

Implicit Bias in Litigation

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This presentation is intended to provide an overview of implicit bias in litigation.

I. INTRODUCTION

a. Overview

i. Implicit Bias

1. Definition

- a. Implicit bias is the brain's automatic, instant association of stereotypes or attitudes toward particular groups, without person's conscious awareness.
- b. It is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g. implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.

2. Exhibit A

- a. Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasguta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson, Jennifer Mnookin, *Implicit Bias in the Court Room*, 59 UCLA L. Rev. 1124 – 1186 (2012)
- b. Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, Colorado Bar Association, The Colorado Lawyer 45 (May 2016)

II. IMPLICIT BIAS IN CRIMINAL LAW & LITIGATION

a. Overview

i. Exhibit B

1. *Batson v Kentucky*, 476 U.S. 79 (1986)
2. *Flowers v Mississippi*, 588 U.S. ____ (2019)
3. Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, UC Irvine L Rev 5, 843 – 872 (2015)
4. Peter A. Joy, *Race Matters in Jury Selection*, Northwestern University L Rev 109, 180 – 186 (2015)

III. IMPLICIT BIAS IN CIVIL LAW & LITIGATION

a. Overview

i. Exhibit C

1. Jennifer K. Elek and Paula Hannaford-Agor, *First, Do No Hard: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 Court Review, 190 – 198
2. Judge Mark W. Bennett, *General Essay: 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*, 49 Harvard L & Policy Rev 149, 149 – 170 (Winter 2010)
3. *Jackson v Scripps Media, Inc.*, 2019 U.S. Dist LEXIS 209462, 2019 WL 6619859 (WD Mo, Dec. 5, 2019, No. 18-00440-CV-W-ODS)
4. *Sanders v Terrace Park*, 2018 Colo. Dist. LEXIS 697 (Dist Ct Colo, June 4, 2018, No. 2017CV31616)

EXHIBIT A

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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TABLE OF CONTENTS

INTRODUCTION	1126
I. IMPLICIT BIASES	1128
A. Empirical Introduction	1128
B. Theoretical Clarification	1132
II. TWO TRAJECTORIES	1135
A. The Criminal Path	1135
1. Police Encounter	1135
2. Charge and Plea Bargain	1139
3. Trial	1142
a. Jury	1142
b. Judge	1146
4. Sentencing	1148
B. The Civil Path	1152
1. Employer Discrimination	1153
2. Pretrial Adjudication: 12(b)(6)	1159
3. Jury Verdict	1164
a. Motivation to Shift Standards	1164
b. Performer Preference	1166
III. INTERVENTIONS	1169
A. Decrease the Implicit Bias	1169
B. Break the Link Between Bias and Behavior	1172
1. Judges	1172
a. Doubt One's Objectivity	1172
b. Increase Motivation	1174
c. Improve Conditions of Decisionmaking	1177
d. Count	1178
2. Jurors	1179
a. Jury Selection and Composition	1179
b. Jury Education About Implicit Bias	1181
c. Encourage Category-Conscious Strategies	1184
CONCLUSION	1186

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 judge¹ 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

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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 data¹⁴ 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 criticism²¹ 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

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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).

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 primed³⁶ 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 tasks⁴² 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

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

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

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

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

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

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

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

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

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

45. *Id.* at 1317.

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

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

48. See *id.* at 1324.

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

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

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

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

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

2. Charge and Plea Bargain

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

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

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

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

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

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

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

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

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

55. See Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615–19 (1985).
56. See Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1493 (2000) (citing Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 441–47 (1979)); Radelet & Pierce, *supra* note 55, at 615–19.
57. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 12 n.41 (2000), available at <http://www.protectcivilrights.org/pdf/reports/justice.pdf> (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995)); see also Kevin McNally, *Race and Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004) (compiling studies on the death penalty).
58. See, e.g., Jeremy D. Ball, *Is It a Prosecutor's World? Determinants of Court 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 below⁶⁴—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. & POLY 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 conservatively⁶⁶ 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. DEPT 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. DEPT 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 = $88.58 + 5.74 \times BW + 6.61 \times GI + 9.11 \times AI + e$ (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 $\beta=0.25$ ($p<0.05$); the implicit attitude $\beta=0.34$ ($p<0.01$); 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. & POLY REV. 149, 150 (2010).

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

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

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

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

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

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

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

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

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

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

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

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

4. Sentencing

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

91. *Id.* at 1220 n.114.

92. *See id.* at 1223.

93. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (examining federal judge sentencing under the Sentencing Reform Act of 1984).

94. *See* U.S. GEN. ACCOUNTING OFFICE, GAO GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding killers of White victims receive the death penalty more often than killers of Black victims); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview*,

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

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

Afrocentric features. Irene Blair, Charles Judd, and Kristine Chappleau took photographs from a database of criminals convicted in Florida⁹⁷ 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 cases¹⁰⁸ 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 individual¹¹¹ 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 doctrinal¹¹⁶ and philosophical questions¹¹⁷ 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 hireable 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

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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 reasoning¹³² 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., *Casistry 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. POLY & 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 “Twombal”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 “Twombal”).

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 Yzerby’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 contract 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.1 ($r=0.26, p<0.05$).

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 accountable¹⁹¹ 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.

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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 $M=78$ ms 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/aocvtv/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 comments²³⁰ 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 juries²⁴² 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 & POLY 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,

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 Bohenhause, 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.

Strategies for Confronting Unconscious Bias

by Kathleen Nalty

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So—what’s in a name? Apparently, a lot. If you are named John, you will have a significant advantage over Jennifer when applying for a position, even if you both have the exact same credentials.¹ If your name is José, you will get more callbacks if you change it to Joe.² And if you’re named Emily or Greg, you will receive 50% more callbacks for job interviews than equally qualified applicants named Lakisha or Jamal.³

A three-part dialogue published in *The Colorado Lawyer* earlier this year raised awareness about the prevalence of conscious and unconscious biases in the legal profession.⁴ While we may be aware of our conscious attitudes toward others, we are typically clueless when it comes to our unconscious (or implicit) biases. This article will help you recognize your unconscious biases and provides research-based strategies for addressing them.

Why Does It Matter?

Research studies reveal just how much bias impacts decisions—not just on a conscious basis, but to a much greater extent, on an unconscious basis. Experts believe that the mind’s unconscious is responsible for 80% or more of thought processes.⁵ Yet the conscious mind is simply not capable of perceiving what the unconscious is thinking.⁶ You can be two people at the same time: a conscious self who firmly believes you do not have any bias against others because of their social identities, and an unconscious self who harbors stereotypes or biased attitudes that unknowingly leak into decision-making and behaviors.⁷ The good news is that we can work to redirect and reeducate our unconscious mind to break down stereotypes and biases we don’t agree with by engaging in the research-based activities outlined in this article.

This process is critical to making better decisions in general, and is particularly important as the legal industry struggles to play catch-up with respect to inclusiveness. In addition to eliminating the hidden barriers that keep the legal profession from being more diverse, recognizing and dealing with unconscious biases actually helps individuals become smarter, more effective lawyers. After all, this is a service industry, and our ability to interact with a diverse community and serve a wide variety of clients depends on making decisions free from fundamental errors. Finding the pitfalls in our

thinking, taking them into account, and working to eliminate them leads to better decision-making. Individuals who make better decisions also help their organizations perform better.

So there is a lot at stake in terms of whether you will invest the time to be more inclusive and become a more effective lawyer by attending to your unconscious biases.

Types of Unconscious Cognitive Biases

We all have unconscious cognitive biases that can, and often do, interfere with good decision-making. There are too many to address in this article, but it is worthwhile to learn about a few that are particularly important with respect to diversity and inclusion.

Confirmation Bias

Confirmation bias is a type of unconscious bias that causes people to pay more attention to information that confirms their existing belief system and disregard that which is contradictory. Clearly this can harm good decision-making. You can probably think of at least one instance when you advised a client or reached a decision and later realized you dismissed or unintentionally ignored critical information that would have led to a different and perhaps better outcome.

Confirmation bias can also skew your evaluations of others’ work and potentially disrupt their careers. In *The Colorado Lawyer’s* three-part dialogue, Professor Eli Wald briefly mentioned a research study on confirmation bias in the legal industry that I feel bears further elaboration here.⁸ In 2014, Dr. Arin Reeves released results of a study she conducted to probe whether practicing attorneys make workplace decisions based on confirmation bias.⁹ This study tested whether attorneys unconsciously believe African Americans produce inferior written work and that Caucasians are better writers.

With the help of other practicing attorneys, Reeves created a research memo that contained 22 errors (spelling, grammar, technical writing, factual, and analytical). The memo was distributed to 60 partners working in nearly two dozen law firms who thought they were participating in a “writing analysis study” to help young lawyers with their writing skills. All of the participants were told the memo was written by a (fictitious) third-year associate named



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Thomas Meyer who graduated from New York University Law School. Half of the participants were told Thomas Meyer was Caucasian and the other half were told Thomas Meyer was African American. The law firm partners participating in the study were asked to give the memo an overall rating from 1 (poorly written) to 5 (extremely well written). They were also asked to edit the memo for any mistakes.

The results indicated strong confirmation bias on the part of the evaluators. African American Thomas Meyer's memo was given an average overall rating of 3.2 out of 5.0, while the exact same memo garnered an average rating of 4.1 out of 5.0 for Caucasian Thomas Meyer. The evaluators found twice as many spelling and grammatical errors for African American Thomas Meyer (5.8 out of 7.0) compared to Caucasian Thomas Meyer (2.9 out of 7.0). They also found more technical and factual errors and made more critical comments with respect to African American Thomas Meyer's memo. Even more significantly, Dr. Reeves found that the female and racially/ethnically diverse partners who participated in the study *were just as likely* as white male participants to be more rigorous in examining African American Thomas Meyer's memo (and finding more mistakes), while basically giving Caucasian Thomas Meyer a pass.¹⁰

The attorneys who participated in this study were probably shocked by the results. That is the insidious nature of unconscious bias—people are completely unaware of implicit biases they may harbor and how those biases leak into their decision-making and behaviors.

Attribution Bias

Another type of unconscious cognitive bias—*attribution bias*—causes people to make more favorable assessments of behaviors and circumstances for those in their “in groups” (by giving second chances and the benefit of the doubt) and to judge people in their “out groups” by less favorable group stereotypes.

Availability Bias

Availability bias interferes with good decision-making because it causes people to default to “top of mind” information. So, for instance, if you automatically picture a man when asked to think of a “leader” and a woman when prompted to think of a “support person,” you may be more uncomfortable when interacting with a female leader or a man in a support position, particularly at an unconscious level.

Affinity Bias

The adverse effects of many of these cognitive biases can be compounded by affinity bias, which is the tendency to gravitate toward and develop relationships with people who are more like ourselves and share similar interests and backgrounds. This leads people to invest more energy and resources in those who are in their affinity group while unintentionally leaving others out. Due to the prevalence of affinity bias, the legal profession can best be described as a “mirrortocracy”—not a meritocracy. A genuine meritocracy can never exist until individual lawyers and legal organizations come to terms with unconscious biases through training and focused work to interrupt biases.

How Unconscious Bias Plays Out in the Legal Profession

Traditional diversity efforts have never translated into sustained diversity at all levels. Year after year, legal organizations experience disproportionately higher attrition rates for attorneys in already underrepresented groups—female, racially/ethnically diverse, LGBTQ, and those with disabilities.¹¹ Before 2006 and the first of eight national research studies,¹² no one was sure what was causing higher attrition rates for attorneys in these groups. Now the answer is clear: every legal organization has hidden barriers that disproportionately impact and disrupt the career paths of many female, LGBTQ, racially/ethnically diverse, and disabled lawyers.

According to the research studies, critical career-enhancing opportunities are shared unevenly by people in positions of power and influence, often without realizing that certain groups are disproportionately excluded. Hard work and technical skill are the foundation of career progress, but without some access to these opportunities, attorneys are less likely to advance in their organizations. Specifically, female, LGBTQ, disabled, and racially/ethnically diverse attorneys have disproportionately less access to the following:

- networking opportunities—informal and formal
- insider information
- decision-makers
- mentors and sponsors
- meaningful work assignments
- candid and frequent feedback
- social integration

- training and development
- client contact
- promotions.

The studies all point to bias as the major cause of these hidden barriers. Certainly, overt discrimination still exists and contributes to this dynamic. But it turns out that a specific kind of unconscious (and thus unintentional) bias plays the biggest role. Affinity bias, which causes people to develop deeper work and trust relationships with those who have similar identities, interests, and backgrounds, is the unseen and unacknowledged culprit. When senior attorneys—the vast majority of whom are white and male—gravitate toward and share opportunities with others who are like themselves, they unintentionally tend to leave out female, LGBTQ, disabled, and racially/ethnically diverse attorneys.

Strategies for Identifying and Interrupting Unconscious Bias

Having unconscious bias does not make us bad people; it is part of being human. We have all been exposed to thousands of instances of stereotypes that have become embedded in our unconscious minds. It is a bit unsettling, however, to think that good, well-intentioned people are actually contributing—unwittingly—to the inequities that make the legal profession one of the least diverse. The good news is that once you learn more about cognitive biases and work to disrupt the stereotypes and biased attitudes you harbor on an unconscious level, you can become a better decision-maker and help limit the negative impacts that are keeping our industry from being more diverse and inclusive.

The obvious place to start is with affinity bias; learning and reminding yourself about affinity bias should help you lessen the effect on people in your “out groups.” Affinity bias has been well-documented in major league sports. A series of research studies analyzing foul calls in NBA games demonstrates the powerful impact of simply being aware of affinity bias. In the first of three studies examining data from 13 seasons (1991–2004), researchers discovered that referees called more fouls against players who were not the same race as the referee, and these disparities were large enough to affect the outcomes in some games.¹³ Based on a number of studies documenting the existence of “in group” or affinity bias in other realms, the researchers inferred that the differential in called fouls was mostly happening on an unconscious level.

The findings of the first study, released in 2007, were criticized by the NBA, resulting in extensive media coverage. The researchers subsequently conducted two additional studies—one using data from basketball seasons before the media coverage (2003–06) and the other focusing on the seasons after the publicity (2007–10). The results were striking. In the seasons before referees became aware they were calling fouls disparately, the researchers replicated the findings from the initial study. Yet after the widespread publicity, there were no appreciable disparities in foul-calling.

The lesson to be learned from this research is that paying attention to your own affinity bias and auditing your behaviors can help you interrupt and perhaps even eliminate this type of implicit bias. Ask yourself the following questions:

- How did I benefit from affinity bias in my own career? Did someone in my affinity group give me a key opportunity that contributed to my success? Many lawyers insist they “pulled themselves up by their own bootstraps” but upon reflection

have to acknowledge they were given key opportunities—especially from mentors and sponsors. Barry Switzer famously highlighted this tendency when he observed that “some people are born on third base and go through life thinking they hit a triple.”¹⁴

- Who are my usual favorites or “go to” lawyers in the office or practice group?
- With whom am I more inclined to spend discretionary time, go to lunch, and participate in activities outside of work?
- Do I hold back on assigning work to attorneys from underrepresented groups until others vouch for their abilities?
- When I go on client pitches, do I always take the same people?
- Who makes me feel uncomfortable and why?
- Who do I avoid interacting with or giving candid feedback to because I just don’t know how to relate to them or because I’m afraid I’ll make mistakes?
- To whom do I give second chances and the benefit of the doubt (e.g., the people in my “in group”) and who do I judge by group stereotypes and, therefore, fail to give second chances?

It is easy for skeptics to dismiss inequities described by attorneys in underrepresented groups (or even the research studies documenting the disparate impact of hidden barriers) until they are presented with concrete evidence that some people simply have more access to opportunities that play a critical, but mostly unacknowledged, role in any attorney’s success. Thus, when implementing inclusiveness initiatives, it is important to actually count who has access to work-related opportunities, such as going on client pitches or participating in meaningful assignments, to counteract skeptics’ tendency to not believe what they don’t (or won’t) see.

Research scientists are learning more about how implicit biases operate, including methods for uncovering and interrupting them.¹⁵ While it is not yet clear whether implicit biases can be completely eliminated, certain techniques have been shown to lessen bias and disrupt its impact. To rescript your unconscious thoughts and interrupt implicit biases, you have to work your “ABS”: first, develop *Awareness* of those biases, and then make the *Behavior* and *Structural* changes required to disrupt them.

Awareness

If you make conscious negative judgments about groups that are based on stereotypes, you can challenge your thinking by asking yourself why: Why am I bothered by people in that group? Why do I or why should I care about that? Why do I persist in thinking all members of that group engage in that stereotyped behavior? Then actively challenge those beliefs every time they are activated. Overriding stereotypes takes a conscious act of will, whereas the activation of stereotypes does not, because they are often embedded in your unconscious mind.

Two easy ways to develop awareness of your unconscious biases are:

1. Keep track of your surprises (i.e., instances when something you expected turned out to be quite different).¹⁶ Those surprises offer a window into your unconscious. For example, when you pass a slow-moving car impeding the flow of traffic, do you expect to see a very elderly driver behind the wheel? When you see that the driver is actually younger, does that surprise you? You may truly believe you are not consciously

biased against the elderly, but you reflexively presumed that the slower driver was elderly. That is a product of unconscious bias. How could that attitude influence decision-making in other areas, such as in interactions with more senior colleagues, witnesses, jurors, or clients?

2. Take a free, anonymous implicit association test (IAT) online at implicit.harvard.edu/implicit/selectatest.html. This series of tests, sponsored by Harvard University and taken by millions of people since the late 1990s, can reveal areas where you unknowingly harbor unconscious biases. There are over a dozen different tests, measuring unconscious bias with respect to disability, race, age, gender, gender roles, mental health, weight, sexual orientation, religion, and more. The tests measure how quickly or slowly you associate positive or negative words with different concepts. Your unconscious, immediate assumptions reveal themselves in the delayed responses measured by the computer when you struggle to connect words and concepts that are not as readily associated. You might not like, or be in denial with respect to, some of the test results, but they can be useful in revealing often uncomfortable truths about what your unconscious mind is up to.

While awareness is necessary, it is not sufficient, by itself, to interrupt unconscious bias. Behavior changes are also essential.

Behavior Changes

Like correcting a bad habit, you can retrain yourself to think in less biased and stereotyped ways.¹⁷ Motivation is key; research shows that people who seek to be fair and unbiased are more likely to be successful in purging their biases.¹⁸

Researchers have identified strategies people can use to change their behaviors to overcome bias. They include the following:

Retrain your brain. “The ‘holy grail’ of overcoming implicit bias is to change the underlying associations that form the basis of implicit bias.”¹⁹ To do so, you need to develop the ability to be self-observant. Pay attention to your thinking, assumptions, and behaviors and then acknowledge, dissect, and alter automatic responses to break the underlying associations.

Actively doubt your objectivity. Take the time to review your decisions (especially those related to people and their careers) and search for indicia of bias; audit your decisions to ensure they don’t disparately impact people in other groups. Pause before you make a final decision. Question your assumptions and first impressions. Ask others for feedback to check your thought processes. Ask yourself if your decision would be different if it involved a person from a different social identity group. Finally, justify your decision by writing down the reasons for it. This will promote accountability, which can help make unconscious attitudes more visible.

Be mindful of snap judgments. Take notice every time you jump to conclusions about a person belonging to a different social identity group (like the slow driver). Have a conversation with yourself about why you are making judgments or resorting to stereotypes. Then resolve to change your attitudes.

Oppose your stereotyped thinking. One of the best techniques seems odd but has been shown to have a lasting effect: think of a stereotype and say the word “no” and then think of a counter-stereotype and say “yes.” People who do this have greater long-term success in interrupting their unconscious bias with respect to that stereotype.²⁰ To decrease your implicit biases, you might also want to limit your exposure to stereotyped images; for

instance, consider changing the channel if the TV show or song features stereotypes.

Deliberately expose yourself to counter-stereotypical models and images. For example, if it is easier for you to think of leaders as male, study successful female leaders to retrain your unconscious to make the connection between leaders and both women and men. Research has shown that simply viewing photos of women leaders helps reduce implicit gender bias.²¹ Even the Harvard professor who invented the IAT—Dr. Mahzarin Banaji—has acknowledged she has some gender bias. To interrupt it, she put rotating photographs on her computer screensaver that are counter-stereotypical, including one depicting a female construction worker feeding her baby during a work break.

Look for counter-stereotypes. Similarly, pay more attention and be more consciously aware of individuals in counter-stereotypic roles (e.g., male nurses, female airline pilots, athletes with disabilities, and stay-at-home dads).

Remind yourself that you have unconscious bias. Research shows that people who think they are unbiased are actually more biased than those who acknowledge they have biases.²² There is a Skill Pill mobile app on managing unconscious bias available for enterprise usage (skillpill.com). If you play this short app before engaging in hiring, evaluation, and promotion decisions, it could help you interrupt any unconscious biases. But you don’t need an app to prompt yourself to be mindful of implicit bias and its impact. You could create a one-page reminder sheet that accompanies every evaluation form or candidate’s résumé, for instance.

Engage in mindfulness exercises on a regular basis, or at least before participating in an activity that might trigger stereotypes (e.g., interviewing a job candidate).²³ Research shows that mindfulness breaks the link between past experience and impulsive responses, which can reduce implicit bias.²⁴

Engage in cross-difference relationships. Cultivate work relationships (or personal relationships outside of work) that involve people with different social identities.²⁵ This forces you out of your comfort zone and allows your unconscious to become more comfortable with people who are different. Those new relationships will also force you to dismantle stereotypes and create new types of thinking—both conscious and unconscious. So find ways to mentor junior colleagues who are different from you in one or more dimensions (gender, race, age, religion, parental status, etc.), and ask them how they view things. This will open you up to new ways of perceiving and thinking.

Mix it up. Actively seek out cultural and social situations that are challenging for you—where you are in the distinct minority or are forced to see or do things differently. For example, go to a play put on by PHAMILY (an acting troupe of people with mental and physical disabilities) or attend a cultural celebration that involves customs and people you have never been exposed to. The more uncomfortable you are in these situations, the more you will grow and learn.

Shift perspectives. Walk in others’ shoes; look through their lenses to see how they view and experience the world. Join a group that is different (e.g., be the male ally in the women’s affinity group). This will help you develop empathy and see people as individuals instead of lumping them into a group and applying stereotypes.²⁶ And if you’re really serious about reducing implicit racial bias, research shows that picturing yourself as having a different race results in lower scores on the race IAT.²⁷

Find commonalities. It is also useful to look for and find commonalities with colleagues who have different social identities from yourself.²⁸ Do they have pets? Are their children attending the same school as your children? Do they also like to cook, golf, or volunteer in the community? You will be surprised to discover how many things you have in common. Research shows that when you deliberately seek out areas of commonality with others, you will behave differently toward them and exhibit less implicit bias.²⁹

Reduce stress, fatigue, cognitive overload, and time crunches. We are all more prone to revert to unconscious bias when we are stressed, fatigued, or under severe cognitive load or time constraints.³⁰ Relax and slow down decision-making so that your conscious mind drives your behavior with respect to all people and groups.³¹

Give up being color/gender/age blind. Don't buy into the popular notion that you should be blind to differences; it is impossible and backfires anyway. Your unconscious mind sees and reacts to visible differences, even if you consciously believe you don't. Research demonstrates that believing you are blind to people's differences actually makes you more biased.³² The better course is to acknowledge these differences and work to ensure they aren't impairing your decision-making—consciously or unconsciously. The world has changed. In the 20th century, we were taught to avoid differences and there was an emphasis on assimilation (the “melting pot”). In the 21st century, we know that being “difference-seeking” and inclusive actually causes people to work harder cognitively,³³ which leads to better organizational performance and a

healthier bottom line. Today's mantra should be: “I need your differences to be a better thinker and decision-maker, and you need mine too.”

Awareness of implicit bias is not enough. Self-monitoring is also insufficient. Individual behavior changes often have to be supported and encouraged by structural changes to have the greatest impact on interrupting implicit biases.

Structural Changes

Highly skilled, inclusive leaders make concerted efforts to ensure that hidden barriers are not thriving on their watch. Because bias flourishes in unstructured, subjective practices, leaders should put structured, objective practices and procedures in place to help people interrupt their unconscious biases. Just knowing there is accountability and that you could be called on to justify your decisions with respect to others can decrease the influence of implicit bias.³⁴

Leaders, in conjunction with a diversity and inclusiveness (D+I) committee, can examine all systems, structures, procedures, and policies for hidden structural inequities and design action plans to make structural components inclusive of everyone. Structural changes should be designed to address the hidden barriers first, because research shows that these are the most common impediments.

To make the invisible visible with respect to mentorship and sponsorship, one firm simply added the following question to its partners' end-of-year evaluation form: “Who are you sponsoring?”

This simple but profoundly illuminating question allowed firm leaders determine who was falling through the cracks. The firm then created a D+I Action Plan with a focus on mentorship and sponsorship. The firm is currently implementing a “Culture of Mentorship” to ensure that all attorneys receive equitable development opportunities so they can do their best work for the firm. After all, a business model where some attorneys are cultivated and others are not makes no sense; the organization could accomplish so much more if every one of its human capital assets operated at the highest level possible. Imagine the enhancement to the bottom line for organizations that are inclusive and have eliminated hidden barriers to success for everyone.

There are dozens of structural changes that can be made, ranging from small to large. But the structural change with the most potential for lasting change is a D+I competencies framework. Recently, a two-year study of more than 450 companies by Deloitte determined that the talent management practices that predicted the highest performing companies all centered on inclusiveness.³⁵ Many companies that have instituted D+I competencies and hold employees accountable for inclusive behaviors in their job duties and responsibilities are making real progress with respect to diversity. For example, at Sodexo, implementation of D+I competencies has resulted in “double digit growth in representation of women and minorities.”³⁶

This type of framework is critical in any legal organization. Many people would do more with respect to inclusiveness if they just knew what to do. Competencies define behaviors along an eas-

ily understandable scale—are you unskilled, skilled, or highly skilled in inclusiveness (and, therefore, contributing to the organization’s success in more meaningful ways)? This key component was lacking in the legal industry, so I wrote and published a book in 2015: *Going All In on Diversity and Inclusion: The Law Firm Leader’s Playbook*. This book contains individual and organizational competencies frameworks, as well as the tools and strategies law firm leaders need to address the hidden barriers, identify the unconscious biases that allow those barriers to thrive, and make genuine progress on diversity and inclusion.

Examples of Bias-Breaking Activities: Stories from the Front Lines

Implementing the de-biasing strategies outlined above is not a “one and done” proposition. It is an ongoing process and must become second-nature to be most effective. Once you start implementing these strategies, the lessons learned will be impactful.

I teach a class at the University of Denver Sturm College of Law on “Advancing Diversity and Inclusion,” which includes a session on unconscious biases. As part of their learning experience, I ask my students to engage in some of the activities outlined above and write short essays on what they discovered or learned. They have had some eye-opening experiences that will help them interrupt their own implicit biases and make them better decision-makers as practicing lawyers.

For instance, one student who is not very religious visited a local mosque to learn more about Muslim people and their faith. The student attended a presentation on Islam during an open house and observed the members during prayer. His experience gave him more familiarity and comfort with a group of people that is currently widely disparaged and stereotyped.

After taking an IAT that revealed an unconscious bias against older people and consciously acknowledging he avoids his older colleagues at work, another student decided to confront this tendency by finding commonalities with them. Specifically, the student knew that he shared an interest in gardening with an older colleague with whom he would be working on an upcoming project. So he deliberately struck up a conversation with this coworker about gardening and found it was then easier to work with him on the project.

Another student decided to consciously observe his reflexive thought processes by noticing what he was thinking or how he reacted to different people and then opposing any stereotyped thoughts. While attending a basketball game, he saw a black man dressed in medical scrubs enter the gym. Immediately, the student observed that he was trying to figure out what the man did for a living. The student noticed that he assumed the man worked as an x-ray technician or medical assistant. At that point, he realized that the man’s race and gender might be triggering these assumptions and the student then visualized the man as a nurse, a home health-aid worker, or a physician. This student wrote that the exercise made him aware of how often he jumps to conclusions about others based on visible cues and makes assumptions that might be completely wrong.

A female student decided to doubt her own objectivity with respect to how she viewed the support staff at her company. She believes she’s a gender champion but was surprised to realize that she really doesn’t view the support staff (mostly women) as favor-

ably as the sales staff (mostly men). She decided to picture women in sales positions and men in support positions to try to retrain her unconscious mind and the assumptions she was used to making.

Another student, who is white and grew up in an all-white community, chose to observe the “Black Lives Matter” demonstration and participate in the Martin Luther King Day parade. She also later attended a Sunday service at an all-black church and wrote this about the experience:

Overall it was a good experience because I think being uncomfortable can be good for a person. Looking back, I really had no reason to be uncomfortable because everyone was very nice and welcoming; my uneasiness was made up in my head based on assumptions I feared people would make about me.

Putting yourself in situations that are uncomfortable and observing your own attitudes, judgments, and behaviors can flip a switch in your brain and help you learn new ways of thinking and interacting with others. The real-world impact of this is illustrated by a story told to me by an in-house attorney who reassessed a biased assumption before it had an impact on someone else’s career. The attorney met with a group of people at her company to discuss staffing a challenging position that would require a lot of travel. The name of a qualified female employee candidate was proposed. The lawyer knew the candidate was a single mother of a toddler and immediately suggested to the group that it might be very difficult for a single mother to handle the extensive travel required. Effectively, this comment removed the woman from consideration. Later, the lawyer attended a workshop on unconscious bias. She realized that she’d made assumptions that might not be true. The lawyer met with the female employee and asked her if she was able to travel for business. The female employee said that travel wasn’t an impediment because she had several family members nearby who could help care for her child while she was out of town. The lawyer immediately went back to the group and explained her mistake, asking that the female employee’s name be included for consideration for the position.

Conclusion

Many attorneys, judges, and other law professionals in the Colorado legal community are pioneers when it comes to diversity and, particularly, inclusion. Ten years ago, with the establishment of the Deans’ Diversity Council, this legal community was the first in the country to focus on the new paradigm of inclusiveness and how it must be added to traditional diversity efforts to make diversity sustainable. The three-part dialogue on unconscious bias featured in *The Colorado Lawyer* was truly ground-breaking because it addressed challenges not often discussed openly.

The next step is to take action, on an individual and organizational basis, to eliminate hidden barriers and interrupt the unconscious biases that fuel those barriers. It should be deeply concerning to everyone that good, well-meaning people are doing more to foster inequities in the legal workplace—unintentionally and unknowingly—just by investing more in members of their affinity or “in groups” than the harm caused by outright bigotry. This unfortunate dynamic will change only when we come to terms with the fact that we all have biases—conscious and unconscious—and begin to address those biases. Good intentions are not enough; if you are not intentionally including everyone by interrupting bias, you are unintentionally excluding some.

So now, ask yourself, are you up to this challenge?

Notes

1. In a randomized, double-blind study, science faculty rated John, the male applicant for a lab manager position, as significantly more competent than Jennifer, the female candidate, awarding him an average starting salary more than 10% higher and volunteering to mentor him more often than Jennifer, even though she had the exact same credentials and qualifications. The insidious role of unconscious bias was revealed in the finding that the female evaluators were equally as likely as their male colleagues to exhibit bias for John and against Jennifer. Moss-Racusin et al., “Science faculty’s subtle gender biases favor male students,” *Proceedings of the National Academy of Sciences* (Sept. 2012), www.pnas.org/content/109/41/16474.abstract.

2. Matthews, “He Dropped One Letter in His Name While Applying for Jobs, and the Responses Rolled In,” *Huffington Post* (Sept. 2, 2014), www.huffingtonpost.com/2014/09/02/jose-joe-job-discrimination_n_5753880.html.

3. Bertrand and Mullainathan, “Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,” *The National Bureau of Economic Research* (July 2003), www.nber.org/papers/w9873.

4. Sandgrund, “Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part I—Implicit Bias,” 45 *The Colorado Lawyer* 49 (Jan. 2016), www.cobar.org/tcl/tcl_articles.cfm?articleid=9166; Sandgrund, “Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part II—Diversity,” 45 *The Colorado Lawyer* 49 (Feb. 2016), www.cobar.org/tcl/tcl_articles.cfm?articleid=9155; Sandgrund, “Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part III—Inclusiveness,” 45 *The Colorado Lawyer* 67 (Mar. 2016), www.cobar.org/tcl/tcl_articles.cfm?articleid=9179.

5. Banaji and Greenwald, *Blindspot: Hidden Biases of Good People* 61 (Delacorte Press, 2013).

6. *Id.* at 55.

7. *Id.* at 20.

8. Sandgrund, Part I, *supra* note 4 at 48.

9. Reeves, “Yellow Paper Series: Written in Black & White—Exploring Confirmation Bias in Racialized Perceptions of Writing Skills” (Nextions Original Research, 2014), www.nextions.com/wp-content/files_mf/14468226472014040114WritteninBlackandWhiteYPS.pdf.

10. *Id.* at 5.

11. See New York City Bar Association, “2014 Diversity Benchmarking Report” (2015), www.nycbar.org/images/stories/pdfs/diversity/benchmarking2014.pdf.

12. American Bar Association (ABA), “Visible Invisibility: Women of Color in Law Firms” (2006), <http://bit.ly/1DNJRza>; ABA, “From Visible Invisibility to Visibly Successful: Success Strategies for Law Firms and Women of Color in Law Firms” (2009), www.americanbar.org/content/dam/aba/administrative/diversity/Convocation_2013/CWP/VisiblySuccessful.pdf.

cessful-entire-final.authcheckdam.pdf; ABA, “Visible Invisibility: Women of Color in Fortune 500 Legal Departments” (2013), <http://bit.ly/1bZfXWQ>; Bagati, “Women of Color in U.S. Law Firms,” Catalyst, Inc. (2009), <http://bit.ly/1EvTogK>; Cruz and Molina, “Few and Far Between: The Reality of Latina Lawyers,” Hispanic National Bar Association (Sept. 2009), <http://bit.ly/1dxLPxh>; Women’s Bar Association of the District of Columbia, “Creating Pathways for Success for All: Advancing and Retaining Women of Color in Today’s Law Firms” (May 2008), <http://bit.ly/1DZYgYa>; Minority Corporate Counsel Association, “Sustaining Pathways to Diversity: The Next Steps in Understanding and Increasing Diversity and Inclusion in Large Law Firms” (2009), <http://bit.ly/1biQdyh>; Corporate Counsel Women of Color, “The Perspectives of Women of Color Attorneys in Corporate Legal Departments: Research Report” (2011).

13. Pope et al., “Awareness Reduces Racial Bias,” Economic Studies at Brookings (Feb. 2014), www.brookings.edu/~media/research/files/papers/2014/02/awareness-reduces-racial-bias/awareness_reduces_racial_bias_wolfers.pdf.

14. See Shatel, “The Unknown Barry Switzer: Poverty, Tragedy Built Oklahoma Coach Into a Winner,” *The Chicago Tribune* (Dec. 14, 1986), http://articles.chicagotribune.com/1986-12-14/sports/8604030680_1_big-eight-coach-aren-t-many-coaches-oklahoma.

15. One of the best resources for information on bias is an annual review by the Kirwan Institute for the Study of Race and Ethnicity at The Ohio State University: Staats et al., “State of the Science: Implicit Bias Review 2015” (Kirwan Institute, 2015), <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf>; Staats, “State of the Science: Implicit Bias Review 2014” (Kirwan Institute, 2014), <http://bit.ly/Sabh1y>; Staats and Patton, “State of the Science: Implicit Bias Review 2013” (Kirwan Institute, 2013), <http://bit.ly/1KynIcC>.

16. Reeves, *The Next IQ: The Next Level of Intelligence for 21st Century Leaders* (ABA, 2012). See also Lieberman and Berardo, “Interview Bias: Overcoming the Silent Forces Working against You,” *Experience*, <http://bit.ly/1GLnTD1>.

17. “Implicit biases are malleable; therefore, the implicit associations that we have formed can be gradually unlearned and replaced with new mental associations.” Staats et al., *supra* note 15 (citing Blair, 2002; Blair et al., 2001; Dasgupta, 2013; Dasgupta and Greenwald, 2001; Devine, 1989; Kang, 2009; Kang and Lane, 2010; Roos et al., 2013).

18. Rachlinski et al., “Does Unconscious Racial Bias Affect Trial Judges?” 84 *Notre Dame L.Rev.* 1195 (Mar. 2009).

19. Staats and Patton, *supra* note 15.

20. Kawakami et al., “Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation,” 78 *J. of Personality and Social Psychology* 871 (May 2000).

21. See Jolls and Sunstein, “The Law of Implicit Bias,” 94 *California L.Rev.* 969–96 (2006). See also Blair and Lenton, “Imaging Stereotypes Away: The Moderation of Implicit Stereotypes through Mental Imagery,” 8 *J. of Personality and Social Psychology* 828 (May 2001).

22. Uhlmann and Cohen, “‘I Think It, Therefore It’s True’: Effects of Self-Perceived Objectivity on Hiring Discrimination,” 104 *Organizational Behavior and Human Decision Processes* 207 (2007).

23. Mindfulness helps you be more aware; to identify, tolerate, and reduce unproductive thoughts and feelings; to resist having your attention pulled away from what is happening in the moment; to have some mastery over your thought processes; and to reduce stress. For examples of mindfulness exercises, visit the Living Well website at www.livingwell.org.au/

mindfulness-exercises-3. Also recommended is Stanford Professor Shirzad Chamine’s book, *Positive Intelligence: Why Only 20% of Teams and Individuals Achieve Their True Potential and How You can Achieve Yours* (Greenleaf Group Book Press, 2012) and website, www.positiveintelligence.com.

24. Suttie, “Can Mindfulness Help Reduce Racism?” *Greater Good: The Science of a Meaningful Life* (Dec. 9, 2014), <http://bit.ly/1zL2oLf>; Torres, “Mindfulness Mitigates Biases You May Not Know You Have,” *Harvard Business Rev.* (Dec. 24, 2014).

25. Brannon and Walton, “Enacting Cultural Interests: How Intergroup Contact Reduces Prejudice by Sparking Interest in an Out-Group’s Culture,” 79 *J. of Personality and Social Psychology* 631 (Aug. 2013); Kellogg Insight, “Stacking the Deck against Racism” (Oct. 1, 2008), <http://bit.ly/1bZUB6H>. See also Pettigrew, “Generalized Intergroup Contact Effects on Prejudice,” 23 *Personality and Social Psychology Bulletin* 173 (Feb. 1997); Pettigrew and Tropp, “A Meta-Analytic Test of Intergroup Contact Theory,” 90 *J. of Personality and Social Psychology* 751 (May 2006).

