counsel be afforded ample time for thoughtful questioning of prospective jurors, and that removal of jurors must rest solely on causal challenges.

I respectfully concur.



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Readings — From the September 2017 issue

Public Enemy

From the jury selection process that took place over three days in June for the trial of Martin Shkreli, an investor and hedge fund founder who is facing eight counts of securities and wire fraud. In 2015, when Shkreli was CEO of Turing Pharmaceuticals, the company raised the price of its drug Daraprim by 5,000 percent. In 2016, Shkreli was widely criticized for defending the 400 percent increase in the price of EpiPen, an emergency allergy injection sold by Mylan. More than two hundred potential jurors were excused from the trial. Judge Kiyo Matsumoto presided. Benjamin Brafman is a lawyer representing Shkreli.

THE COURT: The purpose of jury selection is to ensure fairness and impartiality in this case. If you think that you could not be fair and impartial, it is your duty to tell me. All right. Juror Number 1.

JUROR NO. 1: I'm aware of the defendant and I hate him.

BENJAMIN BRAFMAN: I'm sorry.

JUROR NO. 1: I think he's a greedy little man.

THE COURT: Jurors are obligated to decide the case based only on the evidence. Do you agree?

JUROR NO. 1: I don't know if I could. I wouldn't want me on this jury.

THE COURT: Juror Number 1 is excused. Juror Number 18.

JUROR NO. 18: Both of my parents are on prescriptions that have gone up over the past few months, so much that they can't afford their drugs. I have several friends who have H.I.V. or AIDS who, again, can't afford the prescription drugs that they were able to afford.

THE COURT: These charges don't concern drug pricing. Could you decide this case based only on the evidence —

JUROR NO. 18: No. No.

THE COURT: — presented at this trial and put aside anything you might have heard in the media?

JUROR NO. 18: No. No.

THE COURT: Sir, we are going to excuse you from this panel. Juror Number 25, come forward, please.

JUROR NO. 25: This is the price-gouging, right, of drugs?

THE COURT: This case has nothing to do with drugs.

JUROR NO. 25: My kids use those drugs.

THE COURT: As I said, the case does not concern anything that you might have read or heard about the pricing of certain pharmaceuticals.

JUROR NO. 25: It affects my opinion of him.

THE COURT: I am going to excuse you. Juror Number 40. Come on up, sir.

JUROR NO. 40: I'm taking prescription medication. I would be upset if it went up by a thousand percent. I saw the testimony on TV to Congress and I saw his face on the news last night. By the time I came in and sat down and he turned around, I felt immediately I was biased.

THE COURT: Sir, we are going to excuse you. Juror Number 47, please come up.

JUROR NO. 47: He's the most hated man in America. In my opinion, he equates with Bernie Madoff with the drugs for pregnant women going from $15 to $750. My parents are in their eighties. They're struggling to pay for their medication. My mother was telling me yesterday how my father's cancer drug is $9,000 a month.

THE COURT: The case is going to come before you on evidence that you must consider fairly and with an open mind.

JUROR NO. 47: I would find that difficult.

THE COURT: And that's based on your parents' experience with medication?

JUROR NO. 47: It's based on people working very hard for their money. He defrauded his company and his investors, and that's not right.

THE COURT: Ma'am, we're going to excuse you. Juror Number 52, how are you?

JUROR NO. 52: When I walked in here today I looked at him, and in my head, that's a snake — not knowing who he was. I just walked in and looked right at him and that's a snake.

BRAFMAN: So much for the presumption of innocence.

THE COURT: We will excuse Juror Number 52. Juror Number 67?

JUROR NO. 67: The fact that he raised the price of that AIDS medication, like, such an amount of money disgusts me. I don't think I'll ever be able to forget that. Who does that, puts profit and self-interest ahead of anything else? So it's not a far stretch that he could do what he's accused of.

THE COURT: Please go to the jury room and tell them you have been excused. Juror Number 70.

JUROR NO. 70: I have total disdain for the man. When you go back to how he was able to put so many children —

THE COURT: You have negative feelings?

JUROR NO. 70: Very.

THE COURT: Would those feelings prevent you from being fair to both sides in this case?

JUROR NO. 70: I can be fair to one side but not the other.

THE COURT: We will excuse you from this jury. Juror Number 77.

JUROR NO. 77: From everything I've seen on the news, everything I've read, I believe the defendant is the face of corporate greed in America.

BRAFMAN: We would object.

JUROR NO. 77: You'd have to convince me he was innocent rather than guilty.

THE COURT: I will excuse this juror. Hello, Juror Number 125.

JUROR NO. 125: I've read extensively about Martin's shameful past and his ripping off sick people and it hits close to me. I have a mother with epilepsy, a grandmother with Alzheimer's, and a brother with multiple sclerosis. I think somebody that's dealt in those things deserves to go to jail.

THE COURT: Just to be clear, he's not being charged with anything relating to the pricing of pharmaceuticals.

JUROR NO. 125: I understand that, but I already sense the man is guilty.

THE COURT: Well, I'm going to excuse you. Juror Number 144, tell us what you have heard.

JUROR NO. 144: I heard through the news of how the defendant changed the price of a pill by up-selling it. I heard he bought an album from the Wu-Tang Clan for a million dollars.

THE COURT: The question is, have you heard anything that would affect your ability to decide this case with an open mind. Can you do that?

JUROR NO. 144: I don't think I can because he kind of looks like a dick.

THE COURT: You are Juror Number 144 and we will excuse you. Come forward, Juror Number 155.

JUROR NO. 155: I have read a lot of articles about the case. I think he is as guilty as they come.

THE COURT: Then I will excuse you from this case. Juror Number 10, please come forward.

JUROR NO. 10: The only thing I'd be impartial about is what prison this guy goes to.

THE COURT: Okay. We will excuse you. Juror 28, do you need to be heard?

JUROR NO. 28: I don't like this person at all. I just can't understand why he would be so stupid as to take an antibiotic which H.I.V. people need and jack it up five thousand percent. I would honestly, like, seriously like to go over there —

THE COURT: Sir, thank you.

JUROR NO. 28: Is he stupid or greedy? I can't understand.

THE COURT: We will excuse you. Juror 41, are you coming up?

JUROR NO. 41: I was looking yesterday in the newspaper and I saw the defendant. There was something about him. I can't be fair. There was something that didn't look right.

THE COURT: All right. I'm going to excuse you. Juror Number 59, come on up.

JUROR NO. 59: Your Honor, totally he is guilty and in no way can I let him slide out of anything because —

THE COURT: Okay. Is that your attitude toward anyone charged with a crime who has not been proven guilty?

JUROR NO. 59: It's my attitude toward his entire demeanor, what he has done to people.

THE COURT: All right. We are going to excuse you, sir.

JUROR NO. 59: And he disrespected the Wu-Tang Clan.

- [Drugs]
- [Jury selection]
- [Profiteering]
- [Trials (Fraud)]
- [United States]

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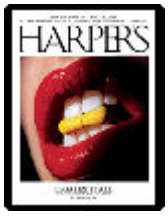

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