26. Galinsky and Moskowitz, “Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism,” 78 *J. of Personality and Social Psychology* 708 (Apr. 2000); Todd et al., “Perspective Taking Combats Automatic Expressions of Racial Bias,” 100 *J. of Personality and Social Psychology* 1027 (June 2011). See also Shih, “Perspective-taking and empathy: Generalizing the reduction of group bias towards Asian Americans to general outgroups,” 4(2) *Asian American J. of Abnormal Psychology* 79 (June 2013) (empathy reduces implicit bias).

27. Almendrala, “When White People See Themselves With Black Skin, Something Interesting Happens,” *Huffington Post* (Dec. 15, 2014), www.huffingtonpost.com/2014/12/15/virtual-body-swapping-racism_n_6328654.html.

28. Gaertner, *Reducing Intergroup Bias: The Common In-group Identity Model* (Psychology Press, 2000) (When we re-categorize others according to features or characteristics we share, we are more likely to see them as part of us and are less likely to discriminate against them as an out group).

29. Gaertner and Dovidio, “Common Ingroup Identity Model,” *The Encyclopedia of Peace Psychology* (2011).

30. Stepanikova, “Racial-Ethnic Biases, Time Pressure, and Medical Decisions,” 53(3) *J. of Health and Social Behavior* 329 (July 2012).

31. Kang, “Communications Law: Bits of Bias,” in Levinson and Smith, eds., *Implicit Racial Bias across the Law* 132 (Cambridge University Press, 2012).

32. Richeson and Nussbaum, “The impact of multiculturalism versus color-blindness on racial bias,” 40 *J. of Experimental Social Psychology* 417 (2004), http://groups.psych.northwestern.edu/spcl/documents/colorblind_final_000.pdf.

33. Phillips, “How Diversity Makes Us Smarter: Being Around People Who Are Different From Us Makes Us More Creative, More Diligent and Harder-Working,” *Scientific American* (Oct. 1, 2014), www.scientificamerican.com/article/how-diversity-makes-us-smarter.

34. Green and Kaley, “Discrimination-Reducing Measures at the Relational Level,” 59 *Hastings L.J.* 1435 (June 2008); Kang et al., “Implicit Bias in the Courtroom,” 590 *UCLA L.Rev.* 1124 (2012).

35. Bersin, “Why Diversity and Inclusion Will Be a Top Priority for 2016,” *Forbes* (Dec. 6, 2015), www.forbes.com/sites/joshbersin/2015/12/06/why-diversity-and-inclusion-will-be-a-top-priority-for-2016/#aea220f4bd40.

36. Whyte, “Tying Diversity to Compensation,” *Diversity Executive* (Dec. 11, 2015), <http://bit.ly/1J7iovb>. ■

EXHIBIT B

476 U.S. 79, 90 L.Ed.2d 69

179James Kirkland BATSON, Petitioner,

v.

KENTUCKY.

No. 84-6263.

Argued Dec. 12, 1985.

Decided April 30, 1986.

Petitioner, a black man, was convicted in a Kentucky state court, and he appealed. The Kentucky Supreme Court affirmed, and petitioner sought review. The Supreme Court, Justice Powell, held that: (1) Equal Protection Clause forbids prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant, and (2) to establish a prima facie case of purposeful discrimination in selection of the petit jury defendant must first show that he is a member of a cognizable racial group, that prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race and that the 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.

Reversed and remanded.

Justice White filed a concurring opinion.

Justice Marshall filed a concurring opinion.

Justice Stevens filed a concurring opinion in which Justice Brennan joined.

Justice O'Connor filed a concurring opinion.

Chief Justice Burger filed a dissenting opinion in which Justice Rehnquist joined.

Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

1. Constitutional Law ⇨221(1)

Jury ⇨33(5.1)

A state denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposely excluded. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇨221(4)

Jury ⇨33(5.1)

State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇨221(1)

Jury ⇨33(5.1)

Equal Protection Clause forbids prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant.

4. Jury ⇨33(5.1)

A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial; to establish such a case, defendant must first show that he is a member of a cognizable racial group, that prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race and that the 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; overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759. U.S.C.A. Const.Amend. 14.

5. Jury ⇨120

In deciding whether a defendant has made a prima facie case of purposeful discrimination in the selection of the petit jury, trial court should consider all relevant circumstances. U.S.C.A. Const.Amend. 14.

6. Jury ⇐120

Once a defendant makes a prima facie showing of purposeful discrimination in selection of the petit jury, burden shifts to State to come forward with a neutral explanation for challenging black jurors; prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption where his intuitive judgment, that they would be partial to the defendant because of their shared race, but rather, must articulate a neutral explanation related to the particular case to be tried. U.S.C.A. Const. Amend. 14.

Syllabus *

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted *voir dire* examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.

Held:

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

1. The principle announced in *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed. Pp. 1716-1719.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. *Strauder v. West Virginia*, 10 Otto 303, 305, 100 U.S. 303, 305, 25 L.Ed. 664. However, the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Pp. 1716-1718.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause 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 State's case against a black defendant. Pp. 1718-1719.

2. The portion of *Swain v. Alabama*, *supra*, concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through

reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

the State's discriminatory use of peremptory challenges is rejected. In *Swain*, it was held that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in *Swain* did not meet that standard because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions relating to selection of the jury venire. A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. Pp. 1719-1722.

3. A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections. Pp. 1723-1724.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties. Pp. 1724-1725.

1815. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings. P. 1725.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., *post*, p. 1725, and MARSHALL, J., *post*, p. 1726, filed concurring opinions. STEVENS, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 1729. O'CONNOR, J., filed a concurring opinion, *post*, p. 1731. BURGER, C.J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 1731. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, *post*, p. 1743.

J. David Niehaus, Louisville, Ky., for petitioner.

Rickie L. Pearson, Asst. Atty. Gen., Frankfort, Ky., for respondent.

Lawrence G. Wallace, Washington, D.C., for United States, as amicus curiae, in support of the respondent by special leave of Court.

182 Justice POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to

exclude members of his race from the petit jury.¹

I

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to exercise peremptory challenges.² The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without express-

ly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that *Swain v. Alabama, supra*, apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow decisions of other States, *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Con-

1. Following the lead of a number of state courts construing their State's Constitution, two Federal Courts of Appeals recently have accepted the view that peremptory challenges used to strike black jurors in a particular case may violate the Sixth Amendment. *Booker v. Jabe*, 775 F.2d 762 (CA6 1985), cert. pending, No. 85-1028; *McCray v. Abrams*, 750 F.2d 1113 (CA2 1984), cert. pending, No. 84-1426. See *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); *Riley v. State*, 496 A.2d 997, 1009-1013 (Del.1985); *State v. Neil*, 457 So.2d 481 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979). See also *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (App. 1980). Other Courts of Appeals have rejected that position, adhering to the requirement that a defendant must prove systematic exclusion of blacks from the petit jury to establish a constitutional violation. *United States v. Childress*, 715 F.2d 1313 (CA8 1983) (en banc), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *United States v. Whitfield*, 715 F.2d 145, 147 (CA4 1983). See *Beed v. State*, 271 Ark. 526, 530-531, 609 S.W.2d 898, 903 (1980); *Blackwell v. State*, 248 Ga. 138, 281 S.E.2d 599, 599-600 (1981); *Gilliard v. State*, 428 So.2d 576, 579 (Miss.), cert. denied, 464 U.S. 867, 104 S.Ct. 40, 78 L.Ed.2d 179 (1983); *People v. McCray*, 57 N.Y.2d 542, 546-549, 457 N.Y.S.2d 441, 442-445,

443 N.E.2d 915, 916-919 (1982), cert. denied, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983); *State v. Lynch*, 300 N.C. 534, 546-547, 268 S.E.2d 161, 168-169 (1980). Federal Courts of Appeals also have disagreed over the circumstances under which supervisory power may be used to scrutinize the prosecutor's exercise of peremptory challenges to strike blacks from the venire. Compare *United States v. Leslie*, 783 F.2d 541 (CA5 1986) (en banc), with *United States v. Jackson*, 696 F.2d 578, 592-593 (CA8 1982), cert. denied, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983). See also *United States v. McDaniels*, 379 F.Supp. 1243 (ED La. 1974).

2. The Kentucky Rules of Criminal Procedure authorize the trial court to permit counsel to conduct *voir dire* examination or to conduct the examination itself. Ky.Rule Crim.Proc. 9.38. After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. Rule 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.

stitution to a jury drawn from a cross section of the community. Petitioner also contended^{1,3} that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under *Swain*.

The Supreme Court of Kentucky affirmed. In a single paragraph, the court declined petitioner's invitation to adopt the reasoning of *People v. Wheeler, supra*, and *Commonwealth v. Soares, supra*. The court observed that it recently had reaffirmed its reliance on *Swain*, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire. See *Commonwealth v. McFerron*, 680 S.W.2d 924 (1984). We granted certiorari, 471 U.S. 1052, 105 S.Ct. 2111, 85 L.Ed. 2d 476 (1985), and now reverse.

II

[1] In *Swain v. Alabama*, this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U.S., at 203-204, 85

3. See, e.g., *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880); *Neal v. Delaware*, 13 Otto 370, 103 U.S. 370, 26 L.Ed. 567 (1881); *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Hollins v. Oklahoma*, 295 U.S. 394, 55 S.Ct. 784, 79 L.Ed. 1500 (1935) (*per curiam*); *Pierre v. Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939); *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947); *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954); *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); *Jones v. Georgia*, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967) (*per curiam*); *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

The basic principles prohibiting exclusion of persons from participation in jury service on account of their race "are essentially the same

S.Ct., at 826-27. This principle has been "consistently and repeatedly" reaffirmed, *id.*, at 204, 85 S.Ct., at 827, in numerous decisions of this Court both preceding and following *Swain*.³ We reaffirm the principle today.⁴

185A

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. *Id.*, at 306-307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

for grand juries and for petit juries." *Alexander v. Louisiana*, 405 U.S. 625, 626, n. 3, 92 S.Ct. 1221, 1223, n. 3, 31 L.Ed.2d 536 (1972); see *Norris v. Alabama, supra*, 294 U.S., at 589, 55 S.Ct., at 583-584. These principles are reinforced by the criminal laws of the United States. 18 U.S.C. § 243.

4. In this Court, petitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross section of the community. Petitioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.*, at 305.⁵ "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. *Akins v. Texas*, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945).⁶ But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Ex parte Virginia*, 10 Otto 339, 345, 100 U.S. 339, 345, 25 L.Ed. 676 (1880). The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder, supra*, 100 U.S., at 305,⁷ or on the false assumption that members of his race as a group are not qualified to serve as jurors, see *Norris v. Alabama*,

294 U.S. 587, 599, 55 S.Ct. 579, 584, 79 L.Ed. 1074 (1935); *Neal v. Delaware*, 13 Otto 370, 397, 103 U.S. 370, 397, 26 L.Ed. 567 (1881).

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder, supra*, 100 U.S., at 308; see *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330, 90 S.Ct. 518, 524, 24 L.Ed.2d 549 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).⁸ Those on the

5. See *Hernandez v. Texas, supra*, 347 U.S., at 482, 74 S.Ct., at 672-73; *Cassell v. Texas*, 339 U.S. 282, 286-287, 70 S.Ct. 629, 631-32, 94 L.Ed. 839 (1950) (plurality opinion); *Akins v. Texas*, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945); *Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Neal v. Delaware, supra*, 103 U.S., at 394.

6. Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), we have never held that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," *id.*, at 538, 95 S.Ct., at 702. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional. *Williams v. Florida*, 399 U.S. 78, 102-103, 90 S.Ct. 1893, 1906-1907, 26 L.Ed.2d 446 (1970).

7. See *Hernandez v. Texas, supra*, 347 U.S., at 482, 74 S.Ct., at 672-673; *Cassell v. Texas, supra*, 339 U.S., at 287, 70 S.Ct., at 632; *Akins v. Texas, supra*, 325 U.S., at 403, 65 S.Ct., at 1279; *Neal v. Delaware, supra*, 103 U.S., at 394.

8. See *Taylor v. Louisiana, supra*, 419 U.S., at 530, 95 S.Ct., at 697-698; *Williams v. Florida, supra*, 399 U.S., at 100, 90 S.Ct., at 1905-1906. See also Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L.Rev. 1 (1966).

In *Duncan v. Louisiana*, decided after *Swain*, the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action by the Due Process Clause of the Fourteenth Amendment. 391 U.S., at 147-158, 88 S.Ct., at 1446-52. The Court emphasized that a defendant's right to be tried by a jury of his peers is designed "to prevent oppression by the Government." *Id.*, at 155, 156-157, 88 S.Ct., at 1450-52. For a jury to perform its intended function as a check on official power, it must be a body drawn from the community. *Id.*, at 156, 88 S.Ct., at 1451; *Glasser v. United States*, 315 U.S. 60, 86-88, 62 S.Ct. 457, 473, 86 L.Ed. 680 (1942). By compromising the representative quality of the jury, discriminatory selection procedures make "juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Akins v. Texas, supra*, 325 U.S., at 408, 65 S.Ct., at 1281 (Murphy, J., dissenting).

venire⁸⁷ must be "indifferently chosen,"⁹ to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Strauder, supra*, 100 U.S., at 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 223-224, 66 S.Ct. 984, 987-88, 90 L.Ed. 1181 (1946). A person's race simply "is unrelated to his fitness as a juror." *Id.*, at 227, 66 S.Ct., at 989 (Frankfurter, J., dissenting). As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U.S., at 308; see *Carter v. Jury Comm'n of Greene County, supra*, 396 U.S., at 329-330, 90 S.Ct., at 523-524; *Neal v. Delaware, supra*, 103 U.S., at 386.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. See *Ballard v. United States*, 329 U.S. 187, 195, 67 S.Ct. 261, 265, 91 L.Ed. 181 (1946); *McCray v. New York*, 461 U.S. 961, 968, 103 S.Ct. 2438, 2443, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of certiorari). Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice

which the law aims to secure to all others." *Strauder*, 100 U.S., at 308.

B

In *Strauder*, the Court invalidated a state statute that provided that only white men could serve as jurors. *Id.*, at 305. We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." *Norris v. Alabama, supra*, 294 U.S., at 589, 55 S.Ct. 579, 580, 79 L.Ed. 1074; see *Hernandez v. Texas*, 347 U.S. 475, 478-479, 74 S.Ct. 667, 670-71, 98 L.Ed. 866 (1954); *Ex parte Virginia, supra*, 100 U.S., at 346-347. Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds,¹⁰ and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors.¹¹ While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, *Hill v. Texas*, 316 U.S. 400, 406, 62 S.Ct. 1159, 1162, 86 L.Ed. 1559 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 893, 97 L.Ed. 1244 (1953); see *McCray v. New York, supra*, 461 U.S., at 965, 968,

9. 4 W. Blackstone, Commentaries 350 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana*, 391 U.S., at 152, 88 S.Ct., at 1449).

10. E.g., *Sims v. Georgia*, 389 U.S. 404, 407, 88 S.Ct. 523, 525, 19 L.Ed.2d 634 (1967) (*per curiam*); *Whitus v. Georgia*, 385 U.S., at 548-549,

87 S.Ct., at 645-46; *Avery v. Georgia*, 345 U.S., at 561, 73 S.Ct., at 892.

11. See *Norris v. Alabama*, 294 U.S., at 589, 55 S.Ct., at 580; *Martin v. Texas*, 200 U.S., at 319, 26 S.Ct., at 338; *Neal v. Delaware*, 103 U.S., at 394, 397.

103 S.Ct., at 2440, 2443¹¹(MARSHALL, J., dissenting from denial of certiorari); see also *Alexander v. Louisiana*, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972).

[2, 3] Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.¹² Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, *United States v. Robinson*, 421 F.Supp. 467, 473 (Conn.1976), mandamus granted *sub nom. United States v. Newman*, 549 F.2d 240 (CA2 1977), the Equal Protection Clause 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 State's case against a black defendant.

III

The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court.¹³ Rather, the Court has been called upon repeatedly to review the application of those principles to particular facts.¹³ A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State. *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S.Ct. 643, 646-647, 17 L.Ed.2d 599 (1967); *Hernandez v. Texas*, *supra*, 347 U.S., at 478-481, 74 S.Ct., at 670-672; *Akins v. Texas*, 325 U.S., at 403-404, 65 S.Ct., at 1279; *Martin v. Texas*, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497 (1906). That question also was at the heart of the portion of *Swain v. Alabama* we reexamine today.¹⁴

12. We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.

Nor do we express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn. See generally J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 183-189* (1977). Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case. In some jurisdictions, where a pool of jurors serves for a substantial period of time, see *id.*, at 116-118, counsel also may seek to learn which members of the pool served on juries in other cases and the outcome of those cases. Counsel even may employ professional investigators to interview persons who have served on a particular petit jury. We have had no occasion to consider particularly this practice. Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here.

13. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739

(1979); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Alexander v. Louisiana*, 405 U.S., at 628-629, 92 S.Ct., at 1224-1225; *Whitus v. Georgia*, *supra*, 385 U.S., at 549-550, 87 S.Ct., at 646-647, 17 L.Ed.2d 599 (1967); *Swain v. Alabama*, 380 U.S. 202, 205, 85 S.Ct. 824, 827-828, 13 L.Ed.2d 759 (1965); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Norris v. Alabama*, *supra*, 294 U.S., at 589, 55 S.Ct., at 580; *Neal v. Delaware*, *supra*, 103 U.S., at 394.

14. The decision in *Swain* has been the subject of extensive commentary. Some authors have argued that the Court should reconsider the decision. E.g., Van Dyke, *supra*, at 166-167; Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 *Loyola (LA) L.Rev.* 247, 268-270 (1973); Kuhn, *Jury Discrimination: The Next Phase*, 41 *S.Cal.L.Rev.* 235, 283-303 (1968); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 *Colum.L.Rev.* 1357 (1985); Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 *Miss.L.J.* 157 (1967); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 *Va.L.Rev.* 1157 (1966). See also Johnson, *Black Innocence and the White Jury*, 83 *Mich.L.Rev.* 1611 (1985).

On the other hand, some commentators have argued that we should adhere to *Swain*. See Saltzburg & Powers, *Peremptory Challenges and*

A

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. 380 U.S., at 209-210, 85 S.Ct., at 830. The record in *Swain* showed that the prosecutor¹⁹ had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. *Id.*, at 210, 85 S.Ct., at 830. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. *Id.*, at 222-224, 85 S.Ct., at 837-838.

The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, *id.*, at 214-220, 85 S.Ct., at 832-836, and the constitutional prohibition on exclusion of persons from jury service on account of race, *id.*, at 222-224, 85 S.Ct., at 837-838. While the Constitution does not confer a right to peremptory challenges, *id.*, at 219, 85 S.Ct., at 835 (citing *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919)), those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury, 380 U.S., at 219, 85 S.Ct., at 835.¹⁵ To preserve the peremptory nature of the prosecutor's challenge, the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges. *Id.*, at 221-222, 85 S.Ct., at 836-837.

the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337 (1982).

15. In *Swain*, the Court reviewed the "very old credentials" of the peremptory challenge system and noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." 380 U.S., at 219, 85 S.Ct., at 835; see *id.*, at 212-219, 85 S.Ct., at 831-835.

16. *E.g.*, *United States v. Jenkins*, 701 F.2d 850, 859-860 (CA10 1983); *United States v. Boykin*,

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, at 224, 85 S.Ct., at 838. Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. *Ibid.* For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the¹⁹² circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.*, at 223, 85 S.Ct., at 837. Evidence offered by the defendant in *Swain* did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. *Id.*, at 224-228, 85 S.Ct., at 838-840.

A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause.¹⁶

679 F.2d 1240, 1245 (CA8 1982); *United States v. Pearson*, 448 F.2d 1207, 1213-1218 (CA5 1971); *Thigpen v. State*, 49 Ala.App. 233, 241, 270 So.2d 666, 673 (1972); *Jackson v. State*, 245 Ark. 331, 336, 432 S.W.2d 876, 878 (1968); *Johnson v. State*, 9 Md.App. 143, 148-150, 262 A.2d 792, 796-797 (1970); *State v. Johnson*, 125 N.J.Super. 438, 311 A.2d 389 (1973) (*per curiam*); *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973).

Since this interpretation of *Swain* has placed on defendants a crippling burden of proof,¹⁷ prosecutors' peremptory challenges are now largely immune¹⁹³ from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

B

Since the decision in *Swain*, we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." *Whitus v. Georgia*, 385 U.S., at 550, 87 S.Ct., at 646-47 (citing *Tarrance v. Florida*, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903)). In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington v. Davis*, 426 U.S., at 242, 96 S.Ct., at 2049. We have observed that under some circum-

stances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Ibid.* For example, "total or seriously disproportionate exclusion of Negroes from jury venires," *ibid.*, "is itself such an 'unequal application of the law ... as to show intentional discrimination,'" *id.*, at 241, 96 S.Ct., at 2048 (quoting *Akins v. Texas*, 325 U.S., at 404, 65 S.Ct., at 1279).

Moreover, since *Swain*, we have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima¹⁹⁴ facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Washington v. Davis*, *supra*, 426 U.S., at 239-242, 96 S.Ct., at 2047-49. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander v. Louisiana*, 405 U.S., at 632, 92 S.Ct., at 1226. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. See *Alexander v. Louisiana*, *supra*, 405 U.S., at 632, 92 S.Ct., at 1226; *Jones v. Georgia*, 389 U.S. 24, 25, 88 S.Ct. 4, 5, 19 L.Ed.2d 25 (1967). Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v. Louisiana*, *supra*, 405 U.S., at 632, 92 S.Ct., at 1226; see *Washington v. Davis*, *supra*, 426 U.S., at 241, 96 S.Ct., at 2048.¹⁸

17. See *McCray v. Abrams*, 750 F.2d, at 1120, and n. 2. The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised

their peremptory challenges. *United States v. Pearson*, 448 F.2d 1207, 1217 (1971). The court believed this burden to be "most difficult" to meet. *Ibid.* In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable. See *People v. Wheeler*, 22 Cal.3d, at 285-286, 148 Cal.Rptr., at 908-909, 583 P.2d, at 767-768 (1978).

18. Our decisions concerning "disparate treatment" under Title VII of the Civil Rights Act of

The showing necessary to establish a prima facie case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. *E.g.*, *Castaneda v. Partida*, 430 U.S. 482, 494-495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977); *Alexander v. Louisiana*, *supra*, 405 U.S., at 631-632, 92 S.Ct., at 1225-1226. The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment. *Castaneda v. Partida*, *supra*, 430 U.S., at 494, 97 S.Ct., at 1280. In combination with that evidence, a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time. *Id.*, at 494, 97 S.Ct., at 1280. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the "result bespeaks discrimination." *Hernandez v. Texas*, 347 U.S., at 482, 74 S.Ct., at 672-73; see *Arlington Heights v. Metropolitan Housing Development Corp.*, *supra*, 429 U.S., at 266, 97 S.Ct., at 564.

Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a prima facie case "in other ways than by evidence of long-continued unexplained absence" of members of his race "from many panels." *Cassell v. Texas*, 339 U.S. 282, 290, 70 S.Ct. 629, 633, 94 L.Ed. 839 (1950) (plurality opinion). In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Whitus v. Georgia*, *supra*, 385 U.S.,

at 552, 87 S.Ct., at 647; see *Castaneda v. Partida*, *supra*, 430 U.S., at 494, 97 S.Ct., at 1280; *Washington v. Davis*, *supra*, 426 U.S., at 241, 96 S.Ct., at 2048; *Alexander v. Louisiana*, *supra*, 405 U.S., at 629-631, 92 S.Ct., at 1224-26. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. When circumstances suggest the need, the trial court must undertake a "factual inquiry" that "takes into account all possible explanatory factors" in the particular case. *Alexander v. Louisiana*, *supra*, at 630, 92 S.Ct., at 1225.

Thus, since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*. These decisions are in accordance with the proposition, articulated in *Arlington Heights v. Metropolitan Housing Department Corp.*, that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." 429 U.S., at 266, n. 14, 97 S.Ct., at 564, n. 14. For evidentiary requirements⁹⁶ to dictate that "several must suffer discrimination" before one could object, *McCray v. New York*, 461 U.S., at 965, 103 S.Ct., at 2440 (MARSHALL, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all.¹⁹

1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). The party alleging that he has been the victim of

intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S., at 252-256, 101 S.Ct., at 1093-95.

19. Decisions under Title VII also recognize that a person claiming that he has been the victim of intentional discrimination may make out a prima facie case by relying solely on the facts

C

[4] The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. See *Castaneda v. Partida*, *supra*, 430 U.S., at 494-495, 97 S.Ct., at 1280; *Washington v. Davis*, 426 U.S., at 241-242, 96 S.Ct., at 2048-2049; *Alexander v. Louisiana*, *supra*, 405 U.S., at 629-631, 92 S.Ct., at 1224-1226. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, *supra*, 430 U.S., at 494, 97 S.Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S., at 562, 73 S.Ct., at 892. Finally, the defendant 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. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

[5] In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances.⁹⁷ For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an

concerning the alleged discrimination against

inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

[6] Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. See *McCray v. Abrams*, 750 F.2d, at 1132; *Booker v. Jabe*, 775 F.2d 762, 773 (CA6 1985), cert. pending, No. 85-1028. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. Cf. *Norris v. Alabama*, 294 U.S., at 598-599, 55 S.Ct., at 583-84; see *Thompson v. United States*, 469 U.S. 1024, 1026, 105 S.Ct. 443, 445, 83 L.Ed.2d 369 (1984) (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, *supra*, at 1716, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of [98]such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by

him. See cases in n. 18, *supra*.

denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." *Alexander v. Louisiana*, 405 U.S., at 632, 92 S.Ct., at 1226. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." *Norris v. Alabama, supra*, 294 U.S. at 598, 55 S.Ct., at 583-84. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.²⁰ The trial court then will have the duty to determine if the defendant has established purposeful discrimination.²¹

IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an impor-

tant position in our trial procedures, we do not agree that our decision today will undermine the ¹⁹⁹contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice.²² In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens,²³ and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be fol-

20. The Court of Appeals for the Second Circuit observed in *McCray v. Abrams*, 750 F.2d, at 1132, that "[t]here are any number of bases" on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause. As we explained in another context, however, the prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S., at 258, 101 S.Ct., at 1096.

21. In a recent Title VII sex discrimination case, we stated that "a finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.*, at 575-576, 105 S.Ct., at 1512-1513.

22. While we respect the views expressed in Justice MARSHALL's concurring opinion concerning prosecutorial and judicial enforcement of

our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

23. For example, in *People v. Hall*, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges.

lowed upon a defendant's timely objection to a prosecutor's challenges.²⁴

¶100V

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. *E.g.*, *Whitus v. Georgia*, 385 U.S., at 549-550, 87 S.Ct., at 646-47; *Hernandez v. Texas*, 347 U.S., at 482, 74 S.Ct., at 672-673; *Patton v. Mississippi*, 332 U.S., at 469, 68 S.Ct., at 187.²⁵

It is so ordered.

Justice WHITE, concurring.

The Court overturns the principal holding in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons. The Court now rules that such use of peremptory challenges in a given case may, but does not necessarily,

raise an inference, which the prosecutor carries the burden of refuting, ¶101 that his strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try a black defendant.

I agree that, to this extent, *Swain* should be overruled. I do so because *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries.* This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause.

It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs. If the defendant objects, the judge, in whom the Court puts considerable trust, may determine that the prosecution must respond. If not persuaded otherwise, the judge may conclude that the challenges rest on the belief that blacks could not fairly try a black defendant. This, in effect, attributes to the prosecutor the view that all blacks should be eliminated from the entire venire. Hence, the Court's prior cases dealing with jury venires rather than petit juries are not without relevance in this case.

mandamus granted *sub nom. United States v. Newman*, 549 F.2d 240 (CA2 1977).

24. In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, see *Booker v. Jabe*, 775 F.2d, at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, see *United States v. Robinson*, 421 F.Supp. 467, 474 (Conn.1976),

25. To the extent that anything in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), is contrary to the principles we articulate today, that decision is overruled.

* Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant.

The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional, without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all. If he does, the prosecutor, who in most cases has had a chance to *voir dire* the prospective jurors, will have an opportunity to give trial-related reasons for his strikes—some¹⁰² satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant.

Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

I would, however, adhere to the rule announced in *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), that *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), which held that the States cannot deny jury trials in serious criminal cases, did not require reversal of a state conviction for failure to grant a jury trial where the trial began prior to the date of the announcement in the *Duncan* decision. The same result was reached in *DeStefano* with respect to the retroactivity of *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), as it was in *Daniel v. Louisiana*, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975) (*per curiam*), with respect to the decision in *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), holding that the systematic exclusion of women from jury panels violated the Sixth and Fourteenth Amendments.

Justice MARSHALL, concurring.

I join Justice POWELL's eloquent opinion for the Court, which takes a historic

1. *Commonwealth v. Martin*, 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray v. New York*, 461 U.S. 961,

step toward eliminating the shameful practice of racial discrimination in the selection of juries. The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available.¹ I nonetheless write separately to express my views. The decision today will not end the racial discrimination¹⁰³ that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venues. See *Swain v. Alabama*, 380 U.S. 202, 231-238, 85 S.Ct. 824, 841-846, 13 L.Ed.2d 759 (1965) (Goldberg, J., dissenting); Kuhn, *Jury Discrimination: The Next Phase*, 41 S.Cal.L.Rev. 235 (1968); see also J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 155-157* (1977) (hereinafter Van Dyke). Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. See *United States v. Carter*, 528

965, n. 2, 103 S.Ct. 2438, 2440, n. 2, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of certiorari).

Cite as 106 S.Ct. 1712 (1986)

F.2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors), cert. denied, 425 U.S. 961, 96 S.Ct. 1745, 48 L.Ed.2d 206 (1976); *United States v. McDaniels*, 379 F.Supp. 1243 (ED La.1974) (in 53 criminal cases in 1972-1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); *McKinney v. Walker*, 394 F.Supp. 1015, 1017-1018 (SC 1974) (in 13 criminal trials in 1970-1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors), affirmance order, 529 F.2d 516 (CA4 1975).² Prosecutors¹⁰⁴ have explained to courts that they routinely strike black jurors, see *State v. Washington*, 375 So.2d 1162, 1163-1164 (La.1979). An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "any member of a minority group."³ In 100 felony trials in Dallas County in 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.⁴

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that "in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color." *Neal v. Delaware*, 13 Otto 370, 394, 103

U.S. 370, 394, 26 L.Ed. 567 (1881), quoting *Virginia v. Rives*, 10 Otto 313, 323, 100 U.S. 313, 323, 25 L.Ed. 667 (1880). Justice REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and . . . in many cases hopelessly mistaken" notions. *Post*, at 1745. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes—even an action that does not serve the State's interests. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks ¹⁰⁵lack the "intelligence, experience, or moral integrity," *Neal, supra*, 103 U.S., at 397, to be entrusted with that role.

II

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court, *ante*, at 1723, has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the

2. See also *Harris v. Texas*, 467 U.S. 1261, 104 S.Ct. 3556, 82 L.Ed.2d 858 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Williams v. Illinois*, 466 U.S. 981, 104 S.Ct. 2364, 80 L.Ed.2d 836 (1984) (MARSHALL, J., dissenting from denial of certiorari).

3. Van Dyke, at 152, quoting Texas Observer, May 11, 1973, p. 9, col. 2. An earlier jury-selection treatise circulated in the same county in-

structed prosecutors: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." Quoted in Dallas Morning News, Mar. 9, 1986, p. 29, col. 1.

4. *Id.*, at 1, col. 1; see also Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis U.L.J. 662 (1974).

limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. See *Commonwealth v. Robinson*, 382 Mass. 189, 195, 415 N.E.2d 805, 809-810 (1981) (no prima facie case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); *People v. Rousseau*, 129 Cal.App.3d 526, 536-537, 179 Cal.Rptr. 892, 897-898 (1982) (no prima facie case where prosecutor peremptorily strikes only two blacks on jury panel). Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Second, when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives. See *King v. County of Nassau*, 581 F.Supp. 493, 1106501-502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see *People v. Hall*, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), or seemed "uncommunicative," *King, supra*, at 498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall, supra*, at 165, 197 Cal.Rptr. at 73, 672 P.2d, at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King, supra*, at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. *Post*, at 1745; see also THE CHIEF JUSTICE's dissenting opinion, *post*, at 1737. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet. It is worth remembering that "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole." *Rose v. Mitchell*, 443 U.S. 545, 558-559, 99 S.Ct. 2993, 3001, 61 L.Ed.2d 739 (1979), quoted in *Vasquez v. Hillery*, 474 U.S. 254, 264, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986).

III

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167-169; Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 Loyola (LA) L.Rev. 247, 269-270 (1973). Justice Goldberg, dissenting in *Swain*, emphasized that "[w]ere it necessary to make an absolute choice be-

tween the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." 380 U.S., at 244, 85 S.Ct., at 849. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," *Lewis v. United States*, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011 (1892), and "one of the most important of the rights secured to the accused," *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894). See Van Dyke, at 167; Brown, McGuire, & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 New England L.Rev. 192 (1978). I would not find that an acceptable solution. Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes v. Missouri*, 120 U.S. 68, 70, 7 S.Ct. 350, 353, 30 L.Ed. 578 (1887). We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of §108 peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the *Lewis* and *Pointer* Courts are noted above; the *Swain* Court emphasized the "very old credentials" of the peremptory challenge, 380 U.S., at 212, 85 S.Ct., at 813, and cited the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.*, at 219, 85 S.Ct.,

at 835. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. *Frazier v. United States*, 335 U.S. 497, 505, n. 11, 69 S.Ct. 201, 206, n. 11, 93 L.Ed. 187 (1948); *United States v. Wood*, 299 U.S. 123, 145, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936); *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919); see also *Swain*, 380 U.S., at 219, 85 S.Ct., at 835. The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

Justice STEVENS, with whom Justice BRENNAN joins, concurring.

In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado v. Connelly*, 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and *New Jersey v. T.L.O.*, 468 U.S. 1214, 104 S.Ct. 3583, 82 L.Ed.2d 881 (1984) (STEVENS, J., dissenting)—cases in which the Court directed the State to brief and argue questions not presented in its petition §109 for certiorari—and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision. *Post*, at 1733, nn. 1 and 2. In this case, however—unlike *Connelly* and *T.L.O.*—the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the

Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the equal protection issue:

"... Mr. Chief Justice, and may it please the Court, the issue before this Court today is simply whether Swain versus Alabama should be reaffirmed....

"... We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents perhaps an address to the problem. Swain dealt primarily with the use of peremptory challenges to strike individuals who were of a cognizable or identifiable group.

"Petitioners show no case other than the State of California's case dealing with the use of peremptories wherein the Sixth Amendment was cited as authority for resolving the problem. So, we believe that the Fourteenth Amendment is indeed the issue. That was the guts and primarily the basic concern of Swain.

"In closing, we believe that the trial court of Kentucky and the Supreme Court of Kentucky have firmly embraced

Swain, and we respectfully request that this Court affirm the opinion of the Kentucky court as well as to reaffirm Swain versus Alabama."¹

In addition to the party's reliance on the equal protection argument in defense of the judgment, several *amici curiae*¹¹¹⁰ also addressed that argument. For instance, the argument in the brief filed by the Solicitor General of the United States begins:

"PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS

"A. Under *Swain v. Alabama* A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case"²

Several other *amici* similarly emphasized this issue.³

In these circumstances, although I suppose it is possible that reargument might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years,⁴

1. Tr. of Oral Arg. 27-28, 43.
2. Brief for United States as *Amicus Curiae* 7.
3. The argument section of the brief for the National District Attorneys Association, Inc., as *amicus curiae* in support of respondent begins as follows:

"This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain v. Alabama*." *Id.*, at 5.

Amici supporting petitioner also emphasized the importance of the equal protection issue. See, e.g., Brief for NAACP Legal Defense and Educational Fund, American Jewish Committee, and American Jewish Congress as *Amici Curiae* 24-36; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 11-17; Brief for Elizabeth Holtzman as *Amicus Curiae* 13.

4. See *McCray v. New York*, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) (opinion of STEVENS, J., respecting denial of certiorari); *id.*, at 963, 103 S.Ct., at 2439 (MARSHALL, J., dissenting from denial of certiorari).

The eventual federal habeas corpus disposition of *McCray*, of course, proved to be one of the landmark cases that made the issues in this case ripe for review. *McCray v. Abrams*, 750 F.2d 1113 (CA2 1984), cert. pending, No. 84-1426. See also Pet. for Cert. 5-7 (relying heavily on *McCray* as a reason for review). In *McCray*, as in almost all opinions that have considered similar challenges, the Court of Appeals for the Second Circuit explicitly addressed the equal protection issue and the viability of *Swain*. 750 F.2d, at 1118-1124. The pending petition for certiorari in *McCray* similarly raises the equal protection question that has long been central to this issue. Pet. for Cert. in No. 84-1426 (Question 2). Indeed, shortly after agreeing to hear *Batson*, the Court was presented with a motion to consolidate *McCray* and *Batson*, and consider the cases together. Presumably because the Court believed that *Batson* adequately presented the issues with which other

I believe the Court acts wisely in 111 resolving the issue now on the basis of the arguments that have already been fully presented without any special invitation from this Court.⁵

Justice O'CONNOR, concurring.

I concur in the Court's opinion and judgment, but also agree with the views of THE CHIEF JUSTICE and Justice WHITE that today's decision does not apply retroactively.

112 Chief Justice BURGER, joined by Justice REHNQUIST, dissenting.

We granted certiorari to decide whether petitioner was tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i.

I

Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Reversal of such settled principles would be unusual enough on its own terms,

courts had consistently grappled in considering this question, the Court denied the motion. See *Abrams v. McCray*, 471 U.S. 1097, 105 S.Ct. 2318, 85 L.Ed.2d 837 (1985). Cf. *Ibid.* (BRENNAN, MARSHALL, and STEVENS, JJ., dissenting from denial of motion to consolidate).

5. Although I disagree with his criticism of the Court in this case, I fully subscribe to THE CHIEF JUSTICE's view, expressed today, that the Court should only address issues necessary to the disposition of the case or petition. For contrasting views, see, e.g., *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 551, 106 S.Ct. 1326, 1336, 89 L.Ed.2d 501 (1986) (BURGER, C.J., dissenting) (addressing merits even though majority of the Court found a lack of standing); *Colorado v. Nunez*, 465 U.S. 324, 104 S.Ct. 1257, 79 L.Ed.2d 338 (1984) (concurring

for only three years ago we said that "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420, 103 S.Ct. 2481, 2487, 76 L.Ed.2d 687 (1983). What makes today's holding truly extraordinary is that it is based on a constitutional argument that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky.

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment. See Brief for Appellant 14 and Reply Brief for Appellant 1 in No. 84-SC-733-MR (Ky.). As petitioner explained at oral argument here: "We have not made an equal protection claim. . . . We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such." Tr. of Oral Arg. 6-7. Petitioner has not suggested any barrier prevented raising an equal protection claim in the Kentucky courts. In such circumstances, review of an equal protection argument is improper¹¹³ in this Court: "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state

opinion, joined by BURGER, C.J.) (expressing view on merits even though writ was dismissed as improvidently granted because state-court judgment rested on adequate and independent state grounds); *Florida v. Casal*, 462 U.S. 637, 639, 103 S.Ct. 3100, 3101-3102, 77 L.Ed.2d 277 (1983) (BURGER, C.J., concurring) (agreeing with Court that writ should be dismissed as improvidently granted because judgment rested on adequate and independent state grounds, but noting that "the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement"). See also *Colorado v. Connelly*, 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986) (ordering parties to address issue that neither party raised); *New Jersey v. T.L.O.*, 468 U.S. 1214 (1984) (same).

court decisions. . . .” *Illinois v. Gates*, 459 U.S. 1028, 1029, n. 2, 103 S.Ct. 436, 437, n. 2, 74 L.Ed.2d 595 (1982) (STEVENS, J., dissenting) (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162-63, 22 L.Ed.2d 398 (1969)). Neither the Court nor Justice STEVENS offers any justification for departing from this time-honored principle, which dates to *Owings v. Norwood’s Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809), and *Crowell v. Randell*, 10 Pet. 368, 9 L.Ed. 458 (1836).

Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here. This provides an additional and completely separate procedural novelty to today’s decision. Petitioner’s “question presented” involved only the “constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community.” Pet. for Cert. i. These provisions are found in the Sixth Amendment, not the Equal Protection Clause of the Fourteenth Amendment relied upon by the Court. In his brief on the merits, under a heading distinguishing equal protection cases, petitioner noted “the irrelevance of the *Swain* analysis to the present case,” Brief for Petitioner 11; instead petitioner relied solely on Sixth Amendment analysis found in cases such as *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). During oral argument, counsel for petitioner was pointedly asked:

“QUESTION: Mr. Niehaus, Swain was an equal protection challenge, was it not?”

“MR. NIEHAUS: Yes.

“QUESTION: Your claim here is based solely on the Sixth Amendment?”

“MR. NIEHAUS: Yes.

“QUESTION: Is that correct?”

“MR. NIEHAUS: That is what we are arguing, yes.

¹¹⁴“QUESTION: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?”

“MR. NIEHAUS: We have not made an equal protection claim. I think that Swain will have to be reconsidered to a certain extent if only to consider the arguments that are made on behalf of affirmance by the respondent and the solicitor general.

“MR. NIEHAUS: We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such. . . .” Tr. of Oral Arg. 5-7.

A short time later, after discussing the difficulties attendant with a Sixth Amendment claim, the following colloquy occurred:

“QUESTION: So I come back again to my question why you didn’t attack Swain head on, but I take it if the Court were to overrule Swain, you wouldn’t like that result.

“MR. NIEHAUS: Simply overrule Swain without adopting the remedy?”

“QUESTION: Yes.

“MR. NIEHAUS: I do not think that would give us much comfort, Your Honor, no.

“QUESTION: That is a concession.” *Id.*, at 10.

Later, petitioner’s counsel refused to answer the Court’s questions concerning the implications of a holding based on equal protection concerns:

“MR. NIEHAUS: . . . [T]here is no state action involved where the defendant is exercising his peremptory challenge.

¹¹⁵“QUESTION: But there might be under an equal protection challenge if it is the state system that allows that kind of a strike.

“MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question. . . .” *Id.*, at 20.

In reaching the equal protection issue despite petitioner’s clear refusal to present

it, the Court departs dramatically from its normal procedure without any explanation. When we granted certiorari, we could have—as we sometimes do—directed the parties to brief the equal protection question in addition to the Sixth Amendment question. See, e.g., *Paris Adult Theatre I v. Slaton*, 408 U.S. 921, 92 S.Ct. 2487, 33 L.Ed.2d 331 (1972); *Colorado v. Connelly*, 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986).¹ Even following oral argument, we could have—as we sometimes do—directed reargument on this particular question. See, e.g., *Brown v. Board of Education*, 345 U.S. 972, 73 S.Ct. 1114, 97 L.Ed. 1388 (1953); *Illinois v. Gates, supra*; *New Jersey v. T.L.O.*, 468 U.S. 1214, 104 S.Ct. 3583, 82 L.Ed.2d 881 (1984).² This step is particularly appropriate where reexamination¹¹⁶ of a prior decision is under consideration. See, e.g., *Garcia v. San Antonio Metropolitan Transit Authority*, 468 U.S. 1213, 104 S.Ct. 3582, 82 L.Ed.2d 880 (1984) (directing reargument and briefing on issue of whether *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), should be reconsidered); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 422 U.S. 1005, 95 S.Ct. 2624, 45 L.Ed.2d 668 (1975) (directing reargument and briefing on issue of whether the hold-

ing in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), should be reconsidered). Alternatively, we could have simply dismissed this petition as improvidently granted.

The Court today rejects these accepted courses of action, choosing instead to reverse a 21-year-old unanimous constitutional holding of this Court on the basis of constitutional arguments expressly disclaimed by petitioner. The only explanation for this action is found in Justice STEVENS' concurrence. Justice STEVENS apparently believes that this issue is properly before the Court because "the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance." *Ante*, at 1729. Cf. *Illinois v. Gates*, 459 U.S., at 1029, n. 1, 103 S.Ct., at 437, n. 1 (STEVENS, J., dissenting) ("[T]here is no impediment to presenting a new argument as an alternative basis for affirming the decision below") (emphasis in original). To be sure, respondent and supporting amici did cite *Swain* and the Equal Protection Clause. But their arguments were largely limited to explaining¹¹⁷ that *Swain* placed a negative gloss on the Sixth Amendment claim actually raised by petitioner. In any event,

1. In *Colorado v. Connelly*, Justice BRENNAN, joined by Justice STEVENS, filed a memorandum objecting to this briefing of an additional question, explaining that "it is hardly for this Court to 'second chair' the prosecutor to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), [o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.' Given petitioner's express disclaimer that [this] issue is presented, that question obviously is not 'fairly included' in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim." 474 U.S., at 1052, 106 S.Ct., at 786-87. If the Court's limited step of directing briefing on an additional point at the time certiorari was granted was "cause for concern," I would think *a fortiori* that the far more expansive action the Court takes today would warrant similar concern.

2. Justice STEVENS, joined by Justice BRENNAN and Justice MARSHALL, dissented from the order directing reargument in *New Jersey v. T.L.O.* They explained:

"The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that [petitioner] decided not to bring here. . . . Volunteering unwanted advice is rarely a wise course of action.

"I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." 468 U.S., at 1215-1216, 104 S.Ct., at 3584-3585.

Justice STEVENS' proffered explanation notwithstanding, see *ante*, at 1729 (concurring opinion), I am at a loss to discern how one can consistently hold these views and still reach the question the Court reaches today.

it is a strange jurisprudence that looks to the arguments made by respondent to determine the breadth of the questions presented for our review by petitioner. Of course, such a view is directly at odds with our Rule 21.1(a), which provides that “[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.” Justice STEVENS does not cite, and I am not aware of, *any* case in this Court’s nearly 200-year history where the alternative grounds urged by respondent to affirm a judgment were then seized upon to permit petitioner to obtain relief from that very judgment despite petitioner’s failure to urge that ground.

Justice STEVENS also observes that several *amici curiae* address the equal protection argument. *Ante*, at 1730, and n. 3. But I thought it well settled that, even if a “point is made in an *amicus curiae* brief,” if the claim “has never been advanced by petitioners . . . we have no reason to pass upon it.” *Knetsch v. United States*, 364 U.S. 361, 370, 81 S.Ct. 132, 137, 5 L.Ed.2d 128 (1960).

When objections to peremptory challenges were brought to this Court three years ago, Justice STEVENS agreed with Justice MARSHALL that the challenge involved “a significant and recurring question of constitutional law.” *McCray v. New York*, 461 U.S. 961, 963, 103 S.Ct. 2438, 2439, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of cer-

tiorari), referred to with approval, *id.*, at 961, 103 S.Ct., at 2438 (opinion of STEVENS, J., respecting denial of certiorari). Nonetheless, Justice STEVENS wrote that the issue could be dealt with “more wisely at a later date.” *Id.*, at 962, 103 S.Ct., at 2439. The same conditions exist here today. Justice STEVENS concedes that reargument of this case “might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years.” *Ante*, at 1730. Thus, at bottom his position is that we should overrule an extremely important prior constitutional decision of this Court on a claim not advanced here, even though briefing and oral argument on this claim might convince us to do otherwise.³ I believe that “[d]ecisions made in this manner are unlikely to withstand the test of time.” *United States v. Leon*, 468 U.S. 897, 962, 104 S.Ct. 3430, 3448, 82 L.Ed.2d 702 (1984) (STEVENS, J., dissenting). Before contemplating such a holding, I would at least direct reargument and briefing on the issue of whether the equal protection holding in *Swain* should be reconsidered.

II

Because the Court nonetheless chooses to decide this case on the equal protection grounds not presented, it may be useful to discuss this issue as well. The Court acknowledges, albeit in a footnote, the “‘very old credentials’” of the peremptory challenge and the “‘widely held belief that

3. This fact alone distinguishes the cases cited by Justice STEVENS as support for today’s unprecedented action. See *ante*, at 1730–1731, n. 5. In *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 551, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (BURGER, C.J., dissenting), *Colorado v. Nunez*, 465 U.S. 324, 104 S.Ct. 1257, 79 L.Ed.2d 338 (1984) (WHITE, J., concurring), and *Florida v. Casal*, 462 U.S. 637, 639, 103 S.Ct. 3100, 3101–02, 77 L.Ed.2d 277 (1983) (BURGER, C.J., concurring), the issues discussed were all the primary issues advanced, briefed, and argued by the petitioners in this Court or related directly to the Court’s basis for deciding the case. To be sure, some of the discussion in these separate statements might be parsimoniously viewed as “[un]necessary to the disposition of the case or petition.” *Ante*, at 1730–1731, n. 5. But under

this approach, many dissenting opinions and dissents from the denial of certiorari would have to be condemned as well. More important, in none of these separate statements was it even suggested that it would be proper to overturn a state-court judgment on issues that had not been briefed and argued by petitioner in this Court, as the Court does today. Finally, in *Colorado v. Connelly*, 474 U.S. 1050, 106 S.Ct. 824, 13 L.Ed.2d 759 (1986), and *New Jersey v. T.L.O.*, 468 U.S. 1214, 104 S.Ct. 3583, 82 L.Ed.2d 881 (1984), we directed briefing and argument on particular questions before deciding them. Such a procedure serves the desirable end of ensuring that the issues which the Court wishes to consider will be fully briefed and argued. My suggestion that the Court hear reargument of this case serves the same end.

peremptory challenge is a necessary part of trial by jury.’” *Ante*, at 1720, n. 15 (quoting *Swain*, 380 U.S., at 219, 85 S.Ct., at 835). But proper resolution of this case requires more than a nodding reference to the purpose of the challenge. Long ago it was¹¹⁹ recognized that “[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial.” W. Forsyth, *History of Trial by Jury* 175 (1852). The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed. “It was in use amongst the Romans in criminal cases, and the *Lex Servilia* (B.C. 104) enacted that the accuser and the accused should severally propose one hundred *judices*, and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime.” *Ibid.*; see also J. Pettingal, *An Enquiry into the Use and Practice of Juries Among the Greeks and Romans* 115, 135 (1769).

In *Swain* Justice WHITE traced the development of the peremptory challenge from the early days of the jury trial in England:

“In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to ‘infinite delays and danger.’ Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if ‘they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain.’ So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to ‘stand aside’ until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect

to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies.” 380 U.S., at 212–213, 85 S.Ct., at 831–32 (footnotes omitted).

¹²⁰Peremptory challenges have a venerable tradition in this country as well:

“In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. . . .

“The course in the States apparently paralleled that in the federal system. The defendant’s right of challenge was early conferred by statute, the number often corresponding to the English practice, the prosecution was thought to have retained the Crown’s common-law right to stand aside, and by 1870, most if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant.” *Id.*, at 214–216, 85 S.Ct., at 833 (footnotes omitted).

The Court’s opinion, in addition to ignoring the teachings of history, also contrasts with *Swain* in its failure to even discuss the rationale of the peremptory challenge. *Swain* observed:

“The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise. In this way the peremptory satisfies the rule that ‘to perform its high

function in the best way, "justice must satisfy the appearance of justice."'" *Id.*, at 219, 85 S.Ct., at 835 (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)).

¹²¹Permitting unexplained peremptories has long been regarded as a means to strengthen our jury system in other ways as well. One commentator has recognized:

"The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise. . . . [For example,] [a]lthough experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is socially divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not." Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 *Stan.L.Rev.* 545, 553-554 (1975).

For reasons such as these, this Court concluded in *Swain* that "the [peremptory] challenge is 'one of the most important of the rights'" in our justice system. *Swain*, 380 U.S., at 219, 85 S.Ct., at 835 (quoting *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894)). For close to a century, then, it has been settled that "[t]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain, supra*, at 219, 85 S.Ct., at 835 (citing *Lewis v. United*

States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)).

Instead of even considering the history or function of the peremptory challenge, the bulk of the Court's opinion is spent recounting the well-established principle that intentional exclusion of racial groups from jury venires is a ¹²²violation of the Equal Protection Clause. I too reaffirm that principle, which has been a part of our constitutional tradition since at least *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). But if today's decision is nothing more than mere "application" of the "principles announced in *Strauder*," as the Court maintains, *ante*, at 1719, some will consider it curious that the application went unrecognized for over a century. The Court in *Swain* had no difficulty in unanimously concluding that cases such as *Strauder* did not require inquiry into the basis for a peremptory challenge. See *post*, at 1743-1744 (REHNQUIST, J., dissenting). More recently we held that "[d]efendants are not entitled to a jury of any particular composition. . . ." *Taylor v. Louisiana*, 419 U.S., at 538, 95 S.Ct., at 702.

A moment's reflection quickly reveals the vast differences between the racial exclusions involved in *Strauder* and the allegations before us today:

"Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try *any* case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed *litigants* in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that *particular case* than others on the same venire.

"Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory

Cite as 106 S.Ct. 1712 (1986)

challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular 1123isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." *United States v. Leslie*, 783 F.2d 541, 554 (CA5 1986) (en banc).

Unwilling to rest solely on jury venire cases such as *Strauder*, the Court also invokes general equal protection principles in support of its holding. But peremptory challenges are often lodged, of necessity, for reasons "normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Swain, supra*, 380 U.S., at 220, 85 S.Ct., at 835-36. Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." *Ante*, at 1723. As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to "an arbitrary and capricious right," *Swain, supra*, at 219, 85 S.Ct., at 835 (quoting *Lewis v. United States, supra*, 146 U.S., at 378, 13 S.Ct., at 139); a constitutional principle that may invalidate state action on the basis of "stereotypic notions," *Mississippi University*

for Women v. Hogan, 458 U.S. 718, 725, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982), does not explain the breadth of a procedure exercised on the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" *Lewis, supra*, 146 U.S., at 376, 13 S.Ct., at 138 (quoting 4 W. Blackstone, Commentaries * 353).

That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge *on the basis of race*; the 1124Court's opinion clearly contains such a limitation. See *ante*, at 1723 (to establish a prima facie case, "the defendant first must show that he is a member of a cognizable racial group") (emphasis added); *ibid.* ("Finally, the defendant 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*") (emphasis added). But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); age, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); religious or political affiliation, *Karcher v. Daggett*, 462 U.S. 725, 748, 103 S.Ct. 2653, 2668-2669, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring); mental capacity, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); number of children, *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); living arrangements, *Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); and employment in a particular industry, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981), or profession, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75

S.Ct. 461, 99 L.Ed. 563 (1955).⁴

In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny. See *McCray v. Abrams*, 750 F.2d 1113, 1139 (CA2 1984) (Meskill, J., dissenting), cert. pending, No. 84-1426. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny and . . . sustained only if . . . suitably tailored to serve a compelling state interest," *Cleburne*, 473 U.S., at 440, 105 S.Ct., at 3255; others would be reviewed to determine if they were "substantially related to a sufficiently important government interest," *id.*, at 441, 105 S.Ct., at 3255; and still others would be reviewed to determine whether they were "a rational means to serve a legitimate end." *Id.*, at 442, 105 S.Ct., at 3255.

The Court never applies this conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling. Peremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic. Nearly a century ago the Court stated that the per-

emptory challenge is "essential to the fairness of trial by jury." *Lewis v. United States*, 146 U.S., at 376, 13 S.Ct., at 138. Under conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges. However, the Court is silent on the strength of the State's interest, apparently leaving this issue, among many others, to the further "litigation [that] will be required to spell out the contours of the Court's equal protection holding today . . ." *Ante*, at 1726 (WHITE, J., concurring).⁵

The Court also purports to express "no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Ante*, at 1719, n. 12 (emphasis added). But the clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable¹²⁶ tool to both prosecutors and defense attorneys alike. Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?⁶ "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Ante*, at 1729 (MARSHALL, J., concurring) (quoting *Hayes v. Missouri*, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887)).

Rather than applying straightforward equal protection analysis, the Court substi-

4. While all these distinctions might support a claim under conventional equal protection principles, a defendant would also have to establish standing to raise them before obtaining any relief. See *Alexander v. Louisiana*, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2d 536 (1972).

5. The Court is also silent on whether a State may demonstrate that its use of peremptories rests not merely on "assumptions," *ante*, at 1723, but on sociological studies or other similar foundations. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.

Rev. 337, 365, and n. 124 (1982). For "[i]f the assessment of a juror's prejudices based on group affiliation is accurate, . . . then counsel has exercised the challenge as it was intended—to remove the most partial jurors." *Id.*, at 365.

6. "[E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited." *United States v. Leslie*, 783 F.2d 541, 565 (CA5 1986) (en banc).

tutes for the holding in *Swain* a curious hybrid. The defendant must first establish a "prima facie case," *ante*, at 1721, of invidious discrimination, then the "burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Ante*, at 1723. The Court explains that "the operation of prima facie burden of proof rules" is established in "[o]ur decisions concerning 'disparate treatment' . . ." *Ante*, at 1721, n. 18. The Court then adds, borrowing again from a Title VII case, that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Ante*, at 1723, n. 20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981)).⁷

While undoubtedly these rules are well suited to other contexts, particularly where (as with Title VII) they are required by an Act of Congress,⁸ they seem curiously out of place when applied to peremptory challenges in criminal cases. Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not. "It is called a peremptory challenge, because the prisoner may challenge peremptorily, on his own dislike, *without showing of any cause.*" H. Joy, *On Peremptory Challenge of Jurors 1* (1844) (emphasis added). Analytically, there is no middle ground: A challenge either has to be explained or it does not. It is readily apparent, then, that to permit

inquiry into the basis for a peremptory challenge would force "the peremptory challenge [to] collapse into the challenge for cause." *United States v. Clark*, 737 F.2d 679, 682 (CA7 1984). Indeed, the Court recognized without dissent in *Swain* that, if scrutiny were permitted, "[t]he challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards." *Swain*, 380 U.S., at 222, 85 S.Ct., at 837.

Confronted with the dilemma it created, the Court today attempts to decree a middle ground. To rebut a prima facie case, the Court requires a "neutral explanation" for the challenge, but is at pains to "emphasize" that the "explanation need not rise to the level justifying exercise of a challenge for cause." *Ante*, at 1723. I am at a loss to discern the governing principles here. A "clear and reasonably specific" explanation of "legitimate reasons" for exercising the challenge will be difficult to distinguish from a challenge for cause. Anything¹²⁸ short of a challenge for cause may well be seen as an "arbitrary and capricious" challenge, to use Blackstone's characterization of the peremptory. See 4 W. Blackstone, *Commentaries* * 353. Apparently the Court envisions permissible challenges short of a challenge for cause that are just a little bit arbitrary—but not too much. While our trial judges are "experienced in supervising *voir dire*," *ante*, at 1723, they have no experience in administering rules like this.

7. One court has warned that overturning *Swain* has "[t]he potential for stretching out criminal trials that are already too long, by making the *voir dire* a Title VII proceeding in miniature." *United States v. Clark*, 737 F.2d 679, 682 (CA7 1984). That "potential" is clearly about to be realized.

8. It is worth observing that Congress has been unable to locate the constitutional deficiencies in the peremptory challenge system that the Court discerns today. As the Solicitor General explains in urging a rejection of the Sixth Amendment issue presented by this petition and an affirmation of the decision below, "[i]n rec-

onciling the traditional peremptory challenge system with the requirements of the Sixth Amendment it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* . . . [T]he House Report makes clear that . . . 'the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.'" Brief for United States as Amicus Curiae at 20, n. 11 (quoting H.R.Rep. No. 1076, 90th Cong., 2d Sess., 5-6 (1968)), U.S.Code Cong. & Admin.News 1968, pp. 1792, 1795.

An example will quickly demonstrate how today's holding, while purporting to "further the ends of justice," *ante*, at 1724, will not have that effect. Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. See *Turner v. Murray*, 476 U.S. 28, 36-37, 106 S.Ct. 1683, 1688-1689, 90 L.Ed.2d 27 (1986). The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior . . ." *Id.*, at 35, 106 S.Ct., at 1687.⁹ Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," *ante*, at 1723, that these white jurors will be prejudiced against him, presumably based in part on race. The time-honored rule before today was that peremptory challenges could be exercised on such a basis. The Court explained in *Lewis v. United States*: "[H]ow necessary it is that a prisoner (when put to defend his life) should have good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom 1129he has conceived a prejudice even without being able to assign a reason for such his dislike." 146 U.S., at 376, 13 S.Ct., at 138.

The effect of the Court's decision, however, will be to force the defendant to come forward and "articulate a neutral explanation," *ante*, at 1724, for his peremptory challenge, a burden he probably cannot meet. This example demonstrates that today's holding will produce juries that the

parties do not believe are truly impartial. This will surely do more than "disconcert" litigants; it will diminish confidence in the jury system.

A further painful paradox of the Court's holding is that it is likely to interject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions and the notion of our country as a "melting pot." In *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953), for instance, the Court confronted a situation where the selection of the venire was done through the selection of tickets from a box; the names of whites were printed on tickets of one color and the names of blacks were printed on different color tickets. The Court had no difficulty in striking down such a scheme. Justice Frankfurter observed that "opportunity for working of a discriminatory system exists whenever the mechanism for jury selection *has a component part, such as the slips here, that differentiates between white and colored . . .*" *Id.*, at 564, 73 S.Ct., at 894 (concurring) (emphasis added).

Today we mark the return of racial differentiation as the Court accepts a positive evil for a perceived one. Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion by asking jurors to state their racial background and national origin for the record, despite the fact that "such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire." *People v. Motton*, 39 Cal.3d 596, 604, 217 Cal.Rptr. 416, 420, 704 P.2d 130176, 180, modified, 40 Cal.3d 4b (1985) (advance sheet).¹⁰ This process is sure to

9. This question, required by *Turner* in certain capital cases, demonstrates the inapplicability of traditional equal protection analysis to a jury *voir dire* seeking an impartial jury. Surely the question rests on generalized, stereotypic racial notions that would be condemned on equal protection grounds in other contexts.

10. The California Supreme Court has attempted to finesse this problem by asserting that "dis-

crimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a *prima facie* case" of racial discrimination. *People v. Motton*, 39 Cal.3d, at 604, 217 Cal.Rptr., at 420, 704 P.2d, at 180. This suggests, however, that proper inquiry here concerns not the actual race of the jurors who are excluded, but rather

tax even the most capable counsel and judges since determining whether a prima facie case has been established will "require a continued monitoring and recording of the 'group' composition of the panel present and prospective..." *People v. Wheeler*, 22 Cal.3d 258, 294, 148 Cal.Rptr. 890, 915, 583 P.2d 748, 773 (1978) (Richardson, J., dissenting).

Even after a "record" on this issue has been created, disputes will inevitably arise. In one case, for instance, a conviction was reversed based on the assumption that no blacks were on the jury that convicted a defendant. See *People v. Motton*, *supra*. However, after the court's decision was announced, Carolyn Pritchett, who had served on the jury, called the press to state that the court was in error and that she was black. 71 A.B.A.J. 22 (Nov. 1985). The California court nonetheless denied a rehearing petition.¹¹

The Court does not tarry long over any of these difficult, sensitive problems, preferring instead to gloss over them as swiftly as it slides over centuries of history: "[W]e make no attempt to instruct [trial] courts how best to implement ¹¹³¹our holding today." *Ante*, at 1725, n. 24. That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created "right." I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these "implementation" questions leads quickly to the conclusion that there is no "good" way to imple-

counsel's subjective impressions as to what race they spring from. It is unclear just how a "record" of such impressions is to be made.

11. Similar difficulties may lurk in this case on remand. The Court states as fact that "a jury composed only of white persons was selected." *Ante*, at 1715. The only basis for the Court's finding is the prosecutor's statement, in re-

ment the holding, let alone a "best" way. As one apparently frustrated judge explained after reviewing a case under a rule like that promulgated by the Court today, judicial inquiry into peremptory challenges

"from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom. The pursuit of judicial perfection will require both trial and appellate courts to provide speculative and impractical answers to artificial questions." *Holley v. J & S Sweeping Co.*, 143 Cal.App.3d 588, 595-596, 192 Cal.Rptr. 74, 79 (1983) (Holmdahl, J., concurring) (footnote omitted).

The Court's effort to "furthe[r] the ends of justice," *ante*, at 1724, and achieve hoped-for utopian bliss may be admired, but it is far more likely to enlarge the evil "sporting contest" theory of criminal justice roundly condemned by Roscoe Pound almost 80 years ago to the day. See Pound, *Causes of Popular Dissatisfaction with the Administration of Justice*, August 29, 1906, reprinted in *The Pound Conference: Perspectives on Justice in the Future* 337 (A. Levin & R. Wheeler eds. 1979). Pound warned then that "too much of the current dissatisfaction has a just origin in our judicial organization and procedure." *Id.*, at 352. I am afraid that today's newly created constitutional right will justly give rise to similar disapproval.

¹¹³²III

I also add my assent to Justice WHITE's conclusion that today's decision does not apply retroactively. *Ante*, at 1726 (concurring); see also *ante*, at 1731 (O'CONNOR, J., concurring). We held in *Solem v.*

sponse to a question from defense counsel, that "[i]n looking at them, yes; it's an all-white jury." App. 3.

It should also be underscored that the Court today does *not* hold that petitioner has established a "prima facie case" entitling him to any form of relief. *Ante*, at 1725.

Stumes, 465 U.S. 638, 643, 104 S.Ct. 1338, 1343, 79 L.Ed.2d 579 (1984), that

“ [t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.’ *Stovall v. Denno*, 388 U.S. 293, 297 [87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199] (1967).”

If we are to ignore Justice Harlan’s admonition that making constitutional changes prospective only “cuts this Court loose from the force of precedent,” *Mackey v. United States*, 401 U.S. 667, 680, 91 S.Ct. 1160, 1174, 28 L.Ed.2d 404 (1971) (concurring in judgment), then all three of these factors point conclusively to a nonretroactive holding. With respect to the first factor, the new rule the Court announces today is not designed to avert “the clear danger of convicting the innocent.” *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966). Second, it is readily apparent that “law enforcement authorities and state courts have justifiably relied on a prior rule of law” *Solem*, 465 U.S., at 645–646, 104 S.Ct., at 1343. Today’s holding clearly “overrule[s] [a] prior decision” and drastically “transform[s] standard practice.” *Id.*, at 647, 104 S.Ct., at 1343–1344. This fact alone “virtually compel[s]” the conclusion of nonretroactivity. *United States v. Johnson*, 457 U.S. 537, 549–550, 102 S.Ct. 2579, 2586–87, 73 L.Ed.2d 202 (1982). Third, applying today’s decision retroactively obviously would lead to a whole host of problems, if not utter chaos. Determining whether a defendant has made a “prima facie showing” of invidious intent, *ante*, at 1723, and, if so, whether the state has a sufficient “neutral explanation” for

12. Petitioner concedes that it would be virtually impossible for the prosecutor in this case to recall why he used his peremptory challenges in the fashion he did. Brief for Petitioner 35.

its actions, *ibid.*, essentially requires reconstructing¹³³ the entire *voir dire*, something that will be extremely difficult even if undertaken soon after the close of the trial.¹² In most cases, therefore, retroactive application of today’s decision will be “a virtual impossibility.” *State v. Neil*, 457 So.2d 481, 488 (Fla.1984).

In sum, under our prior holdings it is impossible to construct even a colorable argument for retroactive application. The few States that have adopted judicially created rules similar to that announced by the Court today have all refused full retroactive application. See *People v. Wheeler*, 22 Cal.3d, at 283, n. 31, 148 Cal.Rptr., at 908, n. 31, 583 P.2d, at 766, n. 31; *State v. Neil*, *supra*, at 488; *Commonwealth v. Soares*, 377 Mass. 461, 493, n. 38, 387 N.E.2d 499, 518, n. 38, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979).¹³ I therefore am persuaded by Justice WHITE’s position, *ante*, at 1726 (concurring), that today’s novel decision is not to be given retroactive effect.

IV

An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside, especially on a basis not raised or argued by the petitioner. As one commentator aptly observed:

“The real question is whether to tinker with a system, be it of jury selection or anything else, that has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that ‘it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes’¹³⁴ of

13. Although Delaware has suggested that it might follow a rule like that adopted by the Court today, see *Riley v. State*, 496 A.2d 997 (1985), the issue of retroactive application of the rule does not appear to have been litigated in a published decision.

society....'” Younger, *Unlawful Peremptory Challenges*, 7 *Litigation* 23, 56 (Fall 1980).

At the very least, this important case reversing centuries of history and experience ought to be set for reargument next Term.

Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), concerning “the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State’s use of peremptory challenges to exclude members of his race from the petit jury.” *Ante*, at 1714–1715 (footnote omitted). But in reality the majority opinion deals with much more than “evidentiary burden[s].” With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court’s rejection of this holding both ill considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain*, this Court carefully distinguished two possible scenarios involving the State’s use of its peremptory challenges to exclude blacks from juries in criminal cases. In Part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks “for reasons wholly unrelated to the outcome of the particular case on trial ... to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population,” 380 U.S., at 224, 85 S.Ct., at 838, might violate the guarantees of equal protection. See *id.*, at 222–228, 85 S.Ct., at 837–40. The Court felt that the important and historic purposes of the peremptory challenge were not furthered by

the ¹¹³⁵exclusion of blacks “in case after case, whatever the circumstances, whatever the crime *and whoever the defendant or the victim may be.*” *Id.*, at 223, 85 S.Ct., at 837 (emphasis added). Nevertheless, the Court ultimately held that “the record in this case is not sufficient to demonstrate that th[is] rule has been violated.... Petitioner has the burden of proof and he has failed to carry it.” *Id.*, at 224, 226, 85 S.Ct., at 838, 839. Three Justices dissented, arguing that the petitioner’s evidentiary burden was satisfied by testimony that no black had ever served on a petit jury in the relevant county. See *id.*, at 228–247, 85 S.Ct., at 840–50 (Goldberg, J., joined by Warren, C.J., and Douglas, J., dissenting).

Significantly, the *Swain* Court reached a very different conclusion with respect to the second kind of peremptory-challenge scenario. In Part II of its opinion, the Court held that the State’s use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection. *Id.*, at 209–222, 85 S.Ct., at 829–37. Justice WHITE, writing for the Court, explained:

“While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a *real or imagined* partiality that is less easily designated or demonstrable. *Hayes v. Missouri*, 120 U.S. 68, 70 [7 S.Ct. 350, 352, 30 L.Ed. 578] [1887]. It is often exercised upon the ‘sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,’ *Lewis [v. United States]*, 146 U.S. 370, [376 [13 S.Ct. 136, 138, 36 L.Ed. 1011] [1892], upon a juror’s ‘habits and associations,’ *Hayes v. Missouri, supra*, [120 U.S.,] at 70, [7 S.Ct., at 351], or upon the feeling that ‘the bare questioning [a juror’s] indifference may sometimes provoke a resentment,’ *Lewis, supra*, [146 U.S.,] at 376 [13 S.Ct., at 138]. It is no less fre-

quently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people ¹³⁶summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, *which may include their group affiliations*, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory. . . ." *Id.*, at 220-222, 85 S.Ct., at 835-837 (emphasis added; footnotes omitted).

At the beginning of Part III of the opinion, the *Swain* Court reiterated: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, *the particular defendant involved* and the particular crime charged." *Id.*, at 223, 85 S.Ct., at 837 (emphasis added).

Even the *Swain* dissenters did not take issue with the majority's position that the Equal Protection Clause does not prohibit the State from using its peremptory challenges to exclude blacks based on the assumption or belief that they would be partial to a black defendant. The dissenters emphasized that their view concerning the

evidentiary burden facing a defendant who alleges an equal protection claim based on the State's use of peremptory challenges "would ¹³⁷[not] mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury *in a particular case*." *Id.*, at 245, 85 S.Ct., at 849 (Goldberg, J., dissenting) (emphasis added).

The Court today asserts, however, that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely . . . on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Ante*, at 1719. Later, in discussing the State's need to establish a non-discriminatory basis for striking blacks from the jury, the Court states that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." *Ante*, at 1723. Neither of these statements has anything to do with the "evidentiary burden" necessary to establish an equal protection claim in this context, and both statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in *Swain*. Yet the Court in the instant case offers absolutely no analysis in support of its decision to overrule *Swain* in this regard, and in fact does not discuss Part II of the *Swain* opinion at all.

I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as "a necessary part of trial by jury." *Swain*, 380 U.S., at 219, 85 S.Ct., at 835. In my view, there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving His-

panic defendants, Asians in cases involving Asian defendants, and so¹. This case-specific use of peremptory challenges by the State does not single out blacks, or members of any other race for that matter, for discriminatory treatment.¹ Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see—and the Court most certainly has not explained—how their use violates the Equal Protection Clause.

Nor does such use of peremptory challenges by the State infringe upon any other constitutional interests. The Court does not suggest that exclusion of blacks from the jury through the State's use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment. See *ante*, at 1716, n. 4. And because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving nonblack defendants, it harms neither the excluded jurors nor the remainder of the community. See *ante*, at 1718.

The use of group affiliations, such as age, race, or occupation, as a "proxy" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges. See *Swain, supra*; *United States v. Leslie*, 783 F.2d 541 (CA5 1986) (en banc); *United States v. Carter*, 528 F.2d 844 (CA8 1975), cert. denied, 425 U.S. 961, 96 S.Ct. 1745, 48 L.Ed.2d 206 (1976). Indeed, given the need for reasonable¹ limitations on the time devoted to *voir dire*, the use of such "prox-

ies" by both the State and the defendant² may be extremely useful in eliminating from the jury persons who might be biased in one way or another. The Court today holds that the State may not use its peremptory challenges to strike black prospective jurors on this basis without violating the Constitution. But I do not believe there is anything in the Equal Protection Clause, or any other constitutional provision, that justifies such a departure from the substantive holding contained in Part II of *Swain*. Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in *Swain* that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below.



476 U.S. 140, 90 L.Ed.2d 116

¹⁴⁰Despina SMALIS and Ernest Smalis, Petitioners,

v.

PENNSYLVANIA.

No. 85-227.

Argued April 2, 1986.

Decided May 5, 1986.

The Commonwealth of Pennsylvania appealed from an order of the Superior Court, 331 Pa.Super. 307, 480 A.2d 1046, quashing the Commonwealth's appeal from orders of the Court of Common Pleas, Allegheny County, sustaining defense demurrer to charges of murder, voluntary manslaughter, and causing a catastrophe. The Supreme Court, 507 Pa. 344, 490 A.2d 394, remanded. Certiorari was granted. The

Fifth Circuit in *United States v. Leslie*, 783 F.2d 541, 558-561 (1986).

1. I note that the Court does not rely on the argument that, because there are fewer "minorities" in a given population than there are "majorities," the equal use of peremptory challenges against members of "majority" and "minority" racial groups has an unequal impact. The flaws in this argument are demonstrated in Judge Garwood's thoughtful opinion for the en banc

2. See, e.g., *Commonwealth v. DiMatteo*, 12 Mass. App. 547, 427 N.E.2d 754 (1981) (under State Constitution, trial judge properly rejected white defendant's attempted peremptory challenge of black prospective juror).

Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

FLOWERS v. MISSISSIPPI**CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI**

No. 17–9572. Argued March 20, 2019—Decided June 21, 2019

Petitioner Curtis Flowers has been tried six separate times for the murder of four employees of a Mississippi furniture store. Flowers is black; three of the four victims were white. At the first two trials, the State used its peremptory strikes on all of the qualified black prospective jurors. In each case, the jury convicted Flowers and sentenced him to death, but the convictions were later reversed by the Mississippi Supreme Court based on prosecutorial misconduct. At the third trial, the State used all of its 15 peremptory strikes against black prospective jurors, and the jury convicted Flowers and sentenced him to death. The Mississippi Supreme Court reversed again, this time concluding that the State exercised its peremptory strikes on the basis of race in violation of *Batson v. Kentucky*, 476 U. S. 79. Flowers' fourth and fifth trials ended in mistrials. At the fourth, the State exercised 11 peremptory strikes—all against black prospective jurors. No available racial information exists about the prospective jurors in the fifth trial. At the sixth trial, the State exercised six peremptory strikes—five against black prospective jurors, allowing one black juror to be seated. Flowers again raised a *Batson* claim, but the trial court concluded that the State had offered race-neutral reasons for each of the five peremptory strikes. The jury convicted Flowers and sentenced him to death. The Mississippi Supreme Court affirmed. After this Court vacated that judgment and remanded in light of *Foster v. Chatman*, 578 U. S. ___, the Mississippi Supreme Court again upheld Flowers' conviction in a divided 5-to-4 decision. Justice King dissented on the *Batson* issue and was joined by two other Justices.

Held: All of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective

Syllabus

juror Carolyn Wright was not motivated in substantial part by discriminatory intent. Pp. 7–31.

(a) Under *Batson*, once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its peremptory strikes. The trial judge then must determine whether the prosecutor’s stated reasons were the actual reasons or instead were a pretext for discrimination. The *Batson* Court rejected four arguments. First, the *Batson* Court rejected the idea that a defendant must demonstrate a history of racially discriminatory strikes in order to make out a claim of race discrimination. Second, the *Batson* Court rejected the argument that a prosecutor could strike a black juror based on an assumption or belief that the black juror would favor a black defendant. Third, the *Batson* Court rejected the argument that race-based peremptories should be permissible because black, white, Asian, and Hispanic defendants and jurors were all “equally” subject to race-based discrimination. Fourth, the *Batson* Court rejected the argument that race-based peremptories are permissible because both the prosecution and defense could employ them in any individual case and in essence balance things out. Pp. 7–15.

(b) Four categories of evidence loom large in assessing the *Batson* issue here, where the State had a persistent pattern of striking black prospective jurors from Flowers’ first through his sixth trial. Pp. 15–30.

(1) A review of the history of the State’s peremptory strikes in Flowers’ first four trials strongly supports the conclusion that the State’s use of peremptory strikes in Flowers’ sixth trial was motivated in substantial part by discriminatory intent. The State tried to strike all 36 black prospective jurors over the course of the first four trials. And the state courts themselves concluded that the State had violated *Batson* on two separate occasions. The State’s relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury. Pp. 19–22.

(2) The State’s use of peremptory strikes in Flowers’ sixth trial followed the same pattern as the first four trials. Pp. 22–23.

(3) Disparate questioning can be probative of discriminatory intent. *Miller-El v. Cockrell*, 537 U. S. 322, 331–332, 344–345. Here, the State spent far more time questioning the black prospective jurors than the accepted white jurors—145 questions asked of 5 black prospective jurors and 12 questions asked of 11 white seated jurors. The record refutes the State’s explanation that it questioned black and white prospective jurors differently only because of differences in the jurors’ characteristics. Along with the historical evidence from the earlier trials, as well as the State’s striking of five of six black

Syllabus

prospective jurors at the sixth trial, the dramatically disparate questioning and investigation of black prospective jurors and white prospective jurors at the sixth trial strongly suggest that the State was motivated in substantial part by a discriminatory intent. Pp. 23–26.

(4) Comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred. See *Snyder v. Louisiana*, 552 U. S. 472, 483–484. Here, Carolyn Wright, a black prospective juror, was struck, the State says, in part because she knew several defense witnesses and had worked at Wal-Mart where Flowers’ father also worked. But three white prospective jurors also knew many individuals involved in the case, and the State asked them no individual questions about their connections to witnesses. White prospective jurors also had relationships with members of Flowers’ family, but the State did not ask them follow-up questions in order to explore the depth of those relationships. The State also incorrectly explained that it exercised a peremptory strike against Wright because she had worked with one of Flowers’ sisters and made apparently incorrect statements to justify the strikes of other black prospective jurors. When considered with other evidence, a series of factually inaccurate explanations for striking black prospective jurors can be another clue showing discriminatory intent. The overall context here requires skepticism of the State’s strike of Carolyn Wright. The trial court at Flowers’ sixth trial committed clear error in concluding that the State’s peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. Pp. 26–30.

240 So. 3d 1082, reversed and remanded.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined as to Parts I, II, and III.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17–9572

CURTIS GIOVANNI FLOWERS, PETITIONER
v. MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
MISSISSIPPI

[June 21, 2019]

JUSTICE KAVANAUGH delivered the opinion of the Court.

In *Batson v. Kentucky*, 476 U. S. 79 (1986), this Court ruled that a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial.

In 1996, Curtis Flowers allegedly murdered four people in Winona, Mississippi. Flowers is black. He has been tried six separate times before a jury for murder. The same lead prosecutor represented the State in all six trials.

In the initial three trials, Flowers was convicted, but the Mississippi Supreme Court reversed each conviction. In the first trial, Flowers was convicted, but the Mississippi Supreme Court reversed the conviction due to “numerous instances of prosecutorial misconduct.” *Flowers v. State*, 773 So. 2d 309, 327 (2000). In the second trial, the trial court found that the prosecutor discriminated on the basis of race in the peremptory challenge of a black juror. The trial court seated the black juror. Flowers was then convicted, but the Mississippi Supreme Court again reversed the conviction because of prosecutorial misconduct at trial.

Opinion of the Court

In the third trial, Flowers was convicted, but the Mississippi Supreme Court yet again reversed the conviction, this time because the court concluded that the prosecutor had again discriminated against black prospective jurors in the jury selection process. The court’s lead opinion stated: “The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.” *Flowers v. State*, 947 So. 2d 910, 935 (2007). The opinion further stated that the “State engaged in racially discriminatory practices during the jury selection process” and that the “case evinces an effort by the State to exclude African-Americans from jury service.” *Id.*, at 937, 939.

The fourth and fifth trials of Flowers ended in mistrials due to hung juries.

In his sixth trial, which is the one at issue here, Flowers was convicted. The State struck five of the six black prospective jurors. On appeal, Flowers argued that the State again violated *Batson* in exercising peremptory strikes against black prospective jurors. In a divided 5-to-4 decision, the Mississippi Supreme Court affirmed the conviction. We granted certiorari on the *Batson* question and now reverse. See 586 U. S. ___ (2018).

Four critical facts, taken together, require reversal. *First*, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Tr. of Oral Arg. 32. *Second*, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. *Third*, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. *Fourth*, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly

Opinion of the Court

situated to white prospective jurors who were not struck by the State.

We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State’s peremptory strike of black prospective juror Carolyn Wright was not “motivated in substantial part by discriminatory intent.” *Foster v. Chatman*, 578 U. S. ____, ____ (2016) (slip op., at 23) (internal quotation marks omitted). In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.

We reverse the judgment of the Supreme Court of Mississippi, and we remand the case for further proceedings not inconsistent with this opinion.

I

The underlying events that gave rise to this case took place in Winona, Mississippi. Winona is a small town in northern Mississippi, just off I–55 almost halfway between Jackson and Memphis. The total population of Winona is about 5,000. The town is about 53 percent black and about 46 percent white.

In 1996, Bertha Tardy, Robert Golden, Derrick Stewart, and Carmen Rigby were murdered at the Tardy Furniture store in Winona. All four victims worked at the Tardy Furniture store. Three of the four victims were white; one was black. In 1997, the State charged Curtis Flowers with murder. Flowers is black. Since then, Flowers has been tried six separate times for the murders. In each of the first two trials, Flowers was tried for one individual murder. In each subsequent trial, Flowers was tried for all four of the murders together. The same state prosecutor tried Flowers each time. The prosecutor is white.

Opinion of the Court

At Flowers' first trial, 36 prospective jurors—5 black and 31 white—were presented to potentially serve on the jury. The State exercised a total of 12 peremptory strikes, and it used 5 of them to strike the five qualified black prospective jurors. Flowers objected, arguing under *Batson* that the State had exercised its peremptory strikes in a racially discriminatory manner. The trial court rejected the *Batson* challenge. Because the trial court allowed the State's peremptory strikes, Flowers was tried in front of an all-white jury. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court reversed the conviction, concluding that the State had committed prosecutorial misconduct in front of the jury by, among other things, expressing baseless grounds for doubting the credibility of witnesses and mentioning facts that had not been allowed into evidence by the trial judge. *Flowers*, 773 So. 2d, at 317, 334. In its opinion, the Mississippi Supreme Court described "numerous instances of prosecutorial misconduct" at the trial. *Id.*, at 327. Because the Mississippi Supreme Court reversed based on prosecutorial misconduct at trial, the court did not reach Flowers' *Batson* argument. See *Flowers*, 773 So. 2d, at 327.

At the second trial, 30 prospective jurors—5 black and 25 white—were presented to potentially serve on the jury. As in Flowers' first trial, the State again used its strikes against all five black prospective jurors. But this time, the trial court determined that the State's asserted reason for one of the strikes was a pretext for discrimination. Specifically, the trial court determined that one of the State's proffered reasons—that the juror had been inattentive and was nodding off during jury selection—for striking that juror was false, and the trial court therefore sustained Flowers' *Batson* challenge. The trial court disallowed the strike and sat that black juror on the jury. The jury at Flowers' second trial consisted of 11 white jurors and 1

Opinion of the Court

black juror. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court again reversed. The court ruled that the prosecutor had again engaged in prosecutorial misconduct in front of the jury by, among other things, impermissibly referencing evidence and attempting to undermine witness credibility without a factual basis. See *Flowers v. State*, 842 So. 2d 531, 538, 553 (2003).

At Flowers' third trial, 45 prospective jurors—17 black and 28 white—were presented to potentially serve on the jury. One of the black prospective jurors was struck for cause, leaving 16. The State exercised a total of 15 peremptory strikes, and it used all 15 against black prospective jurors. Flowers again argued that the State had used its peremptory strikes in a racially discriminatory manner. The trial court found that the State had not discriminated on the basis of race. See *Flowers*, 947 So. 2d, at 916. The jury in Flowers' third trial consisted of 11 white jurors and 1 black juror. The lone black juror who served on the jury was seated after the State ran out of peremptory strikes. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court yet again reversed, concluding that the State had again violated *Batson* by discriminating on the basis of race in exercising all 15 of its peremptory strikes against 15 black prospective jurors. See *Flowers*, 947 So. 2d, at 939. The court's lead opinion stated: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Id.*, at 935. The opinion explained that although "each individual strike may have justifiably appeared to the trial court to be sufficiently race neutral, the trial court also has a duty to look at the State's use of peremptory challenges *in toto*." *Id.*, at 937. The opinion emphasized that

Opinion of the Court

“trial judges should not blindly accept any and every reason put forth by the State, especially” when “the State continues to exercise challenge after challenge only upon members of a particular race.” *Ibid.* The opinion added that the “State engaged in racially discriminatory practices” and that the “case evinces an effort by the State to exclude African-Americans from jury service.” *Id.*, at 937, 939.

At Flowers’ fourth trial, 36 prospective jurors—16 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of 11 peremptory strikes, and it used all 11 against black prospective jurors. But because of the relatively large number of prospective jurors who were black, the State did not have enough peremptory challenges to eliminate all of the black prospective jurors. The seated jury consisted of seven white jurors and five black jurors. That jury could not reach a verdict, and the proceeding ended in a mistrial.

As to the fifth trial, there is no available racial information about the prospective jurors, as distinct from the jurors who ultimately sat on the jury. The jury was composed of nine white jurors and three black jurors. The jury could not reach a verdict, and the trial again ended in a mistrial.

At the sixth trial, which we consider here, 26 prospective jurors—6 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of six peremptory strikes, and it used five of the six against black prospective jurors, leaving one black juror to sit on the jury. Flowers again argued that the State had exercised its peremptory strikes in a racially discriminatory manner. The trial court concluded that the State had offered race-neutral reasons for each of the five peremptory strikes against the five black prospective jurors. The jury at Flowers’ sixth trial consisted of 11 white jurors and 1 black juror. That jury convicted Flowers of murder and

Opinion of the Court

sentenced him to death.

In a divided decision, the Mississippi Supreme Court agreed with the trial court on the *Batson* issue and stated that the State’s “race-neutral reasons were valid and not merely pretextual.” *Flowers v. State*, 158 So. 3d 1009, 1058 (2014). Flowers then sought review in this Court. This Court granted Flowers’ petition for a writ of certiorari, vacated the judgment of the Mississippi Supreme Court, and remanded for further consideration in light of the decision in *Foster*, 578 U. S. ____ *Flowers v. Mississippi*, 579 U. S. ____ (2016). In *Foster*, this Court held that the defendant Foster had established a *Batson* violation. 578 U. S., at ____ (slip op., at 25).

On remand, the Mississippi Supreme Court by a 5-to-4 vote again upheld Flowers’ conviction. See 240 So. 3d 1082 (2017). Justice King wrote a dissent for three justices. He stated: “I cannot conclude that Flowers received a fair trial, nor can I conclude that prospective jurors were not subjected to impermissible discrimination.” *Id.*, at 1172. According to Justice King, both the trial court and the Mississippi Supreme Court “completely disregard[ed] the constitutional right of prospective jurors to be free from a racially discriminatory selection process.” *Id.*, at 1171. We granted certiorari. See 586 U. S. ____.

II

A

Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process. See *Powers v. Ohio*, 499 U. S. 400, 407 (1991).

Jury selection in criminal cases varies significantly based on state and local rules and practices, but ordinarily consists of three phases, which we describe here in general terms. *First*, a group of citizens in the community is randomly summoned to the courthouse on a particular day for

Opinion of the Court

potential jury service. *Second*, a subgroup of those prospective jurors is called into a particular courtroom for a specific case. The prospective jurors are often questioned by the judge, as well as by the prosecutor and defense attorney. During that second phase, the judge may excuse certain prospective jurors based on their answers. *Third*, the prosecutor and defense attorney may challenge certain prospective jurors. The attorneys may challenge prospective jurors for cause, which usually stems from a potential juror's conflicts of interest or inability to be impartial. In addition to challenges for cause, each side is typically afforded a set number of peremptory challenges or strikes. Peremptory strikes have very old credentials and can be traced back to the common law. Those peremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked.

That blanket discretion to peremptorily strike prospective jurors for any reason can clash with the dictates of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This case arises at the intersection of the peremptory challenge and the Equal Protection Clause. And to understand how equal protection law applies to peremptory challenges, it helps to begin at the beginning.

Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” A primary objective of the Equal Protection Clause, this Court stated just five years after ratification, was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” *Slaughter-House Cases*, 16 Wall. 36, 71 (1873).

In 1875, to help enforce the Fourteenth Amendment,

Opinion of the Court

Congress passed and President Ulysses S. Grant signed the Civil Rights Act of 1875. Ch. 114, 18 Stat. 335. Among other things, that law made it a criminal offense for state officials to exclude individuals from jury service on account of their race. 18 U. S. C. §243. The Act provides: “No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude.”

In 1880, just 12 years after ratification of the Fourteenth Amendment, the Court decided *Strauder v. West Virginia*, 100 U. S. 303. That case concerned a West Virginia statute that allowed whites only to serve as jurors. The Court held the law unconstitutional.

In reaching its conclusion, the Court explained that the Fourteenth Amendment required “that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.” *Id.*, at 307. In the words of the *Strauder* Court: “The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.” *Id.*, at 308. For those reasons, the Court ruled that the West Virginia statute excluding blacks from jury service violated the Fourteenth Amendment.

Opinion of the Court

As the Court later explained in *Brown v. Board of Education*, 347 U. S. 483 (1954), the Court’s decisions in the *Slaughter-House Cases* and *Strauder* interpreted the Fourteenth Amendment “as proscribing all state-imposed discriminations against the Negro race,” including in jury service. *Brown*, 347 U. S., at 490.

In the decades after *Strauder*, the Court reiterated that States may not discriminate on the basis of race in jury selection. See, *e.g.*, *Neal v. Delaware*, 103 U. S. 370, 397 (1881); *Carter v. Texas*, 177 U. S. 442, 447 (1900); *Norris v. Alabama*, 294 U. S. 587, 597–599 (1935); *Hale v. Kentucky*, 303 U. S. 613, 616 (1938) (*per curiam*); *Pierre v. Louisiana*, 306 U. S. 354, 362 (1939); *Smith v. Texas*, 311 U. S. 128, 130–131 (1940); *Avery v. Georgia*, 345 U. S. 559, 562 (1953); *Hernandez v. Texas*, 347 U. S. 475, 477–478, 482 (1954); *Coleman v. Alabama*, 377 U. S. 129, 133 (1964).

But critical problems persisted. Even though laws barring blacks from serving on juries were unconstitutional after *Strauder*, many jurisdictions employed various discriminatory tools to prevent black persons from being called for jury service. And when those tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all black prospective jurors.

In the century after *Strauder*, the freedom to exercise peremptory strikes for any reason meant that “the problem of racial exclusion from jury service” remained “widespread” and “deeply entrenched.” 5 U. S. Commission on Civil Rights Report 90 (1961). Simple math shows how that happened. Given that blacks were a minority of the population, in many jurisdictions the number of peremptory strikes available to the prosecutor exceeded the number of black prospective jurors. So prosecutors could routinely exercise peremptories to strike all the black prospective jurors and thereby ensure all-white juries. The exclusion of black prospective jurors was almost total in certain

Opinion of the Court

jurisdictions, especially in cases involving black defendants. Similarly, defense counsel could use—and routinely did use—peremptory challenges to strike all the black prospective jurors in cases involving white defendants and black victims.

In the aftermath of *Strauder*, the exclusion of black jurors became more covert and less overt—often accomplished through peremptory challenges in individual courtrooms rather than by blanket operation of law. But as this Court later noted, the results were the same for black jurors and black defendants, as well as for the black community’s confidence in the fairness of the American criminal justice system. See *Batson*, 476 U. S., at 98–99.

Eighty-five years after *Strauder*, the Court decided *Swain v. Alabama*, 380 U. S. 202 (1965). The defendant Swain was black. Swain was convicted of a capital offense in Talladega County, Alabama, and sentenced to death. Swain presented evidence that no black juror had served on a jury in Talladega County in more than a decade. See *id.*, at 226. And in Swain’s case, the prosecutor struck all six qualified black prospective jurors, ensuring that Swain was tried before an all-white jury. Swain invoked *Strauder* to argue that the prosecutor in his case had impermissibly discriminated on the basis of race by using peremptory challenges to strike the six black prospective jurors. See 380 U. S., at 203, 210.

This Court ruled that Swain had not established unconstitutional discrimination. Most importantly, the Court held that a defendant could not object to the State’s use of peremptory strikes in an individual case. In the Court’s words: “[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws.” *Id.*, at 221. The *Swain* Court reasoned that prosecutors do not always judge prospective jurors individually when exercising peremptory strikes. Instead, prosecutors choose which prospective jurors to strike “in light of the

Opinion of the Court

limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.” *Ibid.* In the Court’s view, the prosecutor could strike prospective jurors on the basis of their group affiliations, including race. In other words, a prosecutor could permissibly strike a prospective juror for any reason, including the assumption or belief that a black prospective juror, because of race, would be favorable to a black defendant or unfavorable to the State. See *id.*, at 220–221.

To be sure, the *Swain* Court held that a defendant could make out a case of racial discrimination by showing that the State “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be,” had been responsible for the removal of qualified black prospective jurors so that no black jurors “ever serve on petit juries.” *Id.*, at 223. But *Swain*’s high bar for establishing a constitutional violation was almost impossible for any defendant to surmount, as the aftermath of *Swain* amply demonstrated.

Twenty-one years later, in its 1986 decision in *Batson*, the Court revisited several critical aspects of *Swain* and in essence overruled them. In so doing, the *Batson* Court emphasized that “the central concern” of the Fourteenth Amendment “was to put an end to governmental discrimination on account of race.” 476 U. S., at 85. The *Batson* Court noted that *Swain* had left prosecutors’ peremptory challenges “largely immune from constitutional scrutiny.” 476 U. S., at 92–93. In his concurrence in *Batson*, Justice Byron White (the author of *Swain*) agreed that *Swain* should be overruled. He stated: “[T]he practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so” that “I agree with the Court that the time has come to rule as it has.” 476 U. S., at 101–102.

Under *Batson*, once a *prima facie* case of discrimination has been shown by a defendant, the State must provide

Opinion of the Court

race-neutral reasons for its peremptory strikes. The trial judge must determine whether the prosecutor’s stated reasons were the actual reasons or instead were a pretext for discrimination. *Id.*, at 97–98.

Four parts of *Batson* warrant particular emphasis here.

First, the *Batson* Court rejected *Swain*’s insistence that a defendant demonstrate a history of racially discriminatory strikes in order to make out a claim of race discrimination. See 476 U. S., at 95. According to the *Batson* Court, defendants had run into “practical difficulties” in trying to prove that a State had systematically “exercised peremptory challenges to exclude blacks from the jury on account of race.” *Id.*, at 92, n. 17. The *Batson* Court explained that, in some jurisdictions, requiring a defendant to “investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges” posed an “insurmountable” burden. *Ibid.*

In addition to that practical point, the Court stressed a basic equal protection point: In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.

For those reasons, the *Batson* Court held that a criminal defendant could show “purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges *at the defendant’s trial.*” *Id.*, at 96 (emphasis added).

Second, the *Batson* Court rejected *Swain*’s statement that a prosecutor could strike a black juror based on an assumption or belief that the black juror would favor a black defendant. In some of the most critical sentences in the *Batson* opinion, the Court emphasized that a prosecutor may not rebut a claim of discrimination “by stating merely that he challenged jurors of the defendant’s race on the assumption—or his intuitive judgment—that they

Opinion of the Court

would be partial to the defendant because of their shared race.” 476 U. S., at 97. The Court elaborated: The Equal Protection Clause “forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors’ race.” *Id.*, at 97–98. In his concurrence, Justice Thurgood Marshall drove the point home: “Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State’s case against a black defendant than it can be justified by the notion that blacks lack the intelligence, experience, or moral integrity to be entrusted with that role.” *Id.*, at 104–105 (internal quotation marks and citations omitted).

Third, the *Batson* Court did not accept the argument that race-based peremptories should be permissible because black, white, Asian, and Hispanic defendants and jurors were all “equally” subject to race-based discrimination. The Court stated that each removal of an individual juror because of his or her race is a constitutional violation. Discrimination against one defendant or juror on account of race is not remedied or cured by discrimination against other defendants or jurors on account of race. As the Court later explained: Some say that there is no equal protection violation if individuals “of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson*, 163 U. S. 537

Opinion of the Court

(1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.” *Powers*, 499 U. S., at 410 (citing *Loving v. Virginia*, 388 U. S. 1 (1967)).

Fourth, the *Batson* Court did not accept the argument that race-based peremptories are permissible because both the prosecution and defense could employ them in any individual case and in essence balance things out. Under the Equal Protection Clause, the Court stressed, even a single instance of race discrimination against a prospective juror is impermissible. Moreover, in criminal cases involving black defendants, the both-sides-can-do-it argument overlooks the percentage of the United States population that is black (about 12 percent) and the cold reality of jury selection in most jurisdictions. Because blacks are a minority in most jurisdictions, prosecutors often have more peremptory strikes than there are black prospective jurors on a particular panel. In the pre-*Batson* era, therefore, allowing each side in a case involving a black defendant to strike prospective jurors on the basis of race meant that a prosecutor could eliminate all of the black jurors, but a black defendant could not eliminate all of the white jurors. So in the real world of criminal trials against black defendants, both history and math tell us that a system of race-based peremptories does not treat black defendants and black prospective jurors equally with prosecutors and white prospective jurors. Cf. *Batson*, 476 U. S., at 99.

B

Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, *Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants. By taking steps to

Opinion of the Court

eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system. *Batson* immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States.

In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding. See *Foster*, 578 U. S. ___; *Snyder v. Louisiana*, 552 U. S. 472 (2008); *Miller-El v. Dretke*, 545 U. S. 231 (2005) (*Miller-El II*). Moreover, the Court has extended *Batson* in certain ways. A defendant of any race may raise a *Batson* claim, and a defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races. See *Hernandez*, 347 U. S., at 477–478; *Powers*, 499 U. S., at 406. Moreover, *Batson* now applies to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases. See *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 129 (1994); *Georgia v. McCollum*, 505 U. S. 42, 59 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U. S. 614, 616 (1991).

Of particular relevance here, *Batson's* holding raised several important evidentiary and procedural issues, three of which we underscore.

First, what factors does the trial judge consider in evaluating whether racial discrimination occurred? Our precedents allow criminal defendants raising *Batson* challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race. For example, defendants may present:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and

Opinion of the Court

investigation of black and white prospective jurors in the case;

- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor’s misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State’s peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

See *Foster*, 578 U. S. ____; *Snyder*, 552 U. S. 472; *Miller-El II*, 545 U. S. 231; *Batson*, 476 U. S. 79.

Second, who enforces *Batson*? As the *Batson* Court itself recognized, the job of enforcing *Batson* rests first and foremost with trial judges. See *id.*, at 97, 99, n. 22. America’s trial judges operate at the front lines of American justice. In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process.

As the *Batson* Court explained and as the Court later reiterated, once a prima facie case of racial discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes. The trial court must consider the prosecutor’s race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. The trial judge’s assessment of the prosecutor’s credibility is often important. The Court has explained that “the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge.” *Snyder*, 552 U. S., at 477 (quotation altered). “We have recognized that these determinations of credibility and demeanor lie peculiarly within a

Opinion of the Court

trial judge’s province.” *Ibid.* (internal quotation marks omitted). The trial judge must determine whether the prosecutor’s proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race. The ultimate inquiry is whether the State was “motivated in substantial part by discriminatory intent.” *Foster*, 578 U. S., at ___ (slip op., at 23) (internal quotation marks omitted).

Third, what is the role of appellate review? An appeals court looks at the same factors as the trial judge, but is necessarily doing so on a paper record. “Since the trial judge’s findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.” *Batson*, 476 U. S., at 98, n. 21. The Court has described the appellate standard of review of the trial court’s factual determinations in a *Batson* hearing as “highly deferential.” *Snyder*, 552 U. S., at 479. “On appeal, a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.” *Id.*, at 477.

III

In accord with the principles set forth in *Batson*, we now address Flowers’ case.

The Constitution forbids striking even a single prospective juror for a discriminatory purpose. See *Foster*, 578 U. S., at ___ (slip op., at 9). The question for this Court is whether the Mississippi trial court clearly erred in concluding that the State was not “motivated in substantial part by discriminatory intent” when exercising peremptory strikes at Flowers’ sixth trial. *Id.*, at ___ (slip op., at 23) (internal quotation marks omitted); see also *Snyder*, 552 U. S., at 477. Because this case arises on direct review, we owe no deference to the Mississippi Supreme Court, as

Opinion of the Court

distinct from deference to the Mississippi trial court.

Four categories of evidence loom large in assessing the *Batson* issue in Flowers' case: (1) the history from Flowers' six trials, (2) the prosecutor's striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial. We address each in turn.

A

First, we consider the relevant history of the case. Recall that in *Swain*, the Court held that a defendant may prove racial discrimination by establishing a historical pattern of racial exclusion of jurors in the jurisdiction in question. Indeed, under *Swain*, that was the only way that a defendant could make out a claim that the State discriminated on the basis of race in the use of peremptory challenges.

In *Batson*, the Court ruled that *Swain* had imposed too heavy a burden on defendants seeking to prove that a prosecutor had used peremptory strikes in a racially discriminatory manner. *Batson* lowered the evidentiary burden for defendants to contest prosecutors' use of peremptory strikes and made clear that demonstrating a history of discriminatory strikes in past cases was not necessary.

In doing so, however, *Batson* did not preclude defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination. Most importantly for present purposes, after *Batson*, the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just

Opinion of the Court

as *Swain* had allowed. After *Batson*, the defendant may still cast *Swain*'s "wide net" to gather "'relevant'" evidence. *Miller-El II*, 545 U. S., at 239–240. A defendant may rely on "all relevant circumstances." *Batson*, 476 U. S., at 96–97.

Here, our review of the history of the prosecutor's peremptory strikes in Flowers' first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent. (Recall that there is no record evidence from the fifth trial regarding the race of the prospective jurors.)

The numbers speak loudly. Over the course of the first four trials, there were 36 black prospective jurors against whom the State could have exercised a peremptory strike. The State tried to strike all 36. The State used its available peremptory strikes to attempt to strike every single black prospective juror that it could have struck. (At oral argument in this Court, the State acknowledged that statistic. Tr. of Oral Arg. 32.) Not only did the State's use of peremptory strikes in Flowers' first four trials reveal a blatant pattern of striking black prospective jurors, the Mississippi courts themselves concluded on two separate occasions that the State violated *Batson*. In Flowers' second trial, the trial court concluded that the State discriminated against a black juror. Specifically, the trial court determined that one of the State's proffered reasons—that the juror had been inattentive and was nodding off during jury selection—for striking that juror was false, and the trial court therefore sustained Flowers' *Batson* challenge. In Flowers' next trial—his third trial—the prosecutor used all 15 of its peremptories to strike 15 black prospective jurors. The lead opinion of the Mississippi Supreme Court stated: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge."

Opinion of the Court

Flowers, 947 So. 2d, at 935. The opinion further stated that “the State engaged in racially discriminatory practices during the jury selection process” and that the “case evinces an effort by the State to exclude African-Americans from jury service.” *Id.*, at 937, 939.

To summarize the most relevant history: In *Flowers*’ first trial, the prosecutor successfully used peremptory strikes against all of the black prospective jurors. *Flowers* faced an all-white jury. In *Flowers*’ second trial, the prosecutor tried again to strike all of the black prospective jurors, but the trial court decided that the State could not strike one of those jurors. The jury consisted of 11 white jurors and 1 black juror. In *Flowers*’ third trial, there were 17 black prospective jurors. The prosecutor used 15 out of 15 peremptory strikes against black prospective jurors. After one black juror was struck for cause and the prosecutor ran out of strikes, one black juror remained. The jury again consisted of 11 white jurors and 1 black juror. In *Flowers*’ fourth trial, the prosecutor again used 11 out of 11 peremptory strikes against black prospective jurors. Because of the large number of black prospective jurors at the trial, the prosecutor ran out of peremptory strikes before it could strike all of the black prospective jurors. The jury for that trial consisted of seven white jurors and five black jurors, and the jury was unable to reach a verdict. To reiterate, there is no available information about the race of prospective jurors in the fifth trial. The jury for that trial consisted of nine white jurors and three black jurors, and the jury was unable to reach a verdict.

Stretching across *Flowers*’ first four trials, the State employed its peremptory strikes to remove as many black prospective jurors as possible. The State appeared to proceed as if *Batson* had never been decided. The State’s relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try

Opinion of the Court

Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury. The trial judge was aware of the history. But the judge did not sufficiently account for the history when considering Flowers' *Batson* claim.

The State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history. We cannot take that history out of the case.

B

We turn now to the State's strikes of five of the six black prospective jurors at Flowers' sixth trial, the trial at issue here. As *Batson* noted, a "pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." 476 U. S., at 97.

Flowers' sixth trial occurred in June 2010. At trial, 26 prospective jurors were presented to potentially serve on the jury. Six of the prospective jurors were black. The State accepted one black prospective juror—Alexander Robinson. The State struck the other five black prospective jurors—Carolyn Wright, Tashia Cunningham, Edith Burnside, Flancie Jones, and Dianne Copper. The resulting jury consisted of 11 white jurors and 1 black juror.

The State's use of peremptory strikes in Flowers' sixth trial followed the same pattern as the first four trials, with one modest exception: It is true that the State accepted one black juror for Flowers' sixth trial. But especially given the history of the case, that fact alone cannot insulate the State from a *Batson* challenge. In *Miller-El II*, this Court skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt "to obscure the otherwise consistent pattern of opposition to" seating black jurors. 545 U. S., at 250. The overall record of this case suggests that the same tactic may have been employed here. In light of all of the

Opinion of the Court

circumstances here, the State’s decision to strike five of the six black prospective jurors is further evidence suggesting that the State was motivated in substantial part by discriminatory intent.

C

We next consider the State’s dramatically disparate questioning of black and white prospective jurors in the jury selection process for Flowers’ sixth trial. As *Batson* explained, “the prosecutor’s questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose.” 476 U. S., at 97.

The questioning process occurred through an initial group *voir dire* and then more in-depth follow-up questioning by the prosecutor and defense counsel of individual prospective jurors. The State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions. On average, therefore, the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror.

One can slice and dice the statistics and come up with all sorts of ways to compare the State’s questioning of excluded black jurors with the State’s questioning of the accepted white jurors. But any meaningful comparison yields the same basic assessment: The State spent far more time questioning the black prospective jurors than the accepted white jurors.

The State acknowledges, as it must under our precedents, that disparate questioning can be probative of discriminatory intent. See *Miller-El v. Cockrell*, 537 U. S. 322, 331–332, 344–345 (2003) (*Miller-El I*). As *Miller-El I* stated, “if the use of disparate questioning is determined by race at the outset, it is likely [that] a justification for a

Opinion of the Court

strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination.” *Id.*, at 344.

But the State here argues that it questioned black and white prospective jurors differently only because of differences in the jurors’ characteristics. The record refutes that explanation.

For example, Dianne Copper was a black prospective juror who was struck. The State asked her 18 follow-up questions about her relationships with Flowers’ family and with witnesses in the case. App. 188–190. Pamela Chesteen was a white juror whom the State accepted for the jury. Although the State asked questions of Chesteen during group *voir dire*, the State asked her no individual follow-up questions about her relationships with Flowers’ family, even though the State was aware that Chesteen knew several members of Flowers’ family. Compare *id.*, at 83, with *id.*, at 111. Similarly, the State asked no individual follow-up questions to four other white prospective jurors who, like Dianne Copper, had relationships with defense witnesses, even though the State was aware of those relationships. Those white prospective jurors were Larry Blaylock, Harold Waller, Marcus Fielder, and Bobby Lester.

Likewise, the State conducted disparate investigations of certain prospective jurors. Tashia Cunningham, who is black, stated that she worked with Flowers’ sister, but that the two did not work closely together. To try to disprove that statement, the State summoned a witness to challenge Cunningham’s testimony. *Id.*, at 148–150. The State apparently did not conduct similar investigations of white prospective jurors.

It is certainly reasonable for the State to ask follow-up questions or to investigate the relationships of jurors to the victims, potential witnesses, and the like. But white

Opinion of the Court

prospective jurors who were acquainted with the Flowers' family or defense witnesses were not questioned extensively by the State or investigated. White prospective jurors who admitted that they or a relative had been convicted of a crime were accepted without apparent further inquiry by the State. The difference in the State's approaches to black and white prospective jurors was stark.

Why did the State ask so many more questions—and conduct more vigorous inquiry—of black prospective jurors than it did of white prospective jurors? No one can know for certain. But this Court's cases explain that disparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race. See *Miller-El I*, 537 U. S., at 331–332, 344–345. In other words, by asking a lot of questions of the black prospective jurors or conducting additional inquiry into their backgrounds, a prosecutor can try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike. And by not doing the same for white prospective jurors, by not asking white prospective jurors those same questions, the prosecutor can try to distort the record so as to thereby avoid being accused of treating black and white jurors differently. Disparity in questioning and investigation can produce a record that says little about white prospective jurors and is therefore resistant to characteristic-by-characteristic comparisons of struck black prospective jurors and seated white jurors. Prosecutors can decline to seek what they do not want to find about white prospective jurors.

A court confronting that kind of pattern cannot ignore it. The lopsidedness of the prosecutor's questioning and inquiry can itself be evidence of the prosecutor's objective as much as it is of the actual qualifications of the black and white prospective jurors who are struck or seated.

Opinion of the Court

The prosecutor’s dramatically disparate questioning of black and white prospective jurors—at least if it rises to a certain level of disparity—can supply a clue that the prosecutor may have been seeking to paper the record and disguise a discriminatory intent. See *ibid.*

To be clear, disparate questioning or investigation alone does not constitute a *Batson* violation. The disparate questioning or investigation of black and white prospective jurors may reflect ordinary race-neutral considerations. But the disparate questioning or investigation can also, along with other evidence, inform the trial court’s evaluation of whether discrimination occurred.

Here, along with the historical evidence we described above from the earlier trials, as well as the State’s striking of five of six black prospective jurors at the sixth trial, the dramatically disparate questioning and investigation of black prospective jurors and white prospective jurors at the sixth trial strongly suggests that the State was motivated in substantial part by a discriminatory intent. We agree with the observation of the dissenting justices of the Mississippi Supreme Court: The “numbers described above are too disparate to be explained away or categorized as mere happenstance.” 240 So. 3d, at 1161 (opinion of King, J.).

D

Finally, in combination with the other facts and circumstances in this case, the record of jury selection at the sixth trial shows that the peremptory strike of at least one of the black prospective jurors (Carolyn Wright) was motivated in substantial part by discriminatory intent. As this Court has stated, the Constitution forbids striking even a single prospective juror for a discriminatory purpose. See *Foster*, 578 U. S., at ___ (slip op., at 9).

Comparing prospective jurors who were struck and not struck can be an important step in determining whether a

Opinion of the Court

Batson violation occurred. See *Snyder*, 552 U. S., at 483–484; *Miller-El II*, 545 U. S., at 241. The comparison can suggest that the prosecutor’s proffered explanations for striking black prospective jurors were a pretext for discrimination. When a prosecutor’s “proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.” *Foster*, 578 U. S., at ____ (slip op., at 23) (quotation altered). Although a defendant ordinarily will try to identify a similar white prospective juror whom the State did not strike, a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent. *Miller-El II*, 545 U. S., at 247, n. 6.

In this case, Carolyn Wright was a black prospective juror who said she was strongly in favor of the death penalty as a general matter. And she had a family member who was a prison security guard. Yet the State exercised a peremptory strike against Wright. The State said it struck Wright in part because she knew several defense witnesses and had worked at Wal-Mart where Flowers’ father also worked.

Winona is a small town. Wright had some sort of connection to 34 people involved in Flowers’ case, both on the prosecution witness side and the defense witness side. See, 240 So. 3d, at 1126. But three white prospective jurors—Pamela Chesteen, Harold Waller, and Bobby Lester—also knew many individuals involved in the case. Chesteen knew 31 people, Waller knew 18 people, and Lester knew 27 people. See *ibid.* Yet as we explained above, the State did not ask Chesteen, Waller, and Lester individual follow-up questions about their connections to witnesses. That is a telling statistic. If the State were concerned about prospective jurors’ connections to witnesses in the case, the State presumably would have used

Opinion of the Court

individual questioning to ask those potential white jurors whether they could remain impartial despite their relationships. A “State’s failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.” *Miller-El II*, 545 U. S., at 246 (internal quotation marks omitted).

Both Carolyn Wright and Archie Flowers, who is the defendant’s father, had worked at the local Wal-Mart. But there was no evidence that they worked together or were close in any way. Importantly, the State did not ask individual follow-up questions to determine the nature of their relationship. And during group questioning, Wright said she did not know whether Flowers’ father still worked at Wal-Mart, which “supports an inference that Wright and Flowers did not have a close working relationship.” 240 So. 3d, at 1163 (King, J., dissenting). And white prospective jurors also had relationships with members of Flowers’ family. Indeed, white prospective juror Pamela Chesteen stated that she had provided service to Flowers’ family members at the bank and that she knew several members of the Flowers family. App. 83. Likewise, white prospective juror Bobby Lester worked at the same bank and also encountered Flowers’ family members. *Id.*, at 86. Although Chesteen and Lester were questioned during group *voir dire*, the State did not ask Chesteen or Lester individual follow-up questions in order to explore the depth of their relationships with Flowers’ family. And instead of striking those jurors, the State accepted them for the jury. To be sure, both Chesteen and Lester were later struck by the defense. But the State’s acceptance of Chesteen and Lester necessarily informs our assessment of the State’s intent in striking similarly situated black prospective jurors such as Wright.

The State also noted that Wright had once been sued by Tardy Furniture for collection of a debt 13 years earlier.

Opinion of the Court

Id., at 209. Wright said that the debt was paid off and that it would not affect her evaluation of the case. *Id.*, at 71, 90–91. The victims in this case worked at Tardy Furniture. But the State did not explain how Wright’s 13-year-old, paid-off debt to Tardy Furniture could affect her ability to serve impartially as a juror in this quadruple murder case. The “State’s unsupported characterization of the lawsuit is problematic.” 240 So. 3d, at 1163 (King, J., dissenting). In any event, the State did not purport to rely on that reason alone as the basis for the Wright strike, and the State in this Court does not rely on that reason alone in defending the Wright strike.

The State also explained that it exercised a peremptory strike against Wright because she had worked with one of Flowers’ sisters. App. 209. That was incorrect. The trial judge immediately stated as much. *Id.*, at 218–219. But incorrect statements of that sort may show the State’s intent: When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent.

That incorrect statement was not the only one made by the prosecutor. The State made apparently incorrect statements to justify the strikes of black prospective jurors Tashia Cunningham, Edith Burnside, and Flancie Jones. The State contradicted Cunningham’s earlier statement that she had only a working relationship with Flowers’ sister by inaccurately asserting that Cunningham and Flowers’ sister were close friends. See *id.*, at 84, 220. The State asserted that Burnside had tried to cover up a Tardy Furniture suit. See *id.*, at 226. She had not. See *id.*, 70–71. And the State explained that it struck Jones in part because Jones was Flowers’ aunt. See *id.*, at 229. That, too, was not true. See *id.*, at 86–88. The State’s pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury. See *Foster*, 578 U. S., at

Opinion of the Court

— (slip op., at 23); *Miller-El II*, 545 U. S., at 240, 245.

To be sure, the back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations. That is entirely understandable, and mistaken explanations should not be confused with racial discrimination. But when considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling. So it is here.

The side-by-side comparison of Wright to white prospective jurors whom the State accepted for the jury cannot be considered in isolation in this case. In a different context, the Wright strike might be deemed permissible. But we must examine the whole picture. Our disagreement with the Mississippi courts (and our agreement with Justice King's dissent in the Mississippi Supreme Court) largely comes down to whether we look at the Wright strike in isolation or instead look at the Wright strike in the context of all the facts and circumstances. Our precedents require that we do the latter. As Justice King explained in his dissent in the Mississippi Supreme Court, the Mississippi courts appeared to do the former. 240 So. 3d, at 1163–1164. As we see it, the overall context here requires skepticism of the State's strike of Carolyn Wright. We must examine the Wright strike in light of the history of the State's use of peremptory strikes in the prior trials, the State's decision to strike five out of six black prospective jurors at Flowers' sixth trial, and the State's vastly disparate questioning of black and white prospective jurors during jury selection at the sixth trial. We cannot just look away. Nor can we focus on the Wright strike in isolation. In light of all the facts and circumstances, we conclude that the trial court clearly erred in ruling that the State's peremptory strike of Wright was not motivated in substantial part by discriminatory intent.

Opinion of the Court

* * *

In sum, the State's pattern of striking black prospective jurors persisted from Flowers' first trial through Flowers' sixth trial. In the six trials combined, the State struck 41 of the 42 black prospective jurors it could have struck. At the sixth trial, the State struck five of six. At the sixth trial, moreover, the State engaged in dramatically disparate questioning of black and white prospective jurors. And it engaged in disparate treatment of black and white prospective jurors, in particular by striking black prospective juror Carolyn Wright.

To reiterate, we need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.

We reverse the judgment of the Supreme Court of Mississippi, and we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

ALITO, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 17–9572

CURTIS GIOVANNI FLOWERS, PETITIONER
v. MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
MISSISSIPPI

[June 21, 2019]

JUSTICE ALITO, concurring.

As the Court takes pains to note, this is a highly unusual case. Indeed, it is likely one of a kind. In 1996, four defenseless victims, three white and one black, were slaughtered in a furniture store in a small town in Montgomery County, Mississippi, a jurisdiction with fewer than 11,000 inhabitants. One of the victims was the owner of the store, which was widely frequented by residents of the community. The person prosecuted for this crime, petitioner Curtis Flowers, an African-American, comes from a local family whose members make up a gospel group and have many community ties.

By the time jury selection began in the case now before us, petitioner had already been tried five times for committing that heinous and inflammatory crime. Three times, petitioner was convicted and sentenced to death, but all three convictions were reversed by the State Supreme Court. Twice, the jurors could not reach a unanimous verdict. In all of the five prior trials, the State was represented by the same prosecutor, and as the Court recounts, many of those trials were marred by racial discrimination in the selection of jurors and prosecutorial misconduct. Nevertheless, the prosecution at the sixth trial was led by the same prosecutor, and the case was tried in Montgomery County where, it appears, a high

ALITO, J., concurring

percentage of the potential jurors have significant connections to either petitioner, one or more of the victims, or both.

These connections and the community's familiarity with the case were bound to complicate a trial judge's task in trying to determine whether the prosecutor's asserted reason for striking a potential juror was a pretext for racial discrimination, and that is just what occurred. Petitioner argues that the prosecution improperly struck five black jurors, but for each of the five, the prosecutor gave one or more reasons that were not only facially legitimate but were of a nature that would be of concern to a great many attorneys. If another prosecutor in another case in a larger jurisdiction gave any of these reasons for exercising a peremptory challenge and the trial judge credited that explanation, an appellate court would probably have little difficulty affirming that finding. And that result, in all likelihood, would not change based on factors that are exceedingly difficult to assess, such as the number of *voir dire* questions the prosecutor asked different members of the venire.

But this is not an ordinary case, and the jury selection process cannot be analyzed as if it were. In light of all that had gone before, it was risky for the case to be tried once again by the same prosecutor in Montgomery County. Were it not for the unique combinations of circumstances present here, I would have no trouble affirming the decision of the Supreme Court of Mississippi, which conscientiously applied the legal standards applicable in less unusual cases. But viewing the totality of the circumstances present here, I agree with the Court that petitioner's capital conviction cannot stand.

THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

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[June 21, 2019]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins as to Parts I, II, and III, dissenting.

On a summer morning in July 1996 in Winona, Mississippi, 16-year-old Derrick “Bobo” Stewart arrived for the second day of his first job. He and Robert Golden had been hired by the Tardy Furniture store to replace petitioner Curtis Flowers, who had been fired a few days prior and had his paycheck docked for damaging store property and failing to show up for work. Another employee, Sam Jones, Jr., planned to teach Stewart and Golden how to properly load furniture.

On Jones’ arrival, he found a bloodbath. Store owner Bertha Tardy and bookkeeper Carmen Rigby had each been murdered with a single gunshot to the head. Golden had been murdered with two gunshots to the head, one at very close range. And Stewart had been shot, execution style, in the back of his head. When Jones entered the store, Stewart was fighting for every breath, blood pouring over his face. He died a week later.

On the morning of the murders, a .380-caliber pistol was reported stolen from the car of Flowers’ uncle, and a witness saw Flowers by that car before the shootings. Officers recovered .380-caliber bullets at Tardy Furniture and matched them to bullets fired by the stolen pistol. Gunshot residue was found on Flowers’ hand a few hours after

THOMAS, J., dissenting

the murders. A bloody footprint found at the scene matched both the size of Flowers' shoes and the shoe style that he was seen wearing on the morning of the murders. Multiple witnesses placed Flowers near Tardy Furniture that morning, and Flowers provided inconsistent accounts of his whereabouts. Several hundred dollars were missing from the store's cash drawer, and \$235 was found hidden in Flowers' headboard after the murders. 240 So. 3d 1082, 1092–1095, 1107 (Miss. 2017).

In the 2010 trial at issue here, Flowers was convicted of four counts of murder and sentenced to death. Applying heightened scrutiny, the state courts found that the evidence was more than sufficient to convict Flowers, that he was tried by an impartial jury, and that the State did not engage in purposeful race discrimination in jury selection in violation of the Equal Protection Clause. *Id.*, at 1096, 1113, 1139, 1135.

The Court today does not dispute that the evidence was sufficient to convict Flowers or that he was tried by an impartial jury. Instead, the Court vacates Flowers' convictions on the ground that the state courts clearly erred in finding that the State did not discriminate based on race when it struck Carolyn Wright from the jury.

The only clear errors in this case are committed by today's majority. Confirming that we never should have taken this case, the Court almost entirely ignores—and certainly does not refute—the race-neutral reasons given by the State for striking Wright and four other black prospective jurors. Two of these prospective jurors knew Flowers' family and had been sued by Tardy Furniture—the family business of one of the victims and also of one of the trial witnesses. One refused to consider the death penalty and apparently lied about working side-by-side with Flowers' sister. One was related to Flowers and lied about her opinion of the death penalty to try to get out of jury duty. And one said that because she worked with two

THOMAS, J., dissenting

of Flowers’ family members, she might favor him and would not consider only the evidence presented. The state courts’ findings that these strikes were not based on race are the opposite of clearly erroneous; they are clearly correct. The Court attempts to overcome the evident race neutrality of jury selection in this trial by pointing to a supposed history of race discrimination in previous trials. But 49 of the State’s 50 peremptory strikes in Flowers’ previous trials were race neutral. The remaining strike occurred 20 years ago in a trial involving only one of Flowers’ crimes and was never subject to appellate review; the majority offers no plausible connection between that strike and Wright’s.

Today’s decision distorts the record of this case, eviscerates our standard of review, and vacates four murder convictions because the State struck a juror who would have been stricken by any competent attorney. I dissent.

I

Twice now, the Court has made the mistake of granting this case. The first time, this case was one of three that the Court granted, vacated, and remanded in light of *Foster v. Chatman*, 578 U. S. ____ (2016), which involved a challenge under *Batson v. Kentucky*, 476 U. S. 79 (1986). See *Flowers v. Mississippi*, 579 U. S. ____ (2016). But “*Foster* did not change or clarify the *Batson* rule in any way,” so remanding was senseless and unproductive: “Without pointing out any errors in the State Supreme Court’s analysis” or bothering to explain how *Foster* was relevant, “the [Court] simply order[ed] the State Supreme Court to redo its work.” *Flowers*, 579 U. S., at ____, ____ (ALITO, J., dissenting) (slip op., at 1, 4).

Unsurprisingly, no one seemed to understand *Foster*’s relevance on remand. The defendants simply “re-urge[d] the arguments [they] had raised” before, and all three courts promptly reinstated their prior decisions—

THOMAS, J., dissenting

confirming the impropriety of the entire enterprise. 240 So. 3d, at 1117–1118, 1153; *State v. Williams*, 2013–0283 (La. App. 4 Cir. 9/7/16), 199 So. 3d 1222, 1230, 1238 (pointing out that “*Foster* did not change the applicable principles for analyzing a *Batson* claim”); *Ex parte Floyd*, 227 So. 3d 1, 13 (Ala. 2016).

Flowers then filed another petition for certiorari, raising the same question as his first petition: whether a prosecutor’s history of *Batson* violations is irrelevant when assessing the credibility of his proffered explanations for peremptory strikes. Under our ordinary certiorari criteria, we would never review this issue. There is no disagreement among the lower courts on this question, and the question is not implicated by this case—the Mississippi Supreme Court *did* consider the prosecutor’s history, see 240 So. 3d, at 1122–1124, 1135, and, to the extent there is a relevant history here, it is one of race-*neutral* strikes, see Part III, *infra*.

Nonetheless, Flowers’ question presented at least had the virtue of being a question of law that could affect *Batson*’s application. Unchastened by its *Foster* remand, however, the Court granted certiorari and changed the question presented to ask merely whether the Mississippi Supreme Court had misapplied *Batson* in this particular case. In other words, the Court tossed aside any pretense of resolving a legal question so it could reconsider the factual findings of the state courts. In so doing, the Court disregards the rule that “[w]e do not grant a certiorari to review evidence and discuss specific facts,” *United States v. Johnston*, 268 U. S. 220, 227 (1925), particularly where there are “concurrent findings of fact by two courts below,” *Exxon Co., U. S. A. v. Sofec, Inc.*, 517 U. S. 830, 841 (1996).

The Court does not say why it disregarded our traditional criteria to take this case. It is not as if the Court lacked better options. See *Gee v. Planned Parenthood of*

THOMAS, J., dissenting

Gulf Coast, Inc., 586 U. S. ____ (2018) (THOMAS, J., dissenting from denial of certiorari). Perhaps the Court lacked confidence in the proceedings below. Flowers’ case, like the others needlessly remanded in light of *Foster*, comes to us from a state court in the South. These courts are “familiar objects of the Court’s scorn,” *United States v. Windsor*, 570 U. S. 744, 795 (2013) (Scalia, J., dissenting), especially in cases involving race.¹

Or perhaps the Court granted certiorari because the case has received a fair amount of media attention. But if so, the Court’s action only encourages the litigation and relitigation of criminal trials in the media, to the potential detriment of all parties—including defendants. The media often seeks “to titillate rather than to educate and inform.” *Chandler v. Florida*, 449 U. S. 560, 580 (1981). And the Court has “long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial,” by “influenc[ing] public opinion” and “inform[ing] potential jurors of . . . information wholly inadmissible at the actual trial.” *Gannett Co. v. DePasquale*, 443 U. S. 368, 378 (1979); e.g., *Sheppard v. Maxwell*, 384 U. S. 333, 356–363 (1966); *Irvin v. Dowd*, 366 U. S. 717, 725–728 (1961). Media attention can produce other dangers, too, including discouraging reluctant witnesses from testifying and encouraging eager witnesses, prosecutors, defense counsel, and even judges to perform for the audience. See *Estes v. Texas*, 381 U. S. 532, 591 (1965) (Harlan, J., concurring). Any appearance that this Court gives closer scrutiny to cases with significant media attention will only exacerbate these problems and undermine the fairness of criminal trials.

¹E.g., *Tharpe v. Sellers*, 583 U. S. ____ (2018) (*per curiam*); *Buck v. Davis*, 580 U. S. ____ (2017); *Foster v. Chatman*, 578 U. S. ____ (2016); *In re Davis*, 557 U. S. 952 (2009); *Snyder v. Louisiana*, 552 U. S. 472 (2008).

THOMAS, J., dissenting

Whatever the Court's reason for taking this case, we should have dismissed it as improvidently granted. If the Court wanted to simply review the state courts' application of *Batson*, it at least could have had the decency to do so the first time around. Instead, the Court wasted the State's, defendant's, and lower court's time and resources—to say nothing of prolonging the ongoing “nightmare” of Bobo Stewart's and the other victims' families as they await justice. Tr. 3268–3272. And now, the majority considers it a point of pride to “break no new legal ground,” *ante*, at 3, 31, and proceeds to second-guess the factual findings of two different courts on matters wholly collateral to the merits of the conviction. If nothing else, its effort proves the reason behind the rule that we do not take intensively fact-specific cases.

II

The majority's opinion is so manifestly incorrect that I must proceed to the merits. Flowers presented no evidence whatsoever of purposeful race discrimination by the State in selecting the jury during the trial below. Each of the five challenged strikes was amply justified on race-neutral grounds timely offered by the State at the *Batson* hearing. None of the struck black jurors was remotely comparable to the seated white jurors. And nothing else about the State's conduct at jury selection—whether trivial mistakes of fact or supposed disparate questioning—provides any evidence of purposeful discrimination based on race.

A

1

The majority focuses its discussion on potential juror Carolyn Wright, but the State offered multiple race-neutral reasons for striking her. To begin, Wright lost a lawsuit to Tardy Furniture soon after the murders, and a

THOMAS, J., dissenting

garnishment order was issued against her. App. 71–72; Record 2697. Noting that Wright claimed the lawsuit “would not affect her evaluation of the case,” the majority questions how this lawsuit “could affect [Wright’s] ability to serve impartially.” *Ante*, at 29. But the potential bias is obvious. The “victims in this case” did not merely “wor[k] at Tardy Furniture.” *Ibid*. At the time of the murders, Bertha Tardy owned Tardy Furniture. Following her murder, her daughter and son-in-law succeeded her as owners; they sued Wright, and the daughter testified at this trial. See App. 71, 209; 240 So. 3d, at 1093; Tr. 1656. Neither the trial court nor Flowers suffered from any confusion as to how losing a lawsuit to a trial witness and daughter of a victim might affect a juror. See App. 280, and n. 2; Recording of Oral Arg. 13:40–13:47 in No. 2010–DP–01328–SCT (Miss., July 14, 2014) (Flowers’ counsel arguing that “the potential jurors who were sued by” Tardy had more “basis for being upset with her” than Flowers did), <https://judicial.mc.edu/case.php?id=1122570>. Indeed, a portion of the daughter’s testimony focused on obtaining judgments and garnishments against customers who did not pay off their accounts. Tr. 2672–2674.

Faced with this strong race-neutral reason for striking Wright, the majority first suggests that the State did not adequately explain how the lawsuit could affect Wright. But it is obvious, and in any event the majority is wrong—the State *did* spell it out. See App. 209 (“She was sued by Tardy Furniture, after these murders, by the family members that will be testifying here today”). Moreover, Flowers did not ask for further explanation, instead claiming that “there is no evidence of an actual lawsuit,” *id.*, at 211, even though Wright had admitted it, *id.*, at 71–72. The State then entered into the record a copy of the judgment containing a garnishment amount. *Id.*, at 215; see Record 2697.

THOMAS, J., dissenting

Second, the majority quotes the dissent below for the proposition that the “State’s unsupported characterization of the lawsuit is problematic.” *Ante*, at 29. But the Court neglects to mention that the dissent’s basis for this statement was that “[n]othing in the record supports the contention that Wright’s wages were garnished.” 240 So. 3d, at 1162 (King, J., dissenting). Again, that is incorrect. See Record 2697.

Finally, the majority dismisses the lawsuit’s significance because “the State did not purport to rely on that reason *alone* as the basis for the Wright strike.” *Ante*, at 29 (emphasis added). But the fact that the State had *additional* race-neutral reasons to strike Wright does not make the lawsuit any less of a race-neutral reason. As the State explained, Wright knew nearly every defense witness and had worked with Flowers’ father at what the trial court described as the “smallest Wal-Mart . . . that I know in existence.” App. 218. The majority tries to minimize this connection by pointing out that “Wright said she did not know whether Flowers’ father still worked at Wal-Mart.” *Ante*, at 28. That is understandable, given that Wright testified that *she* no longer worked at the Wal-Mart. Tr. 782. The majority misses the point: Wright had worked in relatively close proximity with the defendant’s father.²

2

The majority, while admonishing trial courts to “consider the prosecutor’s race-neutral explanations,” *ante*, at 17, completely ignores the State’s race-neutral explanations for striking the other four black jurors.

Tashia Cunningham stated repeatedly that she

²The majority also complains that the State did not ask enough “follow-up questions” of Wright. *Ante*, at 28. I see no reason why the State needed more information. Besides, if the State *had* asked more questions, the majority would complain that the State engaged in “dramatically disparate” questioning of Wright.

THOMAS, J., dissenting

“d[id]n’t believe in the death penalty” and would “not even consider” it. App. 129; see 2d Supp. Record 256b. When pressed by the trial court on this point, she vacillated, saying that she “d[id]n’t think” she could consider the death penalty but then, “I might. I might. I don’t know. I might.” App. 130. Opposition to the death penalty is plainly a valid, race-neutral reason for a strike. Moreover, Cunningham knew Flowers’ sister, having worked with her on an assembly line for several years. *Id.*, at 83–85. She testified that they did not work in close proximity, but a supervisor testified that they actually worked “side by side.” *Id.*, at 149–152. Both this apparent misstatement and the fact that Cunningham worked with Flowers’ sister are valid, race-neutral reasons.

Next, Edith Burnside knew Flowers personally. Flowers had visited in her home, lived one street over, and played basketball with her sons. *Id.*, at 75, 79–80. Burnside also testified repeatedly that she “could not judge anyone,” no “matter what the case was,” *id.*, at 69–70, 143–144, and that her “problem with judging” could “affect [her] judgment” here, *id.*, at 144. Finally, she too was sued by Tardy Furniture soon after the murders, and a garnishment order was entered against her. See *id.*, at 71, 141–142; *Tardy Furniture Co. v. Burnside*, Civ. No. 1359 (Justice Ct. Montgomery Cty., Miss., June 23, 1997), Dkt. 13, p. 553.

Next, Dianne Copper had worked with both Flowers’ father and his sister for “a year or two” each. App. 77, 189, 234, 236. She agreed that because of these relationships and others with various defense witnesses, she might “lean toward” Flowers and would be unable to “come in here . . . with an open mind.” *Id.*, at 190; see *id.*, at 78. She also said that deciding the case on “the evidence only” would make her “uncomfortable.” *Id.*, at 191–192.

Finally, as to Flancie Jones, Flowers conceded below

THOMAS, J., dissenting

that he “did not challenge [her] strike” and that “the State’s bases for striking Jones appear to be race neutral.” Supp. Brief for Appellant in No. 2010–DP–01348–SCT (Miss.), p. 20, n. 12. Because any argument as to Jones “was not raised below, it is waived.” *Sprietsma v. Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002). Even if Flowers had not waived this argument, this strike was obviously supported by race-neutral reasons. Jones was related to Flowers in several ways. See App. 73, 179. She was late to court on multiple occasions. *Id.*, at 180, 182. On her juror questionnaire, she said she was “strongly against the death penalty,” but when asked about her opposition, said, “I guess I’d say anything to get off” jury duty. *Id.*, at 181; see 2d Supp. Record 325b. She then admitted that she was not necessarily “being truthful” on her questionnaire but refused to provide her actual view on the death penalty, saying, “I—really and truly . . . don’t want to be here.” App. 181–182.

3

In terms of race-neutral validity, these five strikes are not remotely close calls. Each strike was supported by multiple race-neutral reasons articulated by the State at the *Batson* hearing and supported by the record. It makes a mockery of *Batson* for this Court to tell prosecutors to “provide race-neutral reasons for the strikes,” and to tell trial judges to “consider the prosecutor’s race-neutral explanations in light of all of the relevant facts and circumstances,” *ante*, at 17, and then completely ignore the State’s reasons for four out of five strikes.

Only by ignoring these facts can the Court assert that “the State’s decision to strike five of the six black prospective jurors is further evidence suggesting that the State was motivated in substantial part by discriminatory intent.” *Ante*, at 23. Putting aside the fact that the majority has its numbers wrong (the State struck five of seven

THOMAS, J., dissenting

potential black jurors),³ the bare numbers are meaningless outside the context of the *reasons* for the strikes. The majority has no response whatsoever to the State’s race-neutral explanations and, for four of the five strikes, does not dispute the state courts’ conclusion that race played no role at all. For *Batson* purposes, these strikes might as well have been exercised against white jurors. Yet the majority illegitimately counts them all against the State.

B

Given the multiple race-neutral reasons for the State’s strikes, evidence of racial discrimination would have to be overwhelming to show a *Batson* violation. The majority’s evidence falls woefully short.

As the majority explains, “comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred.” *Ante*, at 26–27. For example, “[w]hen a prosecutor’s ‘proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.’” *Ante*, at 27. By the same token, a defendant’s failure to find any similarly-situated whites permitted to serve tends to disprove purposeful discrimination. Here, neither the majority nor Flowers has identified any nonstruck white jurors remotely similar to any of the struck black jurors.

The majority points to white jurors Pamela Chesteen and Bobby Lester, who worked at the Bank of Winona and therefore had interacted with several members of Flowers’ family as bank customers. By the majority’s lights, Ches-

³The majority ignores the fact that, after the initial *Batson* challenge, the State tendered a black juror as an alternate instead of exercising available peremptory strikes. The State also tendered the first black juror available. This is hardly a “consistent pattern” of strikes against black jurors. *Ante*, at 22.

THOMAS, J., dissenting

teen's and Lester's banker-customer relationship was the same as Wright's co-worker relationship with Flowers' father. *Ante*, at 27–28. That comparison is untenable. Lester testified that working at the bank meant he and Chesteen “s[aw] everyone in town.” App. 86. And as the trial court explained, “a bank teller, who waits on customers at a bank,” has a “substantially different” relationship from someone who “work[s] at the same business establishment with members of the defendant’s family.” *Id.*, at 278; see *id.*, at 236. The Mississippi Supreme Court agreed that “a coworker relationship” and “employee/customer relationship are distinguishable.” 240 So. 3d, at 1127. The majority mentions none of this, evidently relying on its superior knowledge of the banker-customer relationships at the Bank of Winona.

The more relevant comparator to Chesteen and Lester is Alexander Robinson, a black man who was a customer at a store where Flowers' brother worked. App. 82. The State confirmed with Robinson that this relationship was “just a working relationship”—*i.e.*, an employee-customer relationship—and immediately thereafter clarified with Chesteen and Lester that their relationships with Flowers' family members was “like Mr. Robinson, just a working relationship.” *Id.*, at 82–83, 85–86.⁴ The State then tendered Robinson, Chesteen, and Lester as jurors. *Id.*, at 203, 208. Later, the State would strike black jurors Wright and Copper, who were both co-workers of members of Flowers' family. As the trial court understood, it is “evident . . . that the prosecution utilized peremptory strikes only against those individuals who actually worked with, or who in the past had worked with, members of Flowers' family.” *Id.*, at 278; see *id.*, at 279.

⁴Thus, the majority is simply wrong to complain that the State failed to ask Chesteen or Lester “individual follow-up questions” on this issue. *Ante*, at 28.

THOMAS, J., dissenting

Next, the majority contends that white jurors Chesteen, Lester, and Harold Waller, like Wright, “knew many individuals involved in the case.” *Ante*, at 27. Yet the majority concedes that Wright knew more individuals than any of them. And the more relevant statistic from the State’s perspective is how many *defense* witnesses a juror knows, since that knowledge suggests a greater connection to the defendant. By Flowers’ own count, Wright knew substantially more defense witnesses than the three white jurors. According to Flowers, Wright knew 19 defense witnesses, while Chesteen knew 14 and Lester and Waller knew around 6 each. See Brief for Petitioner 49, n. 37; Brief for Appellant in No. 2010–DP–01348–SCT (Miss.), p. 114.

Additional relevant differences existed between Wright and the three white jurors. Wright had been *sued* by a witness and member of the victim’s family, and worked at the same store as the defendant’s father. Chesteen, on the other hand, was *friends* with the same member of the victim’s family and also knew another victim’s wife. App. 93–94, 46. The trial court found that Chesteen “had a much closer relationship with members of the victim[s] families tha[n] she had with anyone in Flowers’ family.” *Id.*, at 278.

Likewise, Waller knew victim Carmen Rigby and her husband; their children attended school with his daughter, and “[t]hey were involved in school activities together.” Tr. 821, 1042. He served on the school board with Rigby. *Id.*, at 1043. And victim Bobo Stewart “went to school with [Waller’s] daughter,” and Waller knew his family. App. 48, 53.

Similarly, Lester had been friends with Rigby’s husband “for years,” and he “knew her family.” Tr. 822, 1045. Lester’s wife taught Stewart first grade. App. 48; Tr. 1045. Lester was related by marriage to Bertha Tardy and had known the Tardy family his entire life, growing

THOMAS, J., dissenting

up with Bertha's daughter. *Id.*, at 787–788. His daughter had just graduated with Bertha's grandson, and they were friends. *Id.*, at 788, 1046. As Lester put it, “I have a lot of connections to the [victims'] families.” *Id.*, at 788.

Given that these prospective jurors were favorable for the State, it is hardly surprising that the State would not affirmatively “us[e] individual questioning to ask th[e]se potential white jurors whether they could remain impartial despite their relationships” with victims' families or prosecution witnesses, *ante*, at 27–28, for to do so could invite defense strikes. Revealingly, Flowers' counsel had exhaustively questioned these three white jurors—treating them much differently than Wright. Flowers' counsel asked Wright only a handful of questions, all of which sought to confirm that she could judge impartially. App. 90–91, 105–106. By contrast, Flowers' counsel asked Chesteen more than 30 questions, most of which sought to cast doubt on Chesteen's ability to remain impartial given her relationships with the victims' families. *Id.*, at 93–95, 111–118. Flowers' counsel asked Lester more than 60 questions and Waller about 15 questions along the same lines. Tr. 1045–1047; App. 160–174; Tr. 1042–1044; App. 123–124. Flowers was so concerned about these white jurors' connections with the victims that he tried to strike both Chesteen and Lester—but not Wright—for cause, and when that failed, he exercised peremptory strikes on all three white jurors. Tr. 1622, 1624, 1743–1744; App. 204, 208; see *id.*, at 278.

In short, no reasonable litigant or trial court would consider Wright “similarly situated,” *ante*, at 28, to these three white jurors.

C

The majority next discovers “clue[s]” of racial discrimination in minor factual mistakes supposedly made by the State during the *Batson* hearing. *Ante*, at 29–30. As an

THOMAS, J., dissenting

initial matter, Flowers forfeited this argument by failing to present it to the trial court. Under *Batson*, the trial court must decide whether, “*in light of the parties’ submissions*,” “the defendant has shown purposeful discrimination.” *Snyder v. Louisiana*, 552 U. S. 472, 477 (2008) (emphasis added; internal quotation marks omitted). The Court has made clear that “a prosecutor simply has got to state his reasons as best he can [at the *Batson* hearing] and stand or fall on the plausibility of the reasons he gives.” *Miller-El v. Dretke*, 545 U. S. 231, 252 (2005).

The same rule must apply to the defendant, the party with the ultimate burden of proving purposeful discrimination. *Johnson v. California*, 545 U. S. 162, 170–171 (2005); *Batson*, 476 U. S., at 96–98. Thus, if the defendant makes no argument on a particular point, the trial court’s failure to consider that argument cannot be erroneous, much less clearly so. See, e.g., *Davis v. Baltimore Gas and Elec. Co.*, 160 F. 3d 1023, 1027–1028 (CA4 1998); *Wright v. Harris County*, 536 F. 3d 436, 438 (CA5 2008). Excusing the defendant from making his arguments before the trial court encourages defense counsel to remain silent, prevents the State from responding, deprives the trial court of relevant arguments, and denies reviewing courts a sufficient record. See *Snyder*, *supra*, at 483; *Garraway v. Phillips*, 591 F. 3d 72, 76–77 (CA2 2010).⁵

Even if Flowers had not forfeited his argument about the State’s “mistakes,” it is devoid of merit. The *Batson* hearing was conducted immediately after *voir dire*, before a transcript was available. App. 214; *id.*, at 225–226. In

⁵At a minimum, Mississippi has reasonably read *Batson*’s “prophylactic framework,” *Johnson v. California*, 545 U. S. 162, 174 (2005) (THOMAS, J., dissenting), to mean that the party making a *Batson* claim forfeits arguments not made to the trial court. See *Pitchford v. State*, 45 So. 3d 216, 227–228 (Miss. 2010); accord, Record 2965. Thus, whether as a matter of *Batson* itself or the State’s implementation of *Batson*, Flowers forfeited these arguments.

THOMAS, J., dissenting

explaining their strikes, counsel relied on handwritten notes taken during a fast-paced, multiday *voir dire* involving 156 potential jurors. *Id.*, at 229, 258. Still, the majority comes up with only a few mistakes, and they are either imagined or utterly trivial. The majority claims that the State incorrectly “asserted that Burnside”—one of the struck black jurors—“had tried to cover up a Tardy Furniture suit.” *Ante*, at 29. But the State’s assertion was at least reasonable. When the State asked Burnside about the lawsuit, she responded that “[i]t wasn’t a dispute” and “[w]e never had no misunderstanding about it.” App. 141–142. Quite reasonably, the State asked why the matter ended up in court, and Burnside conceded that she had to be sued, even as she insisted that there “was no falling-out about it.” *Id.*, at 142. As previously explained, a judgment and garnishment were issued against her.

The majority’s other supposed mistakes are inconsequential. First, the State confused which potential juror worked with Flowers’ sister, and then corrected its mistake. See *id.*, at 218–219, 234. Second, the State referred to that juror, Tashia Cunningham, as “a close friend” of Flowers’ sister, whereas the testimony established only that they worked together closely. *Id.*, at 220. Flowers *agreed* with the “friendship” characterization during the *Batson* hearing, *id.*, at 221, and in any event, whether Cunningham and Flowers’ sister were close co-workers or close friends is irrelevant. Third, the State confused struck juror Flancie Jones’ familial relationships with Flowers, saying that Flowers’ sister was Jones’ niece, when in fact Flowers’ sister was apparently married to Jones’ nephew. *Id.*, at 229, 231. But whatever the precise relationship, even Flowers conceded that Jones had an “in-law relationship to the entire [Flowers] family,” so the relevant point remained: Jones was related in multiple ways to Flowers. *Id.*, at 230–231; Tr. 967–968. It is hard to imagine less significant “mistakes.”

THOMAS, J., dissenting

Tellingly, Flowers’ counsel, although aided by “‘many interns,’” App. 214, made many more mistakes during this process. *E.g.*, *id.*, at 204–205 (incorrectly identifying a juror); *id.*, at 207–208 (striking a juror and then immediately making an argument premised on not striking that juror); *id.*, at 210 (confusing jurors); *id.*, at 211 (confusing which family members were acquainted with a juror); *id.*, at 212 (incorrectly stating that no general question was asked of all jurors as to accounts or suits with the Tardys, see *id.*, at 70, 217); *id.*, at 222–223 (confusing jurors); *id.*, at 230 (“[M]aybe we didn’t get to this juror”).⁶

In short, in the context of the trial below, a few trivial errors on secondary or tertiary race-neutral reasons for striking some jurors can hardly be counted as “telling” evidence of race discrimination. *Ante*, at 30; see *ibid.* (“[M]istaken explanations should not be confused with racial discrimination”).

⁶These mistakes continued before this Court. Flowers asserts that in his first four trials, the State “struck every black panelist that [it] could,” Brief for Petitioner 23; that is false. See *infra*, at 30. Flowers says that the State asked potential juror Robinson “a total of five questions,” Brief for Petitioner 15, n. 14, but it actually asked 10. See App. 82–83; Tr. 1147–1148. Flowers says that the State “did not question [Robinson] on [his] relationship” with Flowers’ brother, Brief for Petitioner 46, n. 35; it did. See App. 82–83. Flowers refers to Bertha Tardy’s “son,” Brief for Petitioner 52, but Tardy’s only child was a daughter. See Tr. 3268. Flowers says that “the Mississippi Supreme Court found two clear *Batson* violations” in the third trial, Brief for Petitioner 32; it did not. See *infra*, at 28–29. Flowers repeatedly refers to “the decidedly false claim that Wright’s” and Burnside’s “wages had been garnished,” Brief for Petitioner 56, 50, 18, 22, n. 24, 51; Tr. of Oral Arg. 8, 11, 12, even though that claim is true. See *supra*, at 6–9. Flowers said that Wright “still work[ed]” at Wal-Mart at the time of jury selection, Tr. of Oral Arg. 16; she did not. Tr. 782. Flowers agreed that in this trial, the State struck “every black juror that was available on the panel” after “the first one,” Tr. of Oral Arg. 57–58; Reply Brief 1, but it did not. See App. 241 (tendering a black juror as an alternate).

THOMAS, J., dissenting

D

Turning to even less probative evidence, the majority asserts that the State engaged in disparate—“dramatically disparate,” the majority repeats, *ante*, at 2, 19, 23, 26, 31—questioning based on race. By the majority’s count, “[t]he State asked the five black prospective jurors who were struck a total of 145 questions” and “the 11 seated white jurors a total of 12 questions.” *Ante*, at 23. The majority’s statistical “evidence” is irrelevant and misleading.

First, the majority finds that only one juror—Carolyn Wright—was struck on the basis of race, but it neglects to mention that the State asked her only five questions. See App. 71–72, 104–105. Of course, the majority refuses to identify the “certain level of disparity” that meets its “dramatically disparate” standard, *ante*, at 26, but its failure to recognize that the only juror supposedly discriminated against was asked hardly any questions suggests the majority is “slic[ing] and dic[ing]” statistics, *ante*, at 23. Asking other black jurors more questions would be an odd way of “try[ing] to find some pretextual reason” to strike Wright. *Ante*, at 25.

Second, both sides asked a similar number of questions to the jurors they peremptorily struck. This is to be expected—a party will often ask more questions of jurors whose answers raise potential problems. Among other reasons, a party may wish to build a case for a cause strike, and if a cause strike cannot be made, those jurors are more likely to be peremptorily struck. Here, Flowers asked the jurors he struck—all white, Tr. of Oral Arg. 57—an average of about 40 questions, and the State asked the black jurors it struck an average of about 28 questions. The number of questions asked by the State to these jurors is not evidence of race discrimination.

Moreover, the majority forgets that correlation is not causation. The majority appears to assume that the only

THOMAS, J., dissenting

relevant difference between the black jurors at issue and seated white jurors is their race. But reality is not so simple. Deciding whether a statistical disparity is caused by a particular factor requires controlling for other potentially relevant variables; otherwise, the difference could be explained by other influences. See Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 709 (1980); cf. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 587 U. S. ___, ___, n. 4 (2019) (THOMAS, J., concurring) (slip op., at 9, n. 4) (showing that bare statistical disparities can be used to support diametrically different theories of causation). Yet the majority's raw comparison of questions does not control for any of the important differences between struck and seated jurors. See *supra*, at 11–14. This defective analysis does not even begin to provide probative evidence of discrimination. See, e.g., *People Who Care v. Rockford Bd. of Ed., School Dist. No. 205*, 111 F. 3d 528, 537–538 (CA7 1997) (Posner, C. J.) (“[A] statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation”). Indeed, it is difficult to conceive of a statistical study that could possibly control for all of the relevant variables in this context, including tone of voice, facial expressions, and other relevant information.

Most fundamentally, the majority's statistics are divorced from the realities of this case. Winona is a very small town, and “this was the biggest crime that had ever occurred” there. Tr. 1870. As one juror explained, “[e]verybody in Winona has probably” heard about the case. *Id.*, at 1180; accord, *id.*, at 1183 (Flowers' counsel stating the same). One potential juror knew almost everyone “involved in it” between her job as a teacher and attendance at church. App. 81–82. Tardy Furniture “basically did business with the whole Winona community.” Tr. 2667.

THOMAS, J., dissenting

Moreover, Flowers' family was "very, very prominent" in Winona's black community. *Id.*, at 1750. As the trial court explained,

"Flowers has a number of brothers and sisters. His parents are well-known. [His father] is apparently one of the most well-thought of people in this community. You have had countless numbers of African-American individuals that have come in and said they could not sit in judgment because of their knowledge of Mr. Flowers, and they could not be fair and impartial." App. 197; see *id.*, at 199–200; Tr. 1750.

Flowers' counsel stated that when Flowers' father "was working as a greeter at Wal-Mart," there was "probably not a person in Winona who wouldn't have said, 'Mr. Archie's my friend.'" App. 221. According to the trial court, "the overwhelming majority" of potential black jurors "stated that they could not sit in judgment of him because of kinships, friendships, and family ties." *Id.*, at 256.

To obtain a sufficient jury pool, the trial court had to call 600 potential jurors. *Id.*, at 258. In such a small county, that meant a man, his wife, his mother, and his father were all called for jury duty in this case. See Tr. 939–941. According to Flowers,

"seventy-five percent of the total qualified venire, sixty-three percent of the venire members actually tendered for acceptance or rejection as jurors, and forty percent of the persons empanelled as jurors or alternates (six of 15) were personally acquainted with either the defendant or one or more of the decedents or their families and/or had actual opinions as to guilt or innocence formed prior [to] the trial." Brief for Appellant 130.

Before peremptory strikes even started, the venire had

THOMAS, J., dissenting

gone from 42% to 28% black. App. 194–195. As the trial court explained, “nothing the State has done has caused this statistical abnormality.” *Id.*, at 198. Instead, any “statistical abnormality” “is strictly because of the prominence of [Flowers] family.” *Id.*, at 200. Flowers’ counsel admitted that she was not “surprise[d]” by the reduction given the circumstances and the experiences in the previous trials. *Id.*, at 199.⁷

The state courts appropriately viewed the parties’ questioning in light of these circumstances. The Mississippi Supreme Court, for example, found that the State “asked more questions” of the “jurors who knew more about the case, who had personal relationships with Flowers’s family members, who said they could not be impartial, or who said they could not impose the death penalty,” and that “[t]hose issues are appropriate for followup questions.” 240 So. 3d, at 1125. The court also found that “[t]he State’s assertion that elaboration and followup questions were needed with more of the African-American jurors is supported by the record.” *Ibid.* The majority wonders why “the State spent far more time questioning the black prospective jurors” and concludes that “[n]o one can know.” *Ante*, at 23, 25. But even Flowers admits that “more African-American jurors knew the parties, most of the [State’s] follow-up questions pertained to relevant matters, [and] more questions were asked of jurors who had personal relationships about the case, or qualms

⁷One trial had to be moved to a new venue because “during *voir dire* it became apparent that a fair and impartial jury could not be impaneled.” *Flowers v. State*, 842 So. 2d 531, 535 (Miss. 2003). At another trial, one of two black jurors seated was “excused after he informed the judge that he could not be a fair and impartial juror.” *Flowers v. State*, 947 So. 2d 910, 916 (Miss. 2007). And at the next trial, one of the alternate jurors, who was black, was convicted of perjury after it came to light that she had lied during *voir dire* about not knowing Flowers and had visited him in jail. *Flowers v. State*, 240 So. 3d 1082, 1137 (Miss. 2017).

THOMAS, J., dissenting

about the death penalty.” Pet. for Cert. 23 (emphasis deleted).

The majority ignores Flowers’ concession, but the questions asked by the State bear it out. The State’s questions also refute the majority’s suggestion that the State did not “not as[k] white prospective jurors th[e] same questions.” *Ante*, at 25. The State asked all potential jurors whether Tardy Furniture sued them, and only Wright and Burnside answered in the affirmative. See App. 70–71, 99–100, 217–218. Two of five questions to Wright and around eight questions to Burnside followed up on this lawsuit. *Id.*, at 70–72, 141–143. All potential jurors were asked whether they knew Flowers’ father, and no white jurors had worked with him at Wal-Mart. *Id.*, at 61, 218. Two of Wright’s remaining three questions followed up on this relationship. *Id.*, at 104–105. The State asked all potential jurors whether anyone lived in the areas around Flowers’ house, and no white jurors answered in the affirmative. *Id.*, at 75–81. Seven questions to Copper—another black prospective juror—and three to Burnside followed up on this geographic proximity. *Id.*, at 75–77, 79–80. Copper’s remaining questions were mostly about her working with Flowers’ father and sister and her statement that she would lean in Flowers’ favor. *Id.*, at 77–78, 189–190. Burnside’s remaining questions were mostly about Flowers’ visits to her house and her statement that she could not judge others. *Id.*, at 80–81, 143–144. The State asked all potential jurors whether anyone was related to Flowers’ family, and only Jones, a black prospective juror, answered affirmatively, leading to about 18 follow-up questions. *Id.*, at 72–75, 86–88, 179–180. Jones’ remaining questions were mostly about her being late to court and her untruthful answer regarding the death penalty on the jury questionnaire. *Id.*, at 75, 180–182. Finally, nearly all of Cunningham’s questions were about her work with Flowers’ sister. *Id.*, at 83–85, 130–133. Any reasonable

THOMAS, J., dissenting

prosecutor would have followed up on these issues, and the majority does not cite even a single question that it thinks suggests racial discrimination.

The majority's comparison of the State's questions to Copper with its questions to several white jurors is baseless. As an initial matter, Flowers forfeited this argument by not making it at the trial court. See *supra*, at 14–15; App. 235–238. And as the Court has previously explained, “a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial” because “an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.” *Snyder*, 552 U. S., at 483.

Even if Flowers had not forfeited this argument, it is meritless. As previously discussed, Copper worked with two of Flowers' family members and testified that she could “lean toward” Flowers and would not decide the case “with an open mind.” App. 190; see *id.*, at 78. These answers justified heavier questioning than was needed for Chesteen, the white bank teller who occasionally served Flowers' family members. Moreover, the State *did* ask Chesteen and Lester, a white juror who also worked at the bank, “follow-up questions about [their] relationships with Flowers' family.” *Ante*, at 24; see App. 83, 86.⁸ I have already addressed Lester and Waller, another white juror who had connections to the victims, and why the State did not need to ask them more questions. See *supra*, at 11–14. The majority also references Larry Blaylock and Marcus Fielder, two other white prospective jurors who “had relationships with defense witnesses.” *Ante*, at 24.

⁸The majority seems to draw a distinction between individual questions asked during group *voir dire* and individual questions asked during individual *voir dire*. *Ante*, at 23–24. I cannot imagine why this distinction would matter here. The majority does not explain its reasoning, and its statistics treat these questions the same.

THOMAS, J., dissenting

As for Blaylock, the majority makes no attempt to say what those “relationships” were, presumably because the only relationship discussed at the *Batson* hearing was Blaylock’s 30-year friendship with the *prosecutor’s* primary investigator—whom the defense planned to call as a hostile witness. App. 215; Tr. 1041–1042. The investigator was also his uncle by marriage, *id.*, at 1078, and the defense asked Blaylock some 46 questions. *Id.*, at 1041–1042, 1078, 1182–1187. Likewise, Fielder’s only relationship discussed at the *Batson* hearing was his work for a prosecution witness who had investigated the murders. See App. 215. The defense felt it necessary to ask Fielder about 30 follow-up questions. Tr. 1255–1260. In short, despite the majority’s focus on Copper, *ante*, at 24, no one could (or did) compare the State’s need to question her with its need to question these jurors.

Next, the majority complains that the State had a witness testify that Cunningham worked closely with Flowers’ sister. According to the majority, “[t]he State apparently did not conduct similar investigations of white prospective jurors.” *Ibid.* Putting aside that the majority offers no record support for this claim, the majority does not tell us what investigation was performed, much less which white jurors could or should have been similarly investigated. As far as the record reveals, the State made one call to Cunningham’s employer on the morning of the hearing to ask a single question: Where did Cunningham work in relation to Flowers’ sister? App. 149, 154. I see no reason to assume that the State failed to conduct any other single-phone-call “investigations” in this high-profile trial. Nor am I aware of white jurors who worked in any proximity to Flowers’ family members. If the majority is going to infer racial bias from the State’s attempt to present the truth in court—particularly in a case where juror perjury had been a problem, see *supra*, at 21, n. 7—it ought to provide a sound basis for its criticism.

THOMAS, J., dissenting

Finally, to support its view that “[t]he difference in the State’s approaches to black and white prospective jurors was stark,” the majority asserts that “[w]hite prospective jurors who admitted that they or a relative had been convicted of a crime were accepted without apparent further inquiry by the State.” *Ante*, at 25. The majority again cites nothing to support this assertion, and the record does not support it. Three of the struck black jurors had relatives with a criminal conviction. See Tr. 883 (Burnside); *id.*, at 885 (Copper); 2d Supp. Record 255b (Cunningham). The State asked no questions to either Copper or Cunningham on this point, and it asked three questions to Burnside about her son’s robbery conviction and. See App. 144–145. The State treated white jurors similarly. For example, the State asked three questions to Suzanne Winstead about a nephew’s drug charges, Tr. 1190–1191; four questions to Sandra Hamilton about crimes of her first cousins, *id.*, at 977; and two questions to Larry Blaylock about a cousin who committed murder, *id.*, at 978–979.⁹

Because any “disparate questioning or investigation of black and white prospective jurors” here “reflect[s] ordinary race-neutral considerations,” *ante*, at 26, this factor provides no evidence of racial discrimination in jury selection below.

E

If this case required us to decide whether the state courts were correct that no *Batson* violation occurred here, I would find the case easy enough. As I have demonstrated,

⁹The majority ominously warns that, through questioning, prosecutors “can try to find some pretextual reason . . . to justify what is in reality a racially motivated strike” and that “[p]rosecutors can decline to seek what they do not want to find about white prospective jurors.” *Ante*, at 25. I would not so blithely impute single-minded racism to others. Doing so cheapens actual cases of discrimination.

THOMAS, J., dissenting

the evidence overwhelmingly supports the conclusion that the State did not engage in purposeful race discrimination. Any competent prosecutor would have struck the jurors struck below. Indeed, some of the jurors' conflicts might even have justified for-cause strikes. But this case is easier yet. The question before us is not whether we "would have decided the case differently," *Easley v. Cromartie*, 532 U. S. 234, 242 (2001), but instead whether the state courts were *clearly* wrong. And the answer to that question is obviously no.

The Court has said many times before that "[t]he trial court has a pivotal role in evaluating *Batson* claims." *Snyder*, 552 U. S., at 477. The ultimate question in *Batson* cases—whether the prosecutor engaged in purposeful discrimination—"involves an evaluation of the prosecutor's credibility," and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." *Ibid.* The question also turns on "a juror's demeanor," "making the trial court's firsthand observations of even greater importance." *Ibid.* "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*, 470 U. S. 564, 575 (1985).

Because the trial court is best situated to resolve the sensitive questions at issue in a *Batson* challenge, "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder, supra*, at 477; see *Foster*, 578 U. S., at ___ (slip op., at 10). Our review is particularly deferential where, as here, "an intermediate court reviews, and affirms, a trial court's factual findings." *Easley, supra*, at 242.

Under this clear-error standard of review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson, supra*, at 574; see also *Cooper v. Harris*, 581

THOMAS, J., dissenting

U. S. ____, ____ (2017) (slip op., at 4). The notion that it is “impermissible” to adopt the view of the evidence that I have outlined above is incredible. Besides being supported by carefully reasoned opinions from both the trial court and the Mississippi Supreme Court—opinions that, unlike the majority’s, consider all relevant facts and circumstances—that view is *at a minimum* consistent with the factual record. At the *Batson* hearing, the State offered “a coherent and facially plausible story that is not contradicted” by the record, and the trial court’s “decision to credit” such a story “can virtually never be clear error.” *Anderson, supra*, at 575. The trial court reasonably understood the supposedly “dramatically disparate” questioning to be explained by the circumstances of this case—circumstances that the majority does not dispute. Likewise, the trial court reasonably did not view any picayune mistakes by the State to be compelling evidence of racial discrimination. (Of course, neither did the defense, which is presumably why it did not make that argument. But the clear-error and forfeiture doctrines are speed bumps en route to the Court’s desired destination.) Yet the Court discovers “clear error” based on its own review of a near-decade-old record. The majority apparently thinks that it is in a better position than the trial court to judge the tone of the questions and answers, the demeanor of the attorneys and jurors, the courtroom dynamic, and the culture of Winona, Mississippi.

III

Given that there was no evidence of race discrimination in the trial here, the majority’s remaining explanation for its decision is conduct that took place *before* this trial. The majority builds its decision around the narrative that this case has a long history of race discrimination. This narrative might make for an entertaining melodrama, but it has no basis in the record. The history, such as it is, does not

THOMAS, J., dissenting

come close to carrying Flowers' burden of showing that the state courts clearly erred.

A

The State exercised 50 peremptory strikes in Flowers' previous trials. As the case comes to us, 49 of those strikes were race neutral. If this history teaches us anything, it is that we should not assume the State strikes jurors based on their race.

Flowers' first trial was for the murder of Bertha Tardy only. In that trial, the State exercised peremptory strikes on five black jurors and seven white jurors. App. 35. The trial court found that Flowers had not made out even a prima facie *Batson* case, *id.*, at 12, n. 3, much less showed purposeful race discrimination in any of the State's strikes. Thus, as this case comes to us, all of the State's strikes in this trial were race neutral.

What the majority calls the second trial is actually Flowers' first trial for another murder—that of Bobo Stewart. During jury selection, the State exercised peremptory strikes on five black jurors and two white jurors; the trial court disallowed one of the State's strikes under *Batson*. App. 35; *id.*, at 17–19. Flowers was convicted and apparently did not appeal on *Batson* grounds. Eventually, the Mississippi Supreme Court reversed Flowers' convictions from the first two trials for reasons unrelated to jury selection. The court held that certain evidence relevant to all four murders was improperly admitted. *Flowers v. State*, 773 So. 2d 309, 317, 319–324 (Miss. 2000); *Flowers v. State*, 842 So. 2d 531, 538, 539–550 (Miss. 2003).

The State next tried Flowers for all four murders together. In this “third” trial—actually the first trial for the murders of Robert Golden and Carmen Rigby—the State struck 15 black jurors. App. 35. The trial court found no *Batson* violations. *Flowers v. State*, 947 So. 2d 910, 916 (Miss. 2007) (plurality opinion). On appeal, Flowers did

THOMAS, J., dissenting

not challenge four of the strikes, *id.*, at 918, and the Mississippi Supreme Court unanimously upheld the trial court’s ruling as to nine of the other strikes, see *id.*, at 918–935. Four justices, constituting a plurality of the court, would have held that two strikes violated *Batson*, 947 So. 2d, at 926, 928; one justice concurred only in the judgment because she “d[id] not agree” with the “plurality” “that this case is reversible on the *Batson* issue alone,” *id.*, at 939 (Cobb, P. J., concurring in result); and four justices would have held that no strikes violated *Batson*, 947 So. 2d, at 942–943 (Smith, C. J., dissenting). If the concurring justice thought any strikes were impermissible, *Batson* would have required her to reverse on that basis.

Thus, the Court is wrong multiple times over to say that the Mississippi Supreme Court “conclud[ed] that the State had again violated *Batson* by discriminating on the basis of race in exercising all 15 of its peremptory strikes against 15 black prospective jurors.” *Ante*, at 5. That court unanimously concluded that 13 strikes were race neutral, and a majority concluded that the remaining two strikes did not violate *Batson*. Therefore, neither the trial court nor the Mississippi Supreme Court found any *Batson* violation in this third trial—all 15 strikes were race neutral.¹⁰

¹⁰The Court repeatedly and inaccurately attributes statements by the plurality to the Mississippi Supreme Court—or deems those statements part of a “lead opinion,” *ante*, at 5, 20, even though a majority of that court disagreed in relevant part. The Court also takes the plurality’s statements out of context. For instance, three times the Court quotes the plurality’s statement that “[t]he instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.” *Ante*, at 2, 5, 20. But that statement was focused solely on the fact that “[t]he prosecutor exercised all fifteen of his peremptory strikes on African-Americans.” *Flowers*, 947 So. 2d, at 935. One could just as easily say that *Flowers*’ own strikes here—11 whites, zero blacks—present an overwhelming prima facie case of racial discrimination. Tr. of Oral Arg. 57 (admitting

THOMAS, J., dissenting

In the next two trials, Flowers apparently did not even allege a *Batson* violation. In the “fourth” trial, the State struck 11 black jurors but did not exercise its three remaining strikes; five black jurors were seated. App. 28–29, 35. In the “fifth” trial, the State struck five jurors, but Flowers is unable to identify the race of these jurors, and three black jurors were seated. Brief for Petitioner 13. Thus, up to the present trial, the State had sought to exercise 50 peremptory strikes, 36 on potential black jurors. Finally, in this trial, the State struck five black jurors and one white juror; one black juror sat on the jury, and one black juror was an alternate.

According to the majority, “the State’s use of peremptory strikes in Flowers’ first four trials reveal[s] a blatant pattern of striking black prospective jurors.” *Ante*, at 20. The majority claims that “[o]ver the course of the first four trials, there were 36 black prospective jurors against whom the State could have exercised a peremptory strike,” and “[t]he State tried to strike all 36.” *Ibid*. The majority’s argument is wrong on several levels.

First, the majority is wrong on the numbers. The majority repeatedly says that over “the six trials combined,” “the State struck 41 of the 42 black prospective jurors it could have struck.” *Ante*, at 31; see *ante*, at 2. Yet in the fourth trial, according to Flowers himself, the State did not exercise available peremptory strikes on at least three black jurors. See App. 28–29. Moreover, the majority does not know the races of the struck jurors in the fifth trial. Given that at least three black jurors were seated and that the State exercised only five strikes, it would appear that the State did not exercise available strikes against at least

that Flowers’ trial counsel “only exercised peremptories against white jurors”). As the Court understands, a *prima facie* case is only the first step of *Batson*, *ante*, at 12–13, and a majority of the Mississippi Supreme Court in the third trial found that Flowers failed to carry his burden of proving purposeful racial discrimination as to *any* strike.

THOMAS, J., dissenting

three black jurors. Finally, in the most recent trial, the State tendered two black jurors for service on the jury, one of whom served as an alternate. (The majority’s strike numbers include strikes of alternates, so its juror numbers should too.) However the majority arrived at its numbers, the record tells a different story.¹¹

Second, the Court says that “[t]he State’s actions in the first four trials necessarily inform our assessment of the State’s intent,” for “[w]e cannot ignore that history.” *Ante*, at 22. Putting aside that no court below ignored the history, the majority completely ignores Flowers’ failure to challenge the State’s actions in the fifth trial—the one that immediately preceded this one. Flowers bears the burden of proving racial discrimination, and the reason information about the fifth trial is not “available,” *ante*, at 21, is that Flowers failed to present it. Perhaps he did not *want* to present it because the State struck only white jurors—who knows? Regardless, this failure must count against Flowers’ claim. Surely a party making a *Batson* claim cannot gather data from select trials and present only favorable snippets.

Third, and most importantly, that the State previously sought to exercise 36 strikes against black jurors does not “speak loudly” in favor of discrimination here, *ante*, at 20, because 35 of those 36 strikes were race neutral. By the majority’s own telling, the trial court may “consider historical evidence of the State’s *discriminatory* peremptory

¹¹Rather than explain its numbers, the Court points out that when pressed at oral argument, the State agreed that 41 of 42 potential black jurors had been stricken. *Ante*, at 2, 20. No one else—not even Flowers—has agreed with that statistic. See Brief for Petitioner 32; App. 35. Flowers certainly did not present it to the state courts. The question before us is whether those courts clearly erred, and in reviewing their decisions, we must affirm “if the result is correct” based on the actual record. *NLRB v. Kentucky River Community Care, Inc.*, 532 U. S. 706, 722, n. 3 (2001).

THOMAS, J., dissenting

strikes from past trials.” *Ante*, at 19 (emphasis added). As I have shown, 35 of 36 strikes were not “discriminatory peremptory strikes.” The bare number of black-juror strikes is relevant only if one eliminates other explanations for the strikes, cf. *supra*, at 18–19, but prior adjudications (and Flowers’ failure to even object to some strikes) establish that legitimate reasons explained all but one of them. Is the majority today holding that the prior courts all committed clear error too? And what about the strikes that even Flowers did not object to—is the majority *sua sponte* holding that the State was engaged in purposeful racial discrimination as to those strikes? The majority’s reliance on race-neutral strikes to show discrimination is judicial alchemy.

B

The only incident in the history of this case even hinting at discrimination was that a trial judge 20 years ago prevented the State from striking one black juror in a case involving only one of Flowers’ crimes. If this single impermissible strike could provide evidence of purposeful race discrimination in a different trial 11 years later involving different murders (and victims of different races), it is surely the weakest of evidence. Even Flowers concedes that a single “*Batson* violation 20 years ago” would be only “weakly probative.” Tr. of Oral Arg. 19–20. That is the precise situation here. And this “weakly probative” single strike certainly does not overcome the complete absence of evidence of purposeful race discrimination in this trial. We know next to nothing about this strike, for Flowers has not even provided us with a transcript of the jury selection from that trial. And the trial court’s ruling on the strike was never reviewed on appeal.

Pretending for a moment that the concurring justice in the third trial had voted differently than she did, the history still could not overcome the absence of evidence of

THOMAS, J., dissenting

purposeful race discrimination in *this* trial. Flowers forthrightly acknowledged that he needed to show “discrimination in *this* trial in order to have a *Batson* violation.” *Id.*, at 23 (emphasis added). At a minimum, the state courts’ finding—that the history does not carry Flowers’ burden of proving purposeful race discrimination here—is not clearly erroneous. The courts below were presented with Flowers’ view of the history, and even accepting that view and “[t]aking into account the ‘historical evidence’ of past discrimination,” the Mississippi Supreme Court held that the trial court did not err “in finding that the State did not violate *Batson*.” 240 So. 2d, at 1135; see *id.*, at 1122–1124. The majority simply disregards this assessment by the state courts.

IV

Much of the Court’s opinion is a paean to *Batson v. Kentucky*, which requires that a duly convicted criminal go free because a juror was arguably deprived of his right to serve on the jury. That rule was suspect when it was announced, and I am even less confident of it today. *Batson* has led the Court to disregard Article III’s limitations on standing by giving a windfall to a convicted criminal who, even under *Batson*’s logic, suffered no injury. It has forced equal protection principles onto a procedure designed to give parties absolute discretion in making individual strikes. And it has blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials.

A

In *Batson*, this Court held that the Equal Protection Clause prohibits the State from “challeng[ing] 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 State’s case.” 476 U. S., at 89. “[I]ndividual

THOMAS, J., dissenting

jurors subjected to racial exclusion have the legal right to bring suit on their own behalf.” *Powers v. Ohio*, 499 U. S. 400, 414 (1991). To establish standing to assert this equal protection claim in a separate lawsuit, the juror would need to show that the State’s action caused him to suffer an injury in fact, and a likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). Flowers, however, was not the excluded juror. And although he is a party to an ongoing proceeding, ““standing is not dispensed in gross””; to the contrary, ““a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.”” *Town of Chester v. Laroe Estates, Inc.*, 581 U. S. ___, ___ (2017) (slip op., at 5).

Flowers should not have standing to assert the excluded juror’s claim. He does not dispute that the jury that convicted him was impartial, see U. S. Const., Amdt. VI, and as the Court has said many times, “[d]efendants are not entitled to a jury of any particular composition.” *Holland v. Illinois*, 493 U. S. 474, 483 (1990). He therefore suffered no legally cognizable injury. The only other plausible reason a defendant could suffer an injury from a *Batson* violation is if the Court thinks that he has a better chance of winning if more members of his race are on the jury. But that thinking relies on the very assumption that *Batson* rejects: that jurors might ““be partial to the defendant because of their shared race.”” *Ante*, at 14 (quoting *Batson, supra*, at 97). Moreover, it cannot be squared with the Court’s later decisions, which hold that “race is irrelevant to a defendant’s standing to object to the discriminatory use of peremptory challenges.” *Powers*, 499 U. S., at 416 (holding that a white defendant has standing to challenge strikes of black jurors).

Today, the Court holds that Carolyn Wright was denied equal protection by being excluded from jury service. But she is not the person challenging Flowers’ convictions (she

THOMAS, J., dissenting

would lack standing to do so), and I do not understand how Flowers can have standing to assert her claim. Why should a “denial of equal protection to other people” that does “not affect the fairness of that trial” mean that “the defendant must go free”? *Id.*, at 431 (Scalia, J., dissenting).

In *Powers*, the Court relied on the doctrine of third-party standing. As an initial matter, I doubt “whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others.” *Kowalski v. Tesmer*, 543 U. S. 125, 135 (2004) (THOMAS, J., concurring); see also *Whole Woman’s Health v. Hellerstedt*, 579 U. S. ___, ___–___ (2016) (THOMAS, J., dissenting) (slip op., at 2–5).

Even accepting the notion of third-party standing, it is hard to see how it could be satisfied in *Batson* cases. The Court’s precedents require that a litigant asserting another’s rights have suffered an “injury in fact” and have “a close relation” to the third party. *Powers*, *supra*, at 411. As shown, Flowers suffered no injury in fact under the Court’s precedents. Moreover, in the ordinary case, the defendant has no relation whatsoever to the struck jurors. (Here, as it happens, all the struck jurors knew Flowers or his family, but that hardly *helps* his *Batson* claim.)

In *Powers*, the Court concluded that defendants and struck jurors share a “common interest.” 499 U. S., at 413. But like most defendants, Flowers’ interest is in avoiding prison (or execution). A struck juror, by contrast, is unlikely to feel better about being excluded from jury service simply because a convicted criminal may go free. And some potential jurors, like Flancie Jones here, “‘really and truly . . . don’t want to’” serve on a jury in the first place. App. 181 (emphasis added); see also *Hayes v. Missouri*, 120 U. S. 68, 71 (1887) (referring to “an unfortunate disposition on the part of business men to escape from jury duty”). If Flowers had succeeded on his *Batson* claim at

THOMAS, J., dissenting

trial and forced Jones onto the jury, it seems that *he*—her supposed third-party representative with a “common interest”—would have inflicted an injury on her.

Our remedy for *Batson* violations proves the point. The convicted criminal, who suffered no injury, gets his conviction vacated.¹² And even if the struck juror suffered a cognizable injury, but see *Powers, supra*, at 423–426 (Scalia, J., dissenting), that injury certainly is not redressed by undoing the valid conviction of another. Under Article III, Flowers should not have standing.

B

The more fundamental problem is *Batson* itself. The “entire line of cases following *Batson*” is “a misguided effort to remedy a general societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges.” *Campbell v. Louisiana*, 523 U. S. 392, 404, n. 1 (1998) (THOMAS, J., concurring in part and dissenting in part). “[R]ather than helping to ensure the fairness of criminal trials,” *Batson* “serves only to undercut that fairness by emphasizing the rights of excluded jurors at the expense of the traditional protections accorded criminal defendants of all races.” *Campbell, supra*, at 404, n. 1. I would return to our pre-*Batson* understanding—that race matters in the courtroom—and thereby return to litigants one of the most important tools to combat prejudice in their cases.

1

In *Strauder v. West Virginia*, 100 U. S. 303 (1880), the

¹²The Court has never explained “why a violation of a third party’s right to serve on a jury should be grounds for reversal when other violations of third-party rights, such as obtaining evidence against the defendant in violation of another person’s Fourth or Fifth Amendment rights, are not.” *Campbell v. Louisiana*, 523 U. S. 392, 405 (1998) (THOMAS, J., concurring in part and dissenting in part).

THOMAS, J., dissenting

Court invalidated a state law that prohibited blacks from serving on juries. In doing so, we recognized that the racial composition of a jury could affect the outcome of a criminal case. See *id.*, at 308–309. The Court explained that “[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.” *Id.*, at 309. Thus, we understood that allowing the defendant an opportunity to “secur[e] representation of the defendant’s race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.” *Georgia v. McCollum*, 505 U. S. 42, 61 (1992) (THOMAS, J., concurring in judgment).

In *Swain v. Alabama*, 380 U. S. 202 (1965), the Court held that individual peremptory strikes could not give rise to an equal protection challenge. *Swain* followed *Strauder* in assuming that race—like other factors that are generally unsuitable for the government to use in making classifications—can be considered in peremptory strikes: “In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause.” *Swain*, 380 U. S., at 221. That is because the peremptory “challenge is ‘one of the most important of the rights secured to the accused.’” *Id.*, at 219. Based on its long history, the peremptory system “affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial.” *Id.*, at 212; see *id.*, at 212–219. The strike both “eliminate[s] extremes of partiality on both sides” and “assure[s] the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.” *Id.*, at 219. Because this system, “in and of itself, provides justification for striking any group of otherwise qualified jurors in any

THOMAS, J., dissenting

given case, whether they be Negroes, Catholics, accountants or those with blue eyes,” *id.*, at 212, we concluded that an equal protection challenge was unavailable against individual peremptory strikes.

Then, in a departure from the previous century of jurisprudence, the Court moved its focus from the protections accorded the *defendant* to the perceptions of a hypothetical struck *juror*. In *Batson*, the Court concluded that the government could not exercise individual strikes based solely on “the assumption—or [the] intuitive judgment—that [jurors] would be partial to the defendant because of their shared race.” 476 U. S., at 97. The Court’s opinion in *Batson* equated a law categorically excluding a class of people from jury service with the use of discretionary peremptory strikes to remove members of that class: “Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.” *Ibid.* (citation omitted). *Batson* repeatedly relies on this analogy. See *id.*, at 86, 89; *id.*, at 87 (“A person’s race simply is unrelated to his fitness as a juror” (internal quotation marks omitted)); see also *ante*, at 14 (quoting *Batson*, *supra*, at 104–105 (Marshall, J., concurring)); *Powers*, 499 U. S., at 410 (“Race cannot be a proxy for determining juror bias or competence”).

But this framing of the issue ignores the nature and basis of the peremptory strike and the realities of racial prejudice. A peremptory strike reflects no judgment on a juror’s competence, ability, or fitness. Instead, the strike is exercised based on intuitions that a potential juror may be less sympathetic to a party’s case. As Chief Justice Burger emphasized, “venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-

THOMAS, J., dissenting

strike exclusion merely suggests potential partiality in a particular isolated case.” *Batson*, *supra*, at 122–123 (dissenting opinion) (internal quotation marks omitted); accord, *Powers*, *supra*, at 424 (Scalia, J., dissenting). “[T]he question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is *in fact* partial, but whether one from a different group is *less likely* to be.” *Swain*, 380 U. S., at 220–221 (emphasis added). Therefore, “veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges”; instead, “they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.” *Id.*, at 221.

Batson rejects the premise that peremptory strikes can be exercised on the basis of generalizations and demands instead “an assessment of individual qualifications.” 476 U. S., at 87. The Court’s *Batson* jurisprudence seems to conceive of jury selection more as a project for affirming “the dignity of persons” than as a process for providing a jury that is, including in the parties’ view, fairer. *Powers*, *supra*, at 402; see *Edmonson v. Leesville Concrete Co.*, 500 U. S. 614, 631 (1991); see also *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 140–142 (1994).

2

Batson’s focus on individual jurors’ rights is wholly contrary to the rationale underlying peremptory challenges. And the application of equal protection analysis to individual strikes has produced distortions in our jurisprudence that are symptomatic of its poor fit, both as a matter of common sense and the protections traditionally accorded litigants.

The Court did not apply equal protection principles to individual peremptory strikes until more than 100 years after the Fourteenth Amendment was ratified. Once it

THOMAS, J., dissenting

did, it quickly extended *Batson* to civil actions, strikes by criminal defendants, and strikes based on sex. *Edmonson, supra*; *McCullum*, 505 U. S. 42; *J. E. B., supra*. But even now, we do not apply generally applicable equal protection principles to peremptory strikes. For example, our precedents do not apply “strict scrutiny” to race-based peremptory strikes. And we apply “the same protection against sex discrimination as race discrimination” in reviewing peremptory strikes, *J. E. B., supra*, at 145, even though sex is subject to “heightened” rather than “strict” scrutiny under our precedents. Finally, we have not subjected all peremptory strikes to “rational basis” review, which normally applies absent a protected characteristic. *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 440–442 (1985); see generally *Batson, supra*, at 123–125 (Burger, J., dissenting); *J. E. B., supra*, at 161 (Scalia, J., dissenting). Thus, the Court’s own jurisprudence seems to recognize that its equal protection principles do not naturally apply to individual, discretionary strikes.

Now that we have followed *Batson* to its logical conclusion and applied it to race- and sex-based strikes without regard to the race or sex of the defendant, it is impossible to exercise a peremptory strike that cannot be challenged by the opposing party, thereby requiring a “neutral” explanation for the strike. But requiring an explanation is inconsistent with the very nature of peremptory strikes. Peremptory strikes are designed to protect against fears of partiality by giving effect to the parties’ intuitions about jurors’ often-unstated biases. “[E]xercised on grounds normally thought irrelevant to legal proceedings or official action,” like “race, religion, nationality, occupation or affiliations,” *Swain, supra*, at 220, they are a form of action that is by nature “arbitrary and capricious,” 4 W. Blackstone, *Commentaries on the Laws of England* 346 (1769) The strike must “be exercised with full freedom, or it fails of its full purpose.” *Lewis v. United States*, 146

THOMAS, J., dissenting

U. S. 370, 378 (1892). Because the strike may be exercised on as little as the “sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,” *id.*, at 376, reasoned explanation is often impossible. And where scrutiny of individual strikes is permitted, the strike is “no longer . . . peremptory, each and every challenge being open to examination.” *Swain, supra*, at 222.

In sum, as other Members of this Court have recognized, *Batson* charted the course for eliminating peremptory strikes. See, e.g., *Rice v. Collins*, 546 U. S. 333, 344 (2006) (BREYER, J., concurring); *Batson, supra*, at 107–108 (Marshall, J., concurring). Although those Justices welcomed the prospect, I do not. The peremptory system “has always been held essential to the fairness of trial by jury.” *Lewis, supra*, at 376. And the basic premise of *Strauder*—that a juror’s racial prejudices can make a trial less fair—has not become “obsolete.” *McCollum*, 505 U. S., at 61 (opinion of THOMAS, J.). The racial composition of a jury matters because racial biases, sympathies, and prejudices still exist. This is not a matter of “assumptions,” as *Batson* said. It is a matter of reality.¹³ The Court knows these prejudices exist. Why else would it say that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias”? *Turner v. Murray*, 476 U. S. 28, 36–37 (1986).¹⁴ For that matter,

¹³Academic studies appear to support this commonsense proposition. See, e.g., Carter & Mazzula, Race and Racial Identity Status Attitudes, 11 J. Ethnicity Crim. Justice 196, 211 (2013) (“[R]acial bias exists in juror decision making”); Ellsworth & Sommers, Race in the Courtroom, 26 Personality & Soc. Psychol. Bull. 1367, 1367–1379 (2000). Cf. *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 148–149 (1994) (O’Connor, J., concurring) (“We know that like race, gender matters”).

¹⁴It is telling that Flowers here sought a new trial because the trial court supposedly failed to allow sufficient questioning on racial prejudice. See Record 2936. Evidently Flowers was operating “on the

THOMAS, J., dissenting

why else say here that “Flowers is black” and the “prosecutor is white”? *Ante*, at 3. Yet the Court continues to apply a line of cases that prevents, among other things, black defendants from striking potentially hostile white jurors. I remain “certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.” *McCullum*, *supra*, at 60 (opinion of THOMAS, J.).

Instead of focusing on the possibility that a juror will misperceive a peremptory strike as threatening his dignity, I would return the Court’s focus to the fairness of trials for the defendant whose liberty is at stake and to the People who seek justice under the law.

* * *

If the Court’s opinion today has a redeeming quality, it is this: The State is perfectly free to convict Curtis Flowers again. Otherwise, the opinion distorts our legal standards, ignores the record, and reflects utter disrespect for the careful analysis of the Mississippi courts. Any competent prosecutor would have exercised the same strikes as the State did in this trial. And although the Court’s opinion might boost its self-esteem, it also needlessly prolongs the suffering of four victims’ families. I respectfully dissent.

assumption that” jurors might “be biased in a particular case simply because the defendant is black.” *Batson v. Kentucky*, 476 U. S. 79, 97 (1986). Perhaps unsurprisingly, then, he exercised peremptory strikes against 11 white jurors and 0 black jurors.

A New Approach to Voir Dire on Racial Bias

Cynthia Lee*

Introduction	843
I. Voir Dire	847
A. The Process of Voir Dire	848
B. The Supreme Court’s Jurisprudence on Voir Dire into Racial Bias	852
II. Social Science Research on Race Salience	860
A. Implicit Bias	860
B. Race Salience	861
III. Social Science Research on Racial Perceptions of Crime and Support for Punitive Criminal Justice Policies	863
IV. Combating Implicit Racial Bias in the Criminal Courtroom	866
A. Raising Awareness of Implicit Bias Through Jury Orientation Materials	866
B. Raising Awareness of Implicit Bias Through Voir Dire	867
C. Possible Objections	869
Conclusion	872

INTRODUCTION

The shooting of Michael Brown in Ferguson, Missouri on August 9, 2014 renewed debate over whether racial stereotypes about Black men as dangerous, violent criminals encourage police officers and armed civilians to shoot unarmed Black men in cases where they would not have used deadly force had the victim been White.¹ Two diametrically opposed accounts of what happened emerged in

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1. I purposely capitalize the letter “B” in “Black” and “W” in “White” to acknowledge the fact

the weeks following the shooting. Brown's friend, Dorian Johnson, who was with Brown at the time Brown was shot, claimed Officer Darren Wilson shot Brown for no reason and continued shooting even after Brown turned around with his hands in the air, trying to show the officer that he was unarmed.² In contrast, Officer Wilson said he shot Brown in self-defense after a scuffle in which Brown shoved him into his patrol car and attempted to grab his weapon.³

Polls taken shortly after the shooting showed a racial divide in public opinion over whether the officer was justified in shooting Brown with fifty-seven percent of Blacks saying they believed the shooting was unjustified and only eighteen percent of Whites with the same opinion.⁴ When protests erupted in Ferguson, Missouri over the shooting, the police responded with an unusually heavy-handed display of force.⁵ Again, public opinion was split over whether the protesters or the police acted inappropriately.⁶

One question that prosecutors face in highly charged cases with racial overtones like the Ferguson case is whether to attempt to conduct voir dire into

that Black and White are socially constructed racial categories. See IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 9–10 (1996).

2. Elliott C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014, 12:10 AM), <http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know> [<http://perma.cc/SK6Y-YMZ8>].

3. Julia Talanova, *Support Grows for Darren Wilson, Officer Who Shot Ferguson Teen Michael Brown*, CNN (Sept. 8, 2014, 7:11 AM), <http://www.cnn.com/2014/08/19/us/ferguson-darren-wilson-support> [<http://perma.cc/72HL-H5MH>]; see also Julie Bosman et al., *Amid Conflicting Accounts, Trusting the Officer*, N.Y. TIMES, Nov. 26, 2014, at A1 (reporting that Officer Wilson told the grand jury that Michael Brown reached into his police vehicle and fought him for his gun). An investigation into the shooting by the U.S. Department of Justice found that the physical and forensic evidence supported Officer Wilson's claim of self-defense and that the officer shot Brown as Brown was moving toward the officer. See U.S. DEP'T OF JUSTICE, *REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON* 5–8 (2015).

4. *Reactions to the Shooting in Ferguson, Mo., Have Sharp Racial Divides*, N.Y. TIMES (Aug. 21, 2014), <http://www.nytimes.com/interactive/2014/08/21/us/ferguson-poll.html>. The reaction of many African Americans to the shooting likely reflected their distrust of police given a long history of antagonistic police-citizen interactions in Ferguson, Missouri. After a five-month long investigation, from September 4, 2014 to March 4, 2015, the Department of Justice found significant evidence of racial bias, both implicit and explicit, in the Ferguson Police Department and criminal justice system. U.S. DEP'T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 62–63, 70–78 (2015).

5. Joe Coscarelli, *Why Cops in Ferguson Look Like Soldiers: The Insane Militarization of America's Police*, N.Y. MAG. (Aug. 14, 2014, 12:29 PM), <http://nymag.com/daily/intelligencer/2014/08/insane-militarization-police-ferguson.html> [<http://perma.cc/NS5P-JPPC>] (noting that the law-enforcement response to civilian protests against Michael Brown's death involved tear gas, flash grenades, and military-style rifles).

6. A YouGov poll found that forty-eight percent of Whites believed the protests were unreasonable compared to thirty-one percent of Blacks. Peter Moore, *Ferguson, MO.: Racial and Political Divide over Brown Shooting*, YOUGOV (Aug. 18, 2014, 8:01 AM), <http://today.yougov.com/news/2014/08/18/ferguson-mo> [<http://perma.cc/N2SZ-GFBF>] (referring to poll results at http://cdn.yougov.com/cumulus_uploads/document/ou4yi1g0z8/tabs_HP_police_20140817-2.pdf). The same poll found thirty-four percent of Whites believed the police response to the Ferguson protests to be reasonable compared to only sixteen percent of Blacks with the same opinion. *Id.*

racial bias.⁷ Voir dire is the process of questioning prospective jurors to ensure that those chosen to sit on the jury will be impartial and unbiased. As Neil Vidmar and Valerie Hans explain, “[v]oir dire, a term with a French origin meaning roughly ‘to see them say,’ is used to denote the process whereby prospective jurors are questioned about their biases during the jury selection process”⁸ In federal court, voir dire is generally conducted by the trial judge.⁹ In state court, voir dire practice varies widely depending on the jurisdiction. In most states, voir dire is conducted by both the judge and the attorneys.¹⁰

7. In the Ferguson case, since the grand jury convened by prosecutor Robert McCulloch declined to indict Officer Wilson in November 2014, prosecutors did not need to answer this question. Taylor Wofford, *After Grand Jury Decides Not to Charge Darren Wilson, What's Next for Ferguson?*, NEWSWEEK (Nov. 24, 2014, 9:35 PM), <http://www.newsweek.com/no-charges-ferguson-michael-brown-shooting-case-285976> [<http://perma.cc/6TNQ-N4MT>]. Many thought McCulloch should have let someone else handle the case because of McCulloch's strong ties to law enforcement and the fact that his father was a police officer who was killed by a Black man when McCulloch was only twelve years old. See Pema Levy, *Ferguson Prosecutor Robert P. McCulloch's Long History of Siding with the Police*, NEWSWEEK (Aug. 29, 2014, 6:33 AM), <http://www.newsweek.com/ferguson-prosecutor-robert-p-mccullochs-long-history-siding-police-267357> [<http://perma.cc/ZU9A-QP9S>] (“[McCulloch's] father was a St. Louis policeman killed in the line of duty by a Black man when McCulloch was 12. [McCulloch's] brother, nephew and cousin all served with the St. Louis police [department]”); see also Leigh Ann Caldwell, *Concerns Arise About Prosecutor in Michael Brown Case*, CNN (Aug. 20, 2014, 12:48 PM), <http://www.cnn.com/2014/08/19/us/ferguson-prosecutor-mcculloch> [<http://perma.cc/6PSH-SEXY>]. After it came to light that McCulloch knew some of the witnesses he presented to the grand jury were lying, the NAACP Legal Defense Fund asked a Missouri judge to reconvene a new grand jury panel to reconsider the case. Christopher Harress, *NAACP Calls for New Ferguson Grand Jury Citing Multiple Concerns with November Decision*, INT'L BUS. TIMES (Jan. 6, 2015, 7:25 PM), <http://www.ibtimes.com/naacp-calls-new-ferguson-grand-jury-citing-multiple-concerns-november-decision-1775386> [<http://perma.cc/Z5RD-2G2E>]. The judge denied the NAACP's request to convene a new grand jury. Associated Press, *Judge Rejects Request for New Ferguson Grand Jury*, WASH. TIMES (Jan. 21, 2015), <http://www.washingtontimes.com/news/2015/jan/21/judge-rejects-request-for-new-ferguson-grand-jury/>.

8. NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 87 (2007).

9. Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials*, 41 LOY. U. CHI. L.J. 119, 145 (2009) (noting that in the federal system, judges ask most of the questions during voir dire, whereas in the state system, judges allow attorneys to ask most questions).

10. Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 378–79 n.44 (2010) (citing Valerie P. Hans & Alayna Jehle, *Avoiding Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1184 (2003)) (noting that in forty-three states, voir dire questioning is conducted by both the judge and attorneys); David B. Rottman et al., U.S. DEP'T OF JUSTICE, *State Court Organization 1998*, at 273–77 tbl.41 (2000), <http://www.bjs.gov/content/pub/pdf/sco98.pdf> [<http://perma.cc/2SMK-7ETA>] (listing four states—Connecticut, North Carolina, Texas, and Wyoming—in which attorneys only conduct voir dire, listing seven states—Arizona, California, Delaware, Illinois, Massachusetts, New Hampshire, and New Jersey—in which judges only conduct voir dire, and noting that both attorneys and judges conduct voir dire in the remaining states). In Missouri, judges usually allow the attorneys to ask the questions during jury selection, but the judge may, at her discretion, conduct some or all of the voir dire herself. Your Missouri Courts, TRIAL JUDGES CRIMINAL BENCHMARK §§ 7.8–9 (Kelly Broniec et al. eds., 2007), http://www.courts.mo.gov/hosted/resourcecenter/TJCB%20Published%20April%202011/TJBB.htm#CH_07_JurySelect_2d_files/CH_07_JurySelect_2d.htm (noting that voir dire is done first by the counsel for the state and then by the counsel for the defendant (§ 7.8), but also noting that in some instances—at the court's

It is important to note that racial bias is not unique to any particular group. While it is often assumed that racial bias means bias in favor of Whites and against Blacks, racial bias can cut in many different ways. In the Ferguson case, for example, those who believed Michael Brown was shot when he had his hands up before the Department of Justice's investigation into the shooting was completed¹¹ may have assumed Officer Wilson was lying when he claimed self-defense because of stereotypes about White police officers as racist individuals. At the same time, those who believed the officer's account of what happened before knowing all of the facts relating to the shooting may have assumed Michael Brown was acting in a threatening way because of stereotypes about Black men.

The Supreme Court has addressed the question of voir dire into racial bias in only a handful of cases. All of these cases dealt with the issue of whether a criminal defendant has the right to have prospective jurors questioned on racial bias, and the last time the Court dealt with this issue was in 1986, more than twenty-five years ago.

Reasonable minds can disagree as to whether it is good trial strategy to voir dire prospective jurors on racial bias. Perhaps the most common view is that reflected by Albert Alschuler, who suggested over twenty-five years ago that voir dire into racial bias would be "minimally useful."¹² Alschuler argued that asking a prospective juror whether he would be prejudiced against the defendant because of the defendant's race would be patronizing and offensive.¹³ He also argued that no prospective juror would admit to racial bias, even if he was in fact prejudiced against members of a particular racial group.¹⁴

In this Article, I rely on empirical research on implicit bias to challenge Alschuler's view that voir dire into racial bias would be of minimal benefit to an attorney concerned about such bias. This research suggests that for an attorney concerned that racial stereotypes about the defendant, the victim, or a witness might affect how the jury interprets the evidence, voir dire into racial bias can be extremely helpful. Calling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make. While I agree with Alschuler that a simple, close-ended question like, "Are you going to be biased against the defendant because of his race?" is unlikely to be helpful, I believe that a series of open-ended questions

discretion—the judge can conduct some or all of the voir dire by herself (§ 7.9)); Michael L. Matula & G. Nicole Hinger, *The Law of Jury Selection in Missouri State Courts*, 66 J. Mo. BAR 136 (2010), <https://www.mobar.org/uploadedFiles/Home/Publications/Journal/2010/05-06/The%20Law%20of%20Jury%20Selection%20in%20Missouri%20State%20Courts.pdf> (noting that all parties have the opportunity to question jurors to expose juror bias or prejudice).

11. See U.S. DEP'T OF JUSTICE, *supra* note 3, at 5–8 (2015) (finding that the physical and forensic evidence supported Officer Wilson's claim of self-defense).

12. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 160 (1989).

13. *Id.* at 161.

14. *Id.* at 160 ("One doubts that Lester Maddox, Orville Faubus, George Wallace, Theodore Bilbo or anyone else would have responded to the proposed question by confessing a bias . . .").

educating jurors about implicit bias and encouraging them to reflect upon whether and how implicit racial bias might affect their ability to even-handedly consider the evidence can be beneficial in helping to ensure a truly impartial jury.

My Article proceeds in four parts. In Part I, I provide an overview of the process of voir dire and review the Supreme Court's jurisprudence on voir dire into racial bias. In Part II, I examine social science research that helps answer the question whether it is a good idea to conduct voir dire into racial bias. Some of this research relates to the Implicit Association Test (IAT), an online test that measures implicit bias by comparing response times to selected words and images. Additionally, however, a wealth of less familiar empirical research on race salience conducted over the past decade indicates that calling attention to race can motivate jurors to treat Black and White defendants equally, whereas not highlighting race may result in jurors tending to be more punitive and less empathetic towards Black defendants than they might otherwise be without such attention.

In Part III, I examine a few recent studies calling into question whether making race salient is a good idea. These studies indicate that when White individuals perceive extreme racial differences in the prison population (i.e., when they believe there are many more Blacks and Latinos than Whites in prison), they are more likely to support punitive criminal justice policies than when they perceive that the proportion of minorities in prison is not so large. I analyze these studies and conclude that, while they may appear at first glance to contradict the race salience research, they do not in fact undermine that research.

In Part IV, I turn to the question of what steps can be taken to combat implicit racial bias in the criminal courtroom. I argue that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection. Voir dire can be used to both educate prospective jurors about the concept of implicit bias and help them to become aware of their own implicit biases. It makes sense to address the possibility of implicit racial bias early on, rather than waiting until just before the jury deliberates, as it may be too late by then to undo its effects.

I. VOIR DIRE

It is often said that a trial is won or lost when the jury is selected.¹⁵ This is because “jurors bring to the courtroom biases and predispositions which largely determine the outcome of the case.”¹⁶ The process of voir dire presents an opportunity for the attorneys to influence who ends up sitting on the jury, at least in jurisdictions where attorney voir dire is permitted.

In this Part, I first discuss the process of voir dire and its role in jury selection.

15. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1557, 1590 n.223 (2013).

16. Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 576 (1985).

I also examine the benefits of attorney voir dire over judge-dominated voir dire. I then discuss the Supreme Court's jurisprudence on voir dire into racial bias.

A. *The Process of Voir Dire*

"Voir dire is the process of questioning prospective jurors about their qualifications to serve on the jury panel to decide the case."¹⁷ In federal court, voir dire is usually conducted by the judge.¹⁸ In state court, jury selection procedures vary widely with judge-dominated voir dire the practice in seven states, attorney-dominated voir dire the practice in four states, and a mix of judge and attorney questions in the remaining state courts.¹⁹ Some courts allow the attorneys to propose questions that are then given to prospective jurors in the form of a written questionnaire.²⁰

According to one source, jury selection in felony cases takes an average of 3.6 to 3.8 hours.²¹ During the process of jury selection, the parties are given the opportunity to strike an unlimited number of prospective jurors for cause. A "for cause" challenge will be granted if the judge finds that the party has articulated a good reason that the juror should not serve, such as an inability to be impartial or a prior relationship with the defendant, the defense attorney, the prosecutor, the judge, or one of the witnesses.²² Each side is also given a set number of peremptory challenges,²³ which can be used to strike a prospective juror for any reason or no reason at all, as long as the reason for striking the prospective juror is not based on the individual's race or gender.²⁴

In order to guard against the possibility that attorneys may use their peremptory challenges to strike prospective jurors based on their race, the Court in *Batson v. Kentucky*²⁵ established a three-part framework much like the three-part framework used in the Title VII context to determine whether an individual has

17. 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, 158 (2010).

18. Lawson, *supra* note 9, at 145.

19. Rottman et al., *supra* note 10, at 273–77.

20. Roxanne Barton Conlin & Gretchen Jensen, *What, Me? Prejudiced? Absolutely Not!*, TRIAL, Dec. 2000, at 20, 22.

21. Collin P. Wedel, Note, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges*, 7 STAN. J. C.R. & C.L. 293, 315 (2011).

22. VIDMAR & HANS, *supra* note 8, at 87 ("A 'challenge for cause' is an assertion by one of the lawyers that a potential juror is not impartial.").

23. For example, in federal court, a defendant charged with a felony is given ten peremptory challenges, and the prosecutor is given six peremptory challenges. FED. R. CRIM. P. 24(b)(2). If the defendant is in federal court and charged with a misdemeanor, both the defendant and the prosecutor are given three peremptory challenges. (b)(3). In a federal capital case, both sides get twenty peremptory challenges. (b)(1).

24. *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (forbidding peremptory challenges based on gender); *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting peremptory challenges based on race).

25. *Batson*, 476 U.S. at 79.

been denied a job on the basis of unlawful discrimination.²⁶ Under the *Batson* framework, if one party believes the other party has used a peremptory strike to remove a juror because of the juror's race, that party may assert a *Batson* challenge.²⁷ The challenger must first set forth a prima facie case of intentional discrimination.²⁸ Under the original *Batson* framework, a defendant who asserted a *Batson* challenge could establish a prima facie case of purposeful discrimination in the selection of the jury by showing "that he [was] a member of a cognizable racial group . . . , and that the prosecutor [had] exercised peremptory challenges to remove from the venire members of the defendant's race."²⁹ Once the defendant showed that these facts and any other relevant circumstances raised an inference that the opposing party used its peremptory challenges to exclude individuals from the jury on account of their race,³⁰ the burden shifted to the opposing party to proffer a race-neutral reason for the strike.³¹ After a race-neutral reason was proffered by the party opposing the *Batson* challenge, the trial court had to decide whether the challenger has met its burden of proving purposeful discrimination.³² In *J.E.B. v. Alabama*, the Court extended *Batson* to forbid peremptory challenges based on gender.³³ At least one lower court has gone further, applying *Batson* to peremptory challenges based on sexual orientation.³⁴

26. Under the three-part framework established by the Court in *McDonnell Douglas Corp. v. Green*, the employee must first establish a prima facie case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The employee can establish a prima facie case by showing (1) he belongs to a racial minority; (2) he applied and was qualified for a job the employer was trying to fill; (3) though qualified, he was rejected; and (4) thereafter the employer continued to seek applicants with complainant's qualifications. *Id.* Once the employee establishes a prima facie case, the burden shifts to the employer to rebut this prima facie case by articulating a legitimate, nondiscriminatory reason for the employee's rejection. *Id.* The employee can prevail only if he can show that the employer's response is merely a pretext for behavior actually motivated by discrimination. *Id.* at 798.

27. Because *Batson* involved a defendant's challenge to a prosecutor's peremptory challenge, its holding left open the question whether a prosecutor could assert a challenge against a defendant if he believed the defendant was exercising its peremptory challenges in a racially discriminatory manner. In 1992, the Court answered this question in the affirmative, applying *Batson* to criminal defendants. *Georgia v. McCollum*, 505 U.S. 42, 46–48 (1992); *see also* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618–19 (1991) (extending *Batson* to civil litigants).

28. *Batson*, 476 U.S. at 96.

29. *Id.* Subsequently, the Court broadened the *Batson* framework to include challenges based on ethnicity, *see* *Hernandez v. New York*, 500 U.S. 352 (1991), and later gender, *see* *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

30. *Id.*

31. *Id.* at 97. The Court, however, has made it fairly easy for the opposing party to rebut the challenge, finding it is not necessary that the opposing party's race-neutral explanation be minimally persuasive or even plausible at stage two of the *Batson* inquiry. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("The Court of Appeals erred by . . . requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e., a 'plausible' basis for believing that 'the person's ability to perform his or her duties as a juror' will be affected.")

32. *Batson*, 476 U.S. at 98.

33. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

34. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 476 (9th Cir. 2014).

While *Batson* was well intended, it has not proven to be very effective.³⁵ Attorneys facing *Batson* challenges have been able to survive these challenges by proffering fairly implausible “race-neutral” reasons for their strikes. For example, in one case, a prosecutor who faced a *Batson* challenge from a Black defendant charged with importing heroin proffered two ostensibly race-neutral reasons for striking a Black woman from the jury.³⁶ First, the prosecutor noted that the prospective juror was a postal employee and said that it was the U.S. Attorney’s Office’s general policy not to have postal employees on the jury.³⁷ When pressed by the defense attorney, the prosecutor backed down and admitted that the office did not have such a policy and proffered a second reason for the strike.³⁸ The prosecutor then suggested that because the prospective juror was a single parent who rented an apartment in an urban area, she “may be involved in a drug situation where she lives.”³⁹ The judge accepted this second explanation as a race-neutral reason for the strike and denied the defense’s *Batson* objection.⁴⁰

In another case, the government used five of its six peremptory challenges to strike Black jurors.⁴¹ When the defendant, a Black man, asserted a *Batson* challenge, one of the race-neutral reasons proffered by the government for striking a Black female from the jury was that her name, Granderson, closely resembled that of a defendant, Anthony Grandison, in a previous case tried by the same prosecutor.⁴² Even though that case was completely unrelated to the case at hand and therefore the fact that the prospective juror’s name was similar to the name of a defendant in a completely unrelated case would have had no bearing on the prospective juror’s ability to be fair and impartial, the Court of Appeals agreed with the trial court that this was a neutral and nonpretextual reason for the strike and affirmed the defendant’s conviction.⁴³

In *United States v. Romero-Reyna*, the defendant, a Hispanic man charged with possession of marijuana and heroin with intent to distribute, challenged the government’s use of its peremptory challenges against six prospective jurors of Hispanic origin.⁴⁴ The prosecutor proffered as a race-neutral reason for striking one of the individuals who worked as a pipeline operator that he had a “P” rule in which

35. Professor Jean Montoya surveyed prosecutors and criminal defense attorneys and found that most thought *Batson* was of limited effectiveness in eliminating racial discrimination in jury selection in large part because of the ease with which an attorney can come up with a race-neutral reason for the strike. Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 1006 (1996).

36. *United States v. Uwaezhoke*, 995 F.2d 388 (3d Cir. 1993).

37. *Id.* at 390–91.

38. *Id.* at 391.

39. *Id.*

40. *Id.*

41. *United States v. Tindle*, 860 F.2d 125, 128 (4th Cir. 1988).

42. *Id.* at 129.

43. *Id.*

44. *United States v. Romero-Reyna*, 889 F.2d 559, 560 (5th Cir. 1989).

he never accepted jurors whose occupations began with a “P.”⁴⁵ The trial court accepted this explanation as nonpretextual and rejected the defendant’s *Batson* challenge.⁴⁶ On remand, the prosecutor repeated adherence to his “P” rule, but added that he had been informed that marijuana use by pipeline operators was prevalent.⁴⁷ This time, the trial court rejected the prosecutor’s “P” rule as a legitimate basis for the strike, noting that several other members of the venire had occupations beginning with the letter “P” and had not been struck by the prosecutor.⁴⁸ Nonetheless, the trial court found that the newly added explanation was race-neutral and not a pretextual reason for the strike and rejected the defendant’s *Batson* challenge again.⁴⁹

Another problem is that the attorney exercising the challenged strike may not even be aware that she would not have struck the prospective juror if that individual had been of another race. As Antony Page explains, an attorney may be unaware that she has relied on racial stereotypes in forming her opinions about the prospective juror.⁵⁰ When asked to provide a race-neutral reason for the strike, the attorney may sincerely believe that she struck the prospective juror for reasons not related to the juror’s race, even though implicit racial bias may have in fact influenced the attorney’s perceptions of the individual.⁵¹ “By the time the lawyer exercises the peremptory challenge, stereotypes may have thoroughly affected her observation and interpretation of the information upon which she makes her decision.”⁵² In light of these and other problems with the *Batson* framework, critics of *Batson* have argued that it would be best to simply eliminate the peremptory challenge altogether and force attorneys to take the first twelve individuals in the jury box unless the attorneys can articulate reasons to challenge those individuals for cause.⁵³

Regardless of whether peremptory challenges continue to exist in our criminal justice system, a critical question remains: which legal actor—the judge or the attorney—should conduct voir dire? Empirical research suggests that judge-dominated voir dire is less effective at discovering juror bias than attorney voir dire because prospective jurors often give what they think is the socially desirable

45. *Id.*

46. *Id.*

47. *Id.* at 561.

48. *Id.*

49. *Id.*

50. Antony Page, *Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 228 (2005).

51. *Id.*

52. *Id.*

53. See Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369, 420–23 (1992); Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 374 (1990); see also *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring) (opining that the only way to stop the discriminatory use of the peremptory challenge is to completely abolish peremptory challenges).

response when the judge is asking the questions.⁵⁴ There are other reasons why a trial court should allow the attorneys to conduct voir dire, particularly when the case involves the possibility of racial bias. As Judge Mark Bennett notes, attorneys usually know the case better than the trial judge, and therefore “are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome.”⁵⁵ Attorneys also have more of an incentive than the trial judge to use jury consultants and other resources “to develop voir dire strategies to address both explicit and implicit biases of prospective jurors.”⁵⁶ This is because attorneys need as much information as possible about the prospective jurors in order to know which prospective jurors would have difficulty being impartial and should be stricken from the jury.⁵⁷

B. *The Supreme Court’s Jurisprudence on Voir Dire into Racial Bias*

The U.S. Supreme Court has addressed the question of whether a criminal defendant has a right to question prospective jurors on the issue of racial bias in only a handful of cases. Not surprisingly, the Court has gone back and forth on this issue.

Initially, the Court was sympathetic to the idea that a criminal defendant has a constitutional right to question prospective jurors about racial bias. In 1931, the Court reversed a Black defendant’s murder conviction where the trial judge had refused a defense request to interrogate the venire on racial prejudice.⁵⁸ In *Aldridge v. United States*, a Black man charged with the murder of a White police officer was convicted of first-degree murder and sentenced to death.⁵⁹ The trial judge had refused a defense request to question prospective jurors on whether they had any racial prejudice based on the fact that the defendant was Black and the deceased was White.⁶⁰ The Supreme Court reversed the conviction, stating that fairness demands that inquiries into racial prejudice be allowed.⁶¹ In response to the lower court’s suggestion that such inquiry was unnecessary since African Americans were afforded the same rights and privileges as Whites, such as the right to practice law and the right to serve on juries,⁶² the Court said, “Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice

54. See Bennett, *supra* note 17, at 160; Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 143 (1987) (finding that prospective jurors respond more candidly and are less likely to give what they think is the socially desirable response when attorneys are asking the questions during voir dire than when the judge is asking questions).

55. Bennett, *supra* note 17, at 160.

56. *Id.*

57. *J.E.B. v. Alabama*, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) (“[P]reventing bias . . . lies at the very heart of the jury system.” (citations omitted)).

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

59. *Id.* at 309.

60. *Id.* at 310–11.

61. *Id.* at 313.

62. *Id.* at 316 (McReynolds, J., dissenting).

is so remote as to justify the risk in forbidding the inquiry.”⁶³ Noting “[t]he argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices,”⁶⁴ the *Aldridge* Court concluded, “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.”⁶⁵

The Court did not revisit the question of whether a criminal defendant has a right to require the trial judge to question prospective jurors on racial bias until 1973, more than forty years later. In *Ham v. South Carolina*, a case involving a Black civil rights activist charged with possession of marijuana, the Court again sided with the defendant, holding that a trial judge’s refusal to question prospective jurors as to possible racial prejudice violated the defendant’s constitutional rights.⁶⁶ This time, the Court went further than it had in *Aldridge v. United States* and expressly grounded its decision in due process, holding that “the Due Process Clause of the Fourteenth Amendment requires that . . . the [defendant] be permitted to have the jurors interrogated on the issue of racial bias.”⁶⁷ The *Ham* Court reaffirmed the trial court’s discretion to conduct voir dire in the manner it thinks is best, noting that the trial judge is “not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by [the defendant].”⁶⁸ It also limited the right in controversy to questioning regarding possible bias to *racial* bias, refusing to require the trial court to question prospective jurors regarding bias against persons with beards even though the defendant, who sported a beard, had requested such voir dire.⁶⁹

A mere three years later, the Court started backtracking from its support for voir dire into racial bias. In *Ristaino v. Ross*, the Court held that the mere fact that the defendant is Black and the victim is White is not enough to trigger the constitutional requirement that the trial court question prospective jurors about racial prejudice.⁷⁰ The defendants in *Ristaino v. Ross* were three Black men on trial for armed robbery, assault and battery by means of a dangerous weapon, and assault with intent to murder two White security guards.⁷¹ Defendant Ross requested that the trial judge ask prospective jurors the following question: “Are there any of you who believe that a White person is more likely to be telling the truth than a Black person?”⁷² The trial court not only refused to ask this particular question, it failed

63. *Id.* at 314.

64. *Id.* at 314–15.

65. *Id.* at 315.

66. *Ham v. South Carolina*, 409 U.S. 524, 529 (1973).

67. *Id.* at 527.

68. *Id.*

69. *Id.* at 527–28.

70. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976).

71. *Id.* at 590.

72. *Id.* at 590 n.1.

to make any reference to race when giving jurors an overview of the facts of the case and when questioning the jurors about possible bias or prejudice for or against either of the defendants or the victim.⁷³ The jury convicted the defendants on all counts.⁷⁴

In holding that the trial court did not err in refusing to question the venire on racial bias, the Court attempted to distinguish the case before it from *Ham v. South Carolina*. Somewhat unconvincingly, the Court explained that racial issues were “inextricably bound up with the conduct of the trial” in *Ham* because Ham, who had a reputation as a civil rights activist, claimed that he had been framed because of his civil rights work.⁷⁵ The *Ristaino* Court continued, “The mere fact that the victim of the crimes alleged was a White man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*.”⁷⁶ The Court then established what some have called a “special circumstances” rule: a defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a “significant likelihood” of prejudice by the jurors.⁷⁷

Even though the *Ristaino* Court refused to find a due process violation in the trial court’s failure to question jurors on racial bias, it did acknowledge the usefulness of asking questions on racial bias as a prudential matter. “Although we hold that *voir dire* questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant.”⁷⁸ The Court indicated that had the case been tried in federal court, it would have used its supervisory power to require the trial court to ask prospective jurors questions on racial bias.⁷⁹

In 1981, the Court revisited the issue of *voir dire* into racial bias in a case involving a defendant of Mexican descent. The defendant in *Rosales-Lopez v. United States* was charged with smuggling undocumented Mexican immigrants into the United States.⁸⁰ The defendant requested that prospective jurors be asked the following questions: “Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect

73. *Id.* at 592 nn.3–4.

74. *Id.* at 593.

75. *Id.* at 596–97.

76. *Id.* at 597.

77. *Id.* at 596–97; see also Laura A. Giantris, *The Necessity of Inquiry into Racial Bias in Voir Dire, The Maryland Survey: 1994-1995*, 55 MD. L. REV. 615, 629 (1996). Giantris discusses *Hill v. State*, a Maryland decision in which the Maryland Court of Appeals held that the trial court’s refusal to question the venire on racial or ethnic bias constituted constitutional error and concludes that “[a]s a result of *Hill*, Maryland criminal defendants no longer must meet the burdensome ‘special circumstances’ test as enunciated in *Thornton* and *Rosales-Lopez*.” *Id.*; see also Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 672 (2004) (“*Ristaino* established a ‘special circumstances’ rule: the Constitution only requires a court to allow defendants to ask questions designed to elicit racial prejudice when the special circumstances of a case indicate a significant likelihood of prejudice by the jurors.”).

78. *Ristaino*, 424 U.S. at 597 n.9.

79. *Id.*

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

you?”⁸¹ The trial judge did not pose either of these questions to the prospective jurors, nor did he pose any questions specifically addressed to possible prejudice against the defendant because of his race or ethnicity.⁸² The trial judge instead asked the following questions of prospective jurors: “Do any of you have any feelings about the alien problem at all?”; and “Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?”⁸³

In considering defendant Rosales-Lopez’s appeal, the Supreme Court started by discussing the importance of voir dire, noting that “[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.”⁸⁴ The Court observed that lack of adequate voir dire impairs the trial court’s ability to remove jurors who cannot act impartially.⁸⁵ Next, the Court noted that “federal judges have been accorded ample discretion in determining how best to conduct the voir dire.”⁸⁶ This is due to the fact that the responsibility to impanel an impartial jury lies with the trial judge.⁸⁷ Additionally, the trial judge is able to see the prospective jurors and their responses, both verbal and nonverbal, to the questions posed to them during voir dire.⁸⁸

The Court next distinguished between questions directed at the discovery of racial prejudice that are constitutionally mandated and questions directed at the discovery of racial prejudice that are required of federal courts as a matter of the Court’s supervisory authority over the federal courts.⁸⁹ The Court then established a new nonconstitutional rule for federal courts, holding that federal courts must inquire into racial prejudice “when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups.”⁹⁰ In all other cases, the Court explained, reversible error will occur only when the circumstances of the case “indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.”⁹¹ Because Rosales-Lopez was charged with smuggling, not a crime of interracial violence, the trial court was not required to ask questions directed at racial prejudice even though requested to do so by the defense unless there was a reasonable possibility that racial

81. *Id.* at 185.

82. *Id.*

83. *Id.* at 186. It could be argued that the trial court’s use of the word “alien” to describe Rosales-Lopez encouraged the jurors to be biased against Rosales-Lopez. The word “alien,” which is used to refer to one who is an immigrant to the United States, conjures up images of aliens from outer space. Because of this, many progressives use the phrase “undocumented immigrant” rather than “illegal alien.”

84. *Id.* at 188.

85. *Id.*

86. *Id.* at 189.

87. *Id.*

88. *Id.*

89. *Id.* at 190.

90. *Id.* at 196.

91. *Id.* at 191. In other words, in all other cases, the special circumstances rule established in *Ristaino v. Ross* would control.

or ethnic prejudice influenced the jury.⁹² The Court did not believe such a possibility existed in this case.⁹³

While Rosales-Lopez may not have been happy with the Supreme Court's decision since the Court affirmed his conviction, the decision was partially good news for future defendants, as it established a new defense-friendly rule—albeit one that leaves discretion in the trial court's hands—for defendants seeking voir dire into racial bias in federal courts. In federal cases involving a defendant and a victim of different races or ethnicities and a crime of violence, the trial court should as a prudential matter conduct voir dire into racial prejudice if the defense requests that it do so.⁹⁴

In 1986, the Court addressed the issue of a defendant's right to have prospective jurors questioned on racial prejudice for the last time to date.⁹⁵ In *Turner v. Murray*, Willie Lloyd Turner, a Black man, was charged with capital murder and other crimes after fatally shooting a White jewelry store owner with a sawed off shotgun in front of a police officer and three witnesses.⁹⁶ Apparently, Turner became upset with the store owner after learning that he had triggered a silent alarm to summon the police to the store.⁹⁷

Prior to jury selection, Turner's attorney submitted to the trial judge a list of questions that he wished to ask the venire, including the following question: "The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a White Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?"⁹⁸ The trial court refused to ask this question, instead asking the venire the more generic question "whether any person was aware of any reason why he could not render a fair and impartial verdict."⁹⁹ Everyone on the venire responded to this question in the negative.¹⁰⁰ At the time they were asked this question, the prospective jurors did not know that the victim was White.¹⁰¹ Eight

92. *Id.* at 192.

93. *Id.* at 193.

94. *Id.* at 192.

95. The Court has mentioned voir dire on racial bias in other cases, but this was not the main issue in those cases. *See, e.g.,* *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014). The court held that a plaintiff in a personal injury suit may not use a juror affidavit detailing alleged juror dishonesty to get a new trial while noting in a footnote, "There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. . . . We need not consider the question, however, for those facts are not presented here." *Id.; see also, e.g.,* *Mu'Min v. Virginia*, 500 U.S. 415, 422–24 (1991) (finding no error in trial court's refusal to further question prospective jurors about news reports to which they had been exposed while discussing cases involving voir dire into racial bias as examples of state cases on the extent of voir dire examination).

96. *Turner v. Murray*, 476 U.S. 28, 29–30 (1986).

97. *Id.* at 30.

98. *Id.* at 30–31.

99. *Id.* at 31.

100. *Id.*

101. *Id.*

Whites and four Blacks were selected to serve on the jury.¹⁰² The jury found the defendant guilty of all charges, and after a separate sentencing hearing, recommended that Turner be sentenced to death.¹⁰³

Turner appealed his death sentence, which the Supreme Court reversed.¹⁰⁴ The Court started by reaffirming what it stated in *Ristaino*: the mere fact that the defendant is Black and the victim is White is not a special circumstance of constitutional significance.¹⁰⁵ The Court then distinguished this case from *Ristaino*, noting that in addition to the fact that Turner was Black and his victim was White, Turner was charged with a capital offense.¹⁰⁶ The Court explained why this one fact mattered so much. The jury in a capital case, the Court explained, has an enormous amount of discretion.¹⁰⁷ First, the capital jury must decide whether aggravating factors merit putting the defendant to death. The jury must decide, for example, whether the defendant is likely to commit future violent acts, or whether his crime was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.”¹⁰⁸ Additionally, “the [capital] jury must consider any mitigating evidence offered by the defendant.”¹⁰⁹

Next, the Court exhibited an amazing amount of prescience in its recognition of the concept of implicit racial bias. Even though *Turner* was decided in 1986, almost thirty years ago, the Court at that time realized the “unique opportunity for racial prejudice to operate but remain undetected”:¹¹⁰

[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.¹¹¹

The *Turner* Court noted that in cases like the one before it where the defendant was charged with a crime of violence and the defendant and victim were of different races, there was a real risk that racial prejudice might infect the proceeding and improperly lead to a death sentence.¹¹² “The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality

102. *Id.*

103. *Id.*

104. *Id.* at 31–33.

105. *Id.* at 33.

106. *Id.*

107. *Id.* at 33–34.

108. *Id.* at 34.

109. *Id.*

110. *Id.* at 35.

111. *Id.*

112. *Id.*

of the death sentence.”¹¹³ The Court found the risk that racial prejudice may have infected Turner’s capital sentencing “unacceptable in light of the ease with which that risk could have been minimized.”¹¹⁴ In the Court’s view, the trial judge could have minimized this risk by questioning prospective jurors on racial prejudice but refused to do so.¹¹⁵ The Court concluded by holding that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.”¹¹⁶ The Court made clear that “the trial judge retains discretion as to the form and number of questions on the subject.”¹¹⁷ Moreover, “a defendant cannot complain of a judge’s failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry.”¹¹⁸

Turner thus established a constitutional right to voir dire into racial bias in all capital cases in which the defendant is charged with an interracial crime of violence, as long as the defendant specifically requests such voir dire.¹¹⁹ Oddly, however, the Court limited its holding by reversing only the death sentence Turner received, not his guilty conviction.¹²⁰ Even though the twelve jurors who voted to have Turner executed were the same jurors who found him guilty, the Court refused to vacate Turner’s conviction. The Court explained:

At the guilt phase of petitioner’s trial, the jury had no greater discretion than it would have had if the crime charged had been noncapital murder.

Thus, with respect to the guilt phase of petitioner’s trial, we find this case to be indistinguishable from *Ristaino*, to which we continue to adhere.¹²¹

The problem with this reasoning is that *Ristaino* is distinguishable from *Turner*. *Ristaino* was never at risk of being put to death, but *Turner* was. If *Turner*’s jury had not convicted him in the first place, he would not have been at risk of being executed. Moreover, if a juror’s racial beliefs might influence her to see the defendant as more violent and dangerous, and lead that juror to more readily accept evidence of aggravating factors and discount evidence of mitigating factors, then those same beliefs are likely to color the juror’s weighing of the evidence presented at the guilt phase of the trial.¹²²

The Supreme Court’s jurisprudence on voir dire into racial bias leaves us with the following general rules. A capital defendant charged with an interracial crime of

113. *Id.* at 36.

114. *Id.*

115. *Id.*

116. *Id.* at 36–37.

117. *Id.* at 37.

118. *Id.*

119. *Id.* at 36–37.

120. *Id.*

121. *Id.* at 37–38.

122. As noted by Justice Clark in *Gideon v. Wainwright*: “How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprivation of liberty may be less onerous than deprivation of life—a value judgment not universally accepted . . . ?” *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) (Clark, J., concurring).

violence in either state or federal court has a due process right to have prospective jurors questioned on racial bias, but the defendant must specifically request such voir dire in order to trigger the constitutional right.¹²³ A noncapital defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a significant likelihood of prejudice by the jurors.¹²⁴ The mere fact that the defendant and victim are of different races is not considered a special circumstance triggering the due process right to voir dire into racial bias.¹²⁵ A federal court overseeing a case involving a defendant charged with an interracial crime of violence should, as a prudential matter, allow the defense to question prospective jurors on racial bias as long as the defendant requests such voir dire.¹²⁶ The States of course are free to go further than the constitutional minimums set forth by the Supreme Court.

All of the Supreme Court cases on voir dire into racial bias to date have focused on whether the defendant has a right to such voir dire. The Court has never addressed the question of whether the government has a corresponding right to have prospective jurors questioned on racial bias. In certain cases, particularly in interracial cases involving a White defendant and a Black victim, the prosecutor may be concerned that racial stereotypes may lead jurors to sympathize with the defendant and have less empathy for the victim. Racial stereotypes about Black men as dangerous, violent criminals may encourage jurors to see the victim's actions as threatening and the defendant's actions as reasonable.

In perhaps the only law review article to focus on this question, Tania Tetlow argues that the Supreme Court should establish that the prosecutor shares the defendant's constitutional right to conduct voir dire into racial bias.¹²⁷ Tetlow notes that prosecutors are charged with "doing justice," and argues that "doing justice" includes ensuring equal protection of the law for defendants and victims alike.¹²⁸ One way to ensure equal protection for victims of color, Tetlow argues, is to allow prosecutors to question prospective jurors on racial bias so they can better ascertain which individuals can serve as truly impartial jurors.¹²⁹ Tetlow argues that the right to voir dire into racial bias should not be limited to capital cases in which the defendant is charged with an interracial crime of violence and cases involving a significant likelihood of prejudice in the jurors.¹³⁰ Although it is difficult to make a case for a constitutional right to voir dire into racial bias for prosecutors, I agree that as a prudential matter, courts should permit prosecutors as well as defense

123. *Turner*, 476 U.S. at 36–37.

124. *Ristaino v. Ross*, 424 U.S. 589, 596–97 (1976).

125. *Id.*

126. *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981).

127. Tania Tetlow, *Granting Prosecutors Constitutional Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117 (2012).

128. *Id.* at 1125–26 (“Doing battle against discriminatory acquittal falls squarely within a prosecutor’s ethical duty to ‘do justice’ . . .”).

129. *Id.* at 1148–51.

130. *Id.* at 1151–52.

attorneys to conduct voir dire into racial bias in any case in which racial stereotypes may influence the jury.

II. SOCIAL SCIENCE RESEARCH ON RACE SALIENCE

A. *Implicit Bias*

Over the past decade, social scientists have convincingly demonstrated that bias is largely unconscious and often at odds with conscious beliefs.¹³¹ Even though one may sincerely believe that all individuals should be treated equally regardless of race, one may nonetheless have an implicit preference for individuals of one race over individuals of another race. This type of bias that exists outside of conscious awareness is called “implicit bias.”

Social scientists have demonstrated that most Americans are affected by implicit bias through an online test known as the Implicit Association Test (IAT). The IAT measures the amount of time that an individual takes to associate different words and images viewed on a computer screen.¹³² When individuals are asked to pair words and images and those pairings are consistent with widely held beliefs and attitudes, their response times are fairly quick.¹³³ When they are asked to pair words and images that do not correlate to widely held associations, response times are noticeably slower.¹³⁴ For example, individuals asked to pair names like Katie and Meredith with words or images reflecting pleasant and nice things and names like Ebony and LaTonya, names associated with African Americans, with words or images reflecting unpleasant or negative things were able to do this task fairly quickly.¹³⁵ When they were asked to pair White-sounding names with unpleasant or negative words and images and African American sounding names with pleasant or positive words and images, their response times were noticeably slower.¹³⁶ Since I have written at length about implicit bias in previous works, I will not repeat that discussion here.¹³⁷

Over fourteen million IATs, measuring bias based on age, gender, sexuality, among other types of biases, have been taken.¹³⁸ IAT research has shown that both young and old individuals tend to favor the young and disfavor the elderly.¹³⁹ Most

131. Laurie A. Rudman et al., “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 856 (2001).

132. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1509–10 (2005).

133. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1130 (2012).

134. *Id.*

135. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465–68 (1998).

136. *Id.* at 1469–70.

137. See Lee, *supra* note 15, at 1570–72 (2013); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 536–49 (2008).

138. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 69 (2013).

139. Becca R. Levy & Mahzrin R. Banaji, *Implicit Ageism, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS* 49, 55 (Todd D. Nelson ed., 2002). Indeed, researchers have

heterosexuals taking the sexual orientation IAT have demonstrated an implicit bias in favor of heterosexuals over gays and lesbians.¹⁴⁰ Of those who have taken the race IAT, seventy-five percent have demonstrated implicit bias in favor of Whites over Blacks.¹⁴¹

B. *Race Salience*

In light of the research on implicit bias, social scientists have studied whether race salience can encourage individuals to overcome their implicit racial biases. “Race salience” is a term of art used by some social scientists to refer to the process of making salient the potential for racial bias.¹⁴² “Race salience” does not simply refer to juror awareness of the races of the defendant and victim.¹⁴³ It involves “making salient” the potential racism of jurors’ attitudes.¹⁴⁴

A wealth of fairly recent empirical research has shown that when race is made salient either through pretrial publicity, voir dire questioning of prospective jurors, opening and closing arguments, or witness testimony, White jurors are more likely to treat similarly situated Black and White defendants the same way.¹⁴⁵ For example, in one study, Steven Fein and others examined the effects of pretrial publicity on mock jurors.¹⁴⁶ The study found that most mock jurors were negatively influenced by newspaper articles that presented the facts in a way that disfavored the defendant, even when the mock jurors were told that the newspaper articles were inadmissible and should not be considered in deciding the defendant’s guilt.¹⁴⁷ However, when mock jurors were given information suggesting that the media’s treatment of the defendant was racially biased, the negative bias against the defendant that the mock jurors had previously exhibited disappeared.¹⁴⁸

In another experiment conducted by Samuel Sommers and Phoebe Ellsworth, jury-eligible citizens and actual jury pool members from a county in Michigan were

found that implicit ageism or implicit bias against the elderly is even more prevalent than implicit racial bias against Blacks. *Id.* at 54–55.

140. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 19 (2007) (finding that sixty-eight percent of study participants showed an implicit preference for straight people over gay people).

141. BANAJI & GREENWALD, *supra* note 138, at 47.

142. Samuel R. Sommers & Phoebe C. Ellsworth, “Race Salience” in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599, 601 (2009).

143. *Id.* at 603–05.

144. *Id.* at 601.

145. *Id.*

146. Steven Fein et al., *Hype and Suspicion: The Effects of Pretrial Publicity, Race, and Suspicion on Jurors’ Verdicts*, 53 J. SOC. ISSUES 487 (1997).

147. *Id.* at 497 (“Exposure to pretrial publicity that reported incriminating information about the defendant made our mock jurors more likely to reach guilty verdicts than the mock jurors in the control condition.”).

148. *Id.* (“The notable exception concerns mock jurors who received the incriminating pretrial publicity along with other publicity designed to make them suspect that the incriminating information may have been released to the public because of racist motives.”).

shown a videotaped summary of an actual rape trial involving a Black defendant.¹⁴⁹ Participants completed a voir dire questionnaire, watched a trial video, received actual State of Michigan pattern jury instructions, and deliberated on the case as members of six-person juries.¹⁵⁰ Although all the mock jurors viewed the same trial video, some received questions about their racial attitudes and general perceptions of racial bias in the legal system on their voir dire questionnaire while other mock jurors did not.¹⁵¹ For example, some mock jurors read the following race-relevant question: “The defendant in the case is African-American and the victims are White. How might this affect your perceptions of the trial?”¹⁵² Another race-relevant question was: “In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?”¹⁵³

Sommers and Ellsworth found that regardless of their race, mock jurors who received the race-relevant voir dire questions were less likely to vote to convict the Black defendant than the mock jurors who did not receive race-relevant voir dire questions.¹⁵⁴ It is worth noting that the race relevant questions were not intended to identify jurors likely to exhibit racial bias in their judgments.¹⁵⁵ Rather, they were “designed to force mock jurors to think about their racial attitudes and, more generally, about social norms against racial prejudice and institutional bias in the legal system.”¹⁵⁶

Calling attention to the possibility of racial bias through witness testimony can also help minimize racial bias. In another study, Ellen Cohn and others found that White mock jurors were less likely to convict a Black defendant charged with attempted vehicular manslaughter after striking three White men with his car if presented with testimony from the defendant’s wife revealing that the White victims shouted racial slurs at the defendant and his wife before the defendant got into his vehicle and sped away.¹⁵⁷ Calling attention to the possibility that the victims may have been racially biased against the defendant may have encouraged the jurors to consider the facts with a bit more empathy for the defendant than they otherwise might have had.

Racial bias can also be reduced if race is made salient by attorneys in their opening and closing statements. Donald Bucolo and Ellen Cohn found that when a defense attorney called attention to the possibility of racial bias in his opening and closing statements, White mock jurors were less likely to find the Black male

149. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries?: A Review of Social Science Theory and Research*, 78 CHL-KENT L. REV. 997, 1026 (2003).

150. *Id.*

151. *Id.*

152. *Id.* at 1027.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953, 1959, 1964 (2009).

defendant guilty of assault and battery than when the attorney did not call attention to the possibility of racial bias in his opening and closing statements.¹⁵⁸ Statements making race salient included, “The defendant did what any (Black/White) man in this situation would do,” and “The only reason the defendant, and not the supposed victim, is being charged with this crime is because the defendant is (Black/White) and the victim is (White/Black).”¹⁵⁹ Bucolo and Cohn concluded that highlighting race in an interracial trial was a beneficial defense strategy when the defendant was Black, “leading to decreased ratings of guilt.”¹⁶⁰

III. SOCIAL SCIENCE RESEARCH ON RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE CRIMINAL JUSTICE POLICIES

Some recent social science research on racial perceptions of crime and support for punitive polices calls into question whether making race salient is a good idea. In 2014, Rebecca Hetey and Jennifer Eberhardt published the results of experiments they conducted in San Francisco and New York City.¹⁶¹ In each experiment, they manipulated the racial composition of the prison population and then measured the subject’s support for or acceptance of a punitive criminal justice policy.¹⁶² They found that when the prison population was represented as more Black, participants were more supportive of punitive criminal justice policies.¹⁶³

In the first experiment, Hetey and Eberhardt tested support for California’s Three Strikes Law.¹⁶⁴ This law, passed in 1994, mandated a twenty-five-years-to-life prison sentence for anyone convicted of a felony after having been convicted of two prior violent or serious felonies.¹⁶⁵ Even a minor third felony such as “stealing a dollar in loose change from a parked car” could result in a life sentence under the Three Strikes Law as originally enacted.¹⁶⁶ In 2012, critics of the Three Strikes Law sought to amend it by permitting a twenty-five-years-to-life sentence only if the defendant’s third felony was a serious or violent felony.¹⁶⁷ The proposed amendment would appear on the November 2012 ballot only if enough signatures supporting the amendment were gathered.¹⁶⁸

In the experiment, a White female recruited registered California voters from

158. Donald O. Bucolo & Ellen S. Cohn, *Playing the Race Card: Making Race Salient in Defence Opening and Closing Statements*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 293, 297, 299 (2010).

159. *Id.* at 297.

160. *Id.* at 299.

161. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, PSYCHOL. SCI. 1–6 (2014).

162. *Id.* at 1.

163. *Id.*

164. *Id.* at 2.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* The ballot initiative, California Proposition 36, did appear on the November 2012 ballot and passed. STANFORD JUSTICE ADVOCACY PROJECT, <https://law.stanford.edu/stanford-justice-advocacy-project/> [<https://perma.cc/F9CE-Y8NZ>] (last visited Sept. 16, 2015).

a San Francisco Bay Area commuter station to participate in the study, which was described to them as exploring Californians' views on social issues.¹⁶⁹ Participants, all of whom were Caucasian, were shown eighty color photographs of Black and White inmates on an iPad.¹⁷⁰ Some participants were shown fewer Black faces than other participants.¹⁷¹ In the "less Black" condition, only twenty-five percent of the photographs were of Black inmates, which was about the same percentage of Blacks actually in California prisons.¹⁷² In the "more Black" condition, forty-five percent of the photographs were of Black inmates, reflecting the approximate percentage of Blacks incarcerated under California's Three Strikes Law.¹⁷³ Next, the subjects were informed of California's Three Strikes Law and the initiative to amend it.¹⁷⁴ Subjects were asked to rate how punitive they thought the Three Strikes Law was.¹⁷⁵ The subjects were then told the study was over and that the experimenter had copies of the actual petition, which they could look at and sign if they wanted.¹⁷⁶ Subjects were told that if they signed the petition, their signature would be forwarded to the State Attorney General's office to be counted.¹⁷⁷

Hetey and Eberhardt found that regardless of the condition they were in ("more Black" or "less Black"), subjects across the board agreed that California's Three Strikes Law was too punitive rather than not punitive enough.¹⁷⁸ Subjects in the "less Black" condition, however, were much more willing to sign the petition to amend the law to require that the third felony conviction be a serious or violent felony than subjects in the "more Black" condition.¹⁷⁹ Of the participants who saw fewer photos of Black inmates, 51.72% signed the petition, whereas only 27.27% of participants who saw more photos of Black inmates signed the petition.¹⁸⁰ Hetey and Eberhardt concluded that the Blacker the participant believed the prison population to be, the less willing the participant was to amend a law they acknowledged was overly punitive.¹⁸¹

Hetey and Eberhardt conducted a second study (Study 2) in New York City, this time testing support for New York City's controversial stop-and-frisk policy.¹⁸² The researchers recruited White New York City residents to complete an online survey in October 2013.¹⁸³ Instead of showing participants photos of inmates, they

169. Hetey & Eberhardt, *supra* note 161, at 2.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 2–3.

180. *Id.* at 3.

181. *Id.*

182. *Id.*

183. *Id.*

simply presented participants with statistics about the prison population.¹⁸⁴ In the “less Black” condition, they told subjects that the prison population was 40.3% Black and 31.8% White, which was almost the actual percentage of Blacks in prisons across the nation.¹⁸⁵ In the “more Black” condition, they told subjects that the prison population was 60.3% Black and 11.8% White, approximately the actual percentage of Black inmates in New York City Department of Corrections facilities.¹⁸⁶ Next, participants were told that a federal judge had ruled that New York’s stop-and-frisk policy was unconstitutional (this was actually true) and that the city was appealing the judge’s ruling.¹⁸⁷ Participants were then asked a series of questions designed to measure their support for keeping New York’s stop-and-frisk policy.¹⁸⁸ Finally, participants were asked whether they would sign a petition to end New York City’s stop-and-frisk policy.¹⁸⁹

Hetey and Eberhardt found that regardless of what condition they were in, participants across the board felt that New York’s stop and frisk policy was “somewhat punitive.”¹⁹⁰ Participants in the “more Black” condition, however, were “significantly less willing to sign a petition to end the stop-and-frisk policy than were participants in the less-Black condition.”¹⁹¹ Only 12.05% of participants in the “more Black” condition said they would sign the petition compared to 33.3% in the “less Black” condition.¹⁹²

Also in 2014, The Sentencing Project published a report entitled, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*.¹⁹³ The Sentencing Project found that skewed racial perceptions of crime by White Americans bolster their support for harsh criminal justice policies.¹⁹⁴ Synthesizing two decades of research,¹⁹⁵ The Sentencing Project reported that White Americans consistently overestimate the proportion of crime committed by persons of color.¹⁹⁶ The report theorized that attributing crime to racial minorities limits White Americans’ ability to empathize with offenders and encourages retribution as the primary response to crime.¹⁹⁷ The result: increased support for punitive criminal justice policies.

One might conclude that this recent research on racial perceptions of crime

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 4.

191. *Id.*

192. *Id.*

193. NAZGOL GHANDNOOSH, SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES (2014), http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf [<http://perma.cc/R4HH-GVRC>].

194. *Id.* at 5.

195. *Id.* at 3.

196. *Id.* at 5, 13.

197. *Id.* at 6, 18–19.

leading to increased support for punitive policies means that calling attention to race is a bad idea as it may simply remind jurors of the association between Black and crime and encourage White jurors to act more punitively towards Black defendants. The research, however, does not support such a conclusion. Recall that The Sentencing Project's report identified *skewed* or inaccurate racial perceptions of crime as the problem.¹⁹⁸ Similarly, Hetey and Eberhardt's Three Strikes study suggested that when individuals believed there were more Blacks in prison than might actually be the case, they were more supportive of punitive criminal justice policies.¹⁹⁹ Indeed, the Sentencing Project explicitly supports making race salient, noting that "[m]ock jury studies have shown that *increasing* the salience of race in cases *reduces* bias in outcomes by making jurors more conscious of and thoughtful about their biases."²⁰⁰ Making race and the possibility of racial bias salient, as opposed to highlighting extreme racial disparities in the prison population, can help reduce bias in jurors by encouraging them to think about and counter their own biases.

Implicit racial bias—unconscious racial bias even among people who explicitly disavow racial prejudice—contributes to inaccurate perceptions of race and crime because it encourages individuals to associate all or most Blacks and Latinos with crime when only some Blacks and Latinos are engaging in criminal behavior.²⁰¹ One way to overcome implicit racial bias is to recognize its existence. "Dispelling the illusion that we are colorblind in our decision making is a crucial first step to mitigating the impact of implicit racial bias."²⁰²

IV. COMBATING IMPLICIT RACIAL BIAS IN THE CRIMINAL COURTROOM

In light of the social science research on implicit bias, what steps can be taken to combat implicit racial bias in the criminal courtroom? This Section discusses a few different ways to address the problem of implicit bias in the courtroom. While the focus of this Article is on combating racial bias, the proposals discussed within can be helpful to attorneys concerned about bias of any kind.²⁰³

A. Raising Awareness of Implicit Bias Through Jury Orientation Materials

As Carol Izumi notes, "Awareness of bias is critical for mental decontamination success."²⁰⁴ If so, then making sure jurors know what implicit bias

198. *Id.* at 3, 5.

199. Hetey & Eberhardt, *supra* note 161, at 2.

200. GHANDNOOSH, *supra* note 193, at 39.

201. *Id.* at 14.

202. *Id.* at 39.

203. For an excellent discussion on the difficulties of conducting voir dire when the concern is bias against gays, lesbians, and other sexual minorities, see Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407 (2014).

204. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POLY 71, 141 (2010) (citing Laurie A. Rudman et al., "Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001)).

is and that they are likely to be affected by it is critical. Anna Roberts suggests one way to make jurors aware of the concept of implicit bias: include discussion of implicit bias in juror orientation materials. Roberts argues that including information about implicit bias in jury orientation materials, particularly jury orientation videos, makes sense for several reasons.²⁰⁵ First, information on implicit bias dovetails nicely with appeals to neutrality and egalitarian norms that are usually imparted to jurors during jury orientation.²⁰⁶ Second, “impressions formed early on can shape the understanding of what follows.”²⁰⁷ If a juror is made aware of implicit bias early on, she can better guard against it influencing her own decision making. Third, addressing implicit bias during jury orientation insures that all prospective jurors are educated about it, not just those who serendipitously end up with a judge who believes it important to mention the topic.²⁰⁸ Roberts goes further, suggesting not only that prospective jurors be informed about implicit bias during jury orientation but also that they should also be encouraged to take the IAT so they can experience bias within themselves.²⁰⁹ Although there is some research that suggests being forced to take diversity training leads to backlash and resistance,²¹⁰ this research does not undermine Roberts’ proposal because Roberts does not suggest that courts require all prospective jurors to take the IAT. She would merely have courts encourage prospective jurors to take the IAT on a voluntary basis.²¹¹

B. Raising Awareness of Implicit Bias Through Voir Dire

Voir dire on the topic of racial bias offers another way to make jurors aware of the concept of implicit bias. As discussed above, a wealth of social science research suggests that making race salient or calling attention to the possibility of racial bias can encourage prospective jurors to reflect on their own possible biases and consciously counter what would otherwise be automatic stereotype-congruent responses. Voir dire offers an opportunity to make race salient to prospective jurors.

Questions designed to explore the subject of racial bias through voir dire would have to be carefully formatted. Open-ended questions that encourage reflection and thought about the powerful influence of race would be better than close-ended questions that simply encourage the prospective juror to give the politically correct response.²¹² Open-ended questions in general offer prospective

205. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 863–65 (2012).

206. *Id.* at 863.

207. *Id.* at 864.

208. *Id.*

209. *Id.* at 867–71.

210. See Rudman et al., *supra* note 204, at 857 (noting that involuntary diversity training has not been effective), 861 (noting that students who voluntarily enrolled in a diversity education seminar showed less implicit and explicit anti-Black bias at the end of the semester compared to students who did not take the class).

211. Roberts, *supra* note 205, at 874 (“The IAT would be optional . . .”).

212. Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320, 326 (2009).

jurors the chance to reflect and comment. Open-ended questions on racial bias in particular can give the attorney much more valuable information about which prospective jurors are likely to try to overcome their implicit biases than close-ended questions in which the juror is prompted to give a short “yes” or “no” response.²¹³

Jonathan Rapping, President and founder of Gideon’s Promise,²¹⁴ offers several examples of effective voir dire strategies for an attorney concerned about racial bias.²¹⁵ Rapping suggests that an attorney could start with the following:

You have just learned about the concept of [implicit racial bias]. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I’d like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making. Let me start by asking for your reaction to learning about the idea of implicit, or subconscious, racial bias.²¹⁶

If a prospective juror expresses skepticism about implicit racial bias, Rapping recommends that the attorney respond as follows: “I appreciate your candor and thank you for sharing this view . . . it is certainly not an uncommon reaction to first learning about [implicit racial bias] . . . [D]o others share Juror Number X’s skepticism?”²¹⁷

The attorney concerned about implicit racial bias will also want to find out which prospective jurors are motivated to act in egalitarian ways since social science research suggests that egalitarian-minded individuals are more likely than hierarchical individuals to try to counteract stereotypical thinking when made aware of the possibility of racial bias.²¹⁸ To find out which individuals are motivated to act in egalitarian ways, Rapping cautions attorneys not to ask questions like “How do you feel about racism?” or “Do you believe it is ever appropriate to judge someone based on their skin color?” because prospective jurors may answer such questions by simply giving what they believe to be the socially desirable response.²¹⁹ Rapping suggests that the attorney instead ask prospective jurors to “[d]escribe [their] most significant interaction(s) with a member of another race” or “[d]escribe a particularly impactful interaction that [they or someone close to them] had with a member of another race.”²²⁰ Such questions force the prospective jurors to think

213. *Id.* at 326.

214. Founded by Jonathan Rapping, Gideon’s Promise is a nonprofit organization that provides comprehensive advocacy training and community building support for both entry-level and seasoned public defenders. See *FAQs*, GIDEON’S PROMISE, <http://gideonspromise.org/faqs/> [<http://perma.cc/K9Z5-7FP5>] (last visited Sept. 16, 2015).

215. Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB POL’Y 999, 1032 (2013).

216. *Id.*

217. *Id.* at 1033.

218. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 14–15 (1989).

219. Rapping, *supra* note 215, at 1034.

220. *Id.*

about how they felt or acted in an actual situation as opposed to discussing how they think they would act in a hypothetical situation.²²¹ This is important because “people often aspire to act in ways that do not perfectly match how they have behaved in the past.”²²² As Rapping notes, “The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.”²²³ An attorney might also ask a prospective juror to discuss “the best . . . experience the [prospective] juror has had with a member of another race” or ask the prospective juror to identify a member of another race whom the prospective juror admires.²²⁴ Such questions track the social science research on debiasing. This research indicates that encouraging people to think about admired African American figures, such as Barack Obama, Colin Powell, and Martin Luther King, and disfavored White individuals, such as Jeffrey Dahmer (the infamous serial killer also known as the Milwaukee Cannibal), Ted Kaczynski (the Unabomber), and Timothy McVeigh (the man responsible for the 1995 Oklahoma City bombing), can help jurors counter the impulse to associate Blacks with criminality.²²⁵

C. Possible Objections

My proposal that attorneys concerned about implicit racial bias use voir dire to counter the automatic stereotype-congruent associations that most individuals make based on race is likely to encounter resistance on a number of fronts. One possible objection echoes the concerns raised by Albert Alschuler several decades ago. Alschuler opined that voir dire into racial bias would be “minimally useful”²²⁶ because any prospective juror asked whether he would be prejudiced against the defendant because of the defendant’s race would find such a question patronizing

221. *Id.* Such questions could also force prospective jurors to think about whether they have ever had a significant interaction with a member of another race, which could also have a positive effect.

222. *Id.*

223. *Id.* (quoting Ira Mickenberg, *Voir Dire and Jury Selection*, NORTH CAROLINA DEFENDER TRIAL SCHOOL 6 (2011), <http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf>).

224. *Id.* at 1035. Rapping suggests that the attorney should also ask the prospective juror to discuss negative experiences with members of another race and times that the juror relied on a stereotype that turned out to be wrong. *Id.* Reminding prospective jurors of negative experiences with members of another race, however, may trigger negative stereotypes, so I would focus on encouraging jurors to think about positive experiences with members of other racial groups and admired individuals belonging to the racial group in question.

225. 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, 803–05 (2001) (finding that exposure to famous admired Black individuals and infamous disfavored White individuals lead to a reduction in automatic pro-White preferences); Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137 (2010) (finding that exposure to admired Blacks and disliked Whites resulted in a weaker automatic preference for Whites, but exposure to admired Blacks and admired Whites did not reduce automatic preference for Whites).

226. Alschuler, *supra* note 12.

and offensive.²²⁷ Alschuler suggested such voir dire would be akin to saying, “Pardon me. Are you a bigot?”²²⁸

Alschuler’s objection, however, is not responsive to my proposal since I do not encourage attorneys to ask prospective jurors whether they will be prejudiced against the defendant on account of his race. I agree with Alschuler that a question like, “Are you likely to be biased against the defendant because of his race?” is unlikely to provoke an admission of bias. Individuals in today’s society know that it is considered wrong to discriminate on the basis of race, so even an individual who might actually be biased against the defendant because of the defendant’s race would almost surely answer such a question in the negative in order not to appear bigoted. Even an individual who truly disavows racism and racial discrimination might answer such a question in the negative, sincerely believing that he or she will not be biased against the defendant on account of the defendant’s race, when social cognition research suggests that all individuals, even the most egalitarian-minded on explicit measures, are implicitly biased on the basis of race.²²⁹

I disagree, however, with Alschuler’s claim that voir dire into racial bias would be “minimally useful” in cases involving racial issues. Voir dire into racial bias can and should take the form of encouraging prospective jurors to think about racial bias in general. As discussed above, making race salient, whether through witness testimony or questions asked during voir dire, can inhibit the automatic associations that otherwise are likely to come into play when the defendant, the victim, or a witness is a member of a racially stereotyped group.²³⁰

A second possible objection is more troubling and involves a burgeoning field of research on stereotype threat. As Song Richardson and Philip Atiba Goff explain, “[s]tereotype threat refers to the concern with confirming or being evaluated in terms of a negative stereotype about one’s group.”²³¹ Most of us are aware of the concept of stereotype threat from Claude Steele’s research in the 1990s on African American undergraduate students faring poorly on standardized tests.²³² Steele’s research showed that anxiety about confirming the stereotype that links African Americans to lack of intelligence results in African Americans doing poorly on

227. *Id.* at 161.

228. *Id.*

229. BANAJI & GREENWALD, *supra* note 138, at 158–59. Sheri Lynn Johnson explains that “[a]sking a general question about impartiality and race is like asking whether one believes in equality for Blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that Blacks are more prone to violence.” Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1675 (1985). Johnson also explains that prospective jurors “would naturally be reluctant to admit [prejudiced attitudes], particularly since they know that social disapproval will be publicly expressed by dismissing them from the venire.” *Id.*

230. *See infra* text accompanying notes 142–160.

231. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 124 (2014).

232. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995); *see also* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

standardized tests.²³³ Subsequent research has confirmed that “[t]he concern with being negatively stereotyped often provokes anxiety, leading to physical and mental reactions that are difficult, if not impossible to volitionally control such as increased heart rate, fidgeting, sweating, averting eye gaze, and cognitive depletion—often leading to a reported inability to think clearly.”²³⁴

Stereotype threat affects not only African Americans, but also anyone who belongs to a group that is negatively stereotyped. For example, women as a group suffer from the stereotype of not being good at math.²³⁵ When women are reminded of this stereotype, they tend to perform worse on math tests than when they are not reminded of the stereotype.²³⁶ Stereotype threat afflicts not just members of historically disadvantaged groups; it has also been shown to afflict White police officers concerned with being seen as racist.²³⁷ In *Interrogating Racial Violence*, Song Richardson and Phillip Atiba Goff document a study involving police officers with the San Jose, California Police Department.²³⁸ Surprisingly, the officers most concerned with not being or appearing to be racist were found to be quicker to use physical force to control situations involving Black suspects than officers who were not as concerned with how they were perceived by others.²³⁹ To explain these findings, Richardson and Goff theorize that an officer who fears that a suspect sees him as racist will believe that he cannot rely on moral authority to control the situation, and thus must resort to physical force.²⁴⁰

If White police officers concerned about being seen as racist (i.e., officers concerned about the White-cop-as-racist stereotype) end up acting in more racially disparate ways than White police officers not so concerned about being seen as racist, should we worry that White jurors made aware of their own implicit biases

233. Steele & Aronson, *supra* note 232.

234. Richardson & Goff, *supra* note 231.

235. Laurie T. O'Brien & Christian S. Crandall, *Stereotype Threat and Arousal: Effects on Women's Math Performance*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 782, 784 (2003) (noting the stereotype of male superiority in math).

236. *Id.* (finding that women who were told that the test they were going to take had been shown to produce gender differences did less well on math tests than women who were told that the test they were about to take had not been shown to produce gender differences); see also Paul G. Davies et al., *Consuming Images: How Television Commercials That Elicit Stereotype Threat Can Restrain Women Academically and Professionally*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1615, 1624 (2002) (finding that women exposed to gender-stereotypic television commercials underperformed on the math portion of a nondiagnostic test); Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 13 (1999) (finding that women who were told that the math test they were about to take was one in which gender differences do not occur performed just as well as men taking the same test, but women told that the test they were about to take was one in which gender differences had occurred performed worse than men taking the same test).

237. Richardson & Goff, *supra* note 231, at 126 (describing study involving the use of force by police officers with the San Jose Police Department).

238. *Id.*

239. *Id.* (“[T]he more officers were concerned with appearing racist, the more likely they were to have used force against Black suspects, but not suspects of other races, throughout the course of their careers.”).

240. *Id.*

will become overly concerned with not appearing racist and end up acting in ways that disadvantage Black defendants and victims over White defendants and victims? While certainly possible, I do not think this is likely because there is no prevailing stereotype of the White racist juror whereas at least in some communities, there seems to be an existing stereotype of the White racist police officer. While certain communities may view White jurors with distrust, most Whites do not think of themselves as racist and, more importantly, do not think others generally view them as racist. Nonetheless, the research on stereotype threat suggests that attorneys attempting to raise awareness of implicit racial bias during voir dire must be careful not to trigger anxiety in prospective jurors that they might be seen as racist.²⁴¹ Making jurors aware of their own implicit biases while not triggering stereotype threat is likely to be a difficult balancing act, somewhat like walking on a very thin tight rope.

CONCLUSION

In cases in which racial stereotypes about either the defendant, the victim, or a witness may influence the fact finder's assessment of who was at fault, it is important for attorneys concerned about minimizing the risk of racial bias to be aware of the social science research on race salience. This research suggests that calling attention to race can help reduce racial bias in legal decision making. Voir dire into racial bias offers one way an attorney can make race salient to the jury. Calling attention to race can help minimize racial bias by encouraging jurors to consciously think about the impropriety of racial stereotyping.

241. *But see* Phillip Atiba Goff et al., *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91 (2008) (finding that White, male undergrad students at Stanford University reminded of the stereotype that Whites are racist and told that they would be discussing the subject of racial profiling with two partners positioned their chairs further away from their partners when they thought their partners would be Black than when they thought their partners would be White).

RACE MATTERS IN JURY SELECTION

Peter A. Joy*

A lot of things matter in jury selection, and often the biggest thing that matters is what a lawyer trying a case fears most—even if that fear is an issue of race or possible juror biases. Patrick Brayer’s essay, *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*,¹ illustrates the importance of confronting one’s fears even when it involves talking about a difficult subject with prospective jurors. In his essay, Brayer discusses the challenges of picking a jury less than ten miles away from Ferguson, Missouri, just days after a police officer shot and killed Michael Brown, an unarmed 18-year-old African-American. Brayer confides in his readers his concern that potential jurors may have harbored biases that would work against their ability to decide the charges against his client fairly, but he had doubts about saying the word “Ferguson.”² While Brayer did not see race as a major issue in the case, how the jury viewed law enforcement was an important concern in his client’s case.³ Brayer’s fear of discussing the jurors’ views about law enforcement is exactly why he needed to talk with jurors about Ferguson.

Whatever the lawyer fears, whether it is an issue of race in the case or unconscious biases in jurors that may affect how they decide the case, the lawyer must address the fears during jury selection. If the lawyer does not explore what the lawyer fears about the case during jury selection, the lawyer has failed to increase the odds that the jury will consider the client’s case fairly.⁴ If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client.

When race matters in a case, it plays a role in the outcome, just like the state’s burden of proof, the credibility of witnesses, the identification of the defendant-client, how the jury views the police involved in the case, or, if the client testifies, how believable the jury thinks the client is. Race matters to this degree because race affects the way jurors view each of these issues.

In this Essay, I address the importance of a trial lawyer discussing the lawyer’s fears about a case, including issues of race, in jury selection. I begin, in Part I, by explaining why race matters and how important race-

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¹ Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors about Ferguson*, 109 NW. U. L. REV. ONLINE 163 (2015).

² *Id.* at 164.

³ *Id.*

⁴ See GERRY SPENCE, WIN YOUR CASE 114–24 (2005).

salient jury selection is, especially when race is not an obvious issue in the case. Part II argues that discussing Ferguson with the panel of prospective jurors, or venire, was a necessary subject for jury selection in Brayer's client's case. Finally, in Part III, I suggest how an attorney such as Brayer could approach discussing Ferguson with the panel of prospective jurors.

I. RACE MATTERS

Race can matter in jury selection because race continues to matter in the United States. While we hear a lot about the United States being post-racial, the Implicit Association Test (IAT) demonstrates that race influences the way we perceive and behave even when we are unaware of the influence of race.⁵ Over fourteen million people have taken the IAT, and “[s]eventy-five percent of those who have taken the race IAT have demonstrated implicit racial bias in favor of Whites.”⁶ Research using the IAT shows that approximately forty percent of African-Americans also have a pro-White bias.⁷ Ignoring race when it is a salient issue in a case, therefore, may give a green light to the implicit biases jurors may hold.

Research by Samuel Sommers and Phoebe Ellsworth into implicit bias suggests that making race salient in jury voir dire can reverse the effects of implicit bias and influence the jurors' perceptions of the trial and their decisions.⁸ In this study, mock jurors received two different versions of voir dire questionnaires: one set of jurors were asked about their racial attitudes and racial bias in the legal system, and the other set of jurors were not.⁹ To the jurors who discussed race, the researchers posed race-relevant questions like the following: “The defendant in the case is African-American and the victims are White. How might this affect your perceptions of the trial?”¹⁰

⁵ *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html> [<http://perma.cc/B369-USG3>]. Implicit bias refers to unintentional bias that stems from “attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.” Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012) [<http://perma.cc/S2FW-B587>]. The Implicit Association Test (IAT) is a social psychology test that seeks to measure implicit attitudes and prejudices “by having people quickly categorize stimulus words using two response keys. In racial IAT studies, the stimulus words are names that are racially stereotyped (e.g., Jamal and Sue Ellen) . . .” 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, 435 (2001) [<http://perma.cc/YQ2N-4BLX>].

⁶ Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1572 (2013) [<http://perma.cc/VM5C-EZNL>].

⁷ *Id.* at 1572 n.105.

⁸ Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026–27 (2003) [<http://perma.cc/JYN5-ZR4U>].

⁹ *Id.* at 1026.

¹⁰ *Id.* at 1027.

Another question was, “In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?”¹¹

The purpose of these race-relevant questions in jury questionnaires and other race-relevant questions asked during jury selection is not to identify racial bias in particular jurors, but rather to cause prospective jurors to think about their attitudes toward race, social norms against prejudging someone on the basis of race, and institutional biases in the justice system.¹² Surfacing issues of bias during jury selection helps jurors consciously guard against implicit biases. In their study, Sommers and Ellsworth found that both White and African-American jurors were less likely to vote to convict African-American defendants after the race-relevant voir dire.¹³

This research suggests that talking about race in voir dire, through questionnaires or during the verbal questioning of jury selection, may be important when the only racial dimension of a case is the race of the defendant. In these instances, jurors will be less likely to consider the possibility of their biases than in instances when race is an obvious issue in a case.¹⁴ In other words, when the issue of race is obvious in a case, it is *less important* to do a race-relevant voir dire.

In addition to research demonstrating that race-relevant voir dire is important, research into jury trials demonstrates that juries formed out of all-white jury pools convict African-American defendants more often than white defendants.¹⁵ This phenomenon is eliminated when at least one African-American is in the jury pool.¹⁶ This suggests that the presence of African-Americans in the jury venire can have an effect on outcomes at trial even when African-Americans are not on the jury.¹⁷ Combined, race-relevant voir dire and African-Americans in the jury pool may be the two most important factors in overcoming jurors’ implicit biases.

While race-relevant voir dire can be very important, at present, there are only two types of cases in which the accused is entitled to question prospective jurors about racial bias: a capital defendant accused of an interracial crime is entitled to have a defense lawyer inform prospective jurors of the race of the victim and to ask questions that probe racial bias;¹⁸ and when the facts in a case are such that it would be a violation of due

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 210 (2001) [<http://perma.cc/9XS5-R99Z>].

¹⁵ Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019 (2012) (basing findings on an empirical study of all felony trials in two Florida counties during five-and-a-half and ten-year periods) [<http://perma.cc/K6KA-49ZV>].

¹⁶ *Id.*

¹⁷ *Id.* at 1021.

¹⁸ *Turner v. Murray*, 476 U.S. 28, 36–37 (1986) [<https://perma.cc/FAM4-2JDS>].

process to deny questioning on the issue of racial bias.¹⁹ In other cases, race-relevant voir dire depends on the discretion of the trial judge.²⁰ Although discretionary, many jurisdictions give lawyers wide latitude in questioning prospective jurors.²¹ Thus, it is important for defense counsel to advocate for race-relevant voir dire where such practices are barred. And, where the system allows, the zealous advocate faces an ethical and strategic imperative to raise issues of race during voir dire.

II. DISCUSSING FERGUSON WITH THE JURY VENIRE: SPEAKING THE TRUTH TO SEEK THE TRUTH

Brayer states that his fear of discussing Ferguson with the jury venire was not primarily a fear of discussing race, but rather a fear about bringing up Ferguson as a touchstone for discussing jurors' views of law enforcement. Brayer states that jurors' attitudes about law enforcement were potentially important to his case. Ferguson and the issues Ferguson triggers may be important topics to explore with jury venires in other cases, not only in the St. Louis area, but also in other communities.

Brayer states that on the day of jury selection, just a few days after Michael Brown's death and the subsequent protests, potential jurors likely had to walk by police barricades and an increased security presence to enter the courthouse.²² For those potential jurors, "Ferguson" was a code word for how police treated persons of color or what their views and opinions were on the subject. Brayer says he needed to know the potential jurors' beliefs and potential biases, but that he feared the subject was too private or too personal, or could be a distraction.²³ Brayer was afraid to utter the word Ferguson.²⁴

For Brayer's client, and for other persons accused of crimes, effective representation means having a lawyer who is not afraid to share his or her fears with the jury. It is through this process that effective jury selection takes place. Fears worth discussing with the jury include potentially troubling factual issues in a case, but also issues of race or, in the case of Ferguson, events in the local or national community that potential jurors may see implicated in the case at hand. Ferguson had to be on the minds of

¹⁹ *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) [<https://perma.cc/D3AV-Q3GC>]. In *Ham*, the defendant was a well-known African-American civil rights activist charged with possession of marijuana whose defense was that the law enforcement officials had framed him on the drug charge and were "out to get him" for his civil rights work. *Id.* at 524–25.

²⁰ *Lee*, *supra* note 6, at 1592.

²¹ *See, e.g., State v. Holley*, 877 A.2d 872, 876 (Conn. App. Ct. 2005) (stating that "[t]he court should grant such latitude as is reasonably necessary to fairly accomplish the purposes of the voir dire" (quoting *State v. Ross*, 849 A.2d 648, 681 (Conn. 2004) [<https://perma.cc/XW7D-BQZ8>]) [<https://perma.cc/4FBS-GPJZ>]).

²² Brayer, *supra* note 1, at 164.

²³ *Id.*

²⁴ *Id.*

those potential jurors, and they likely thought it was in the minds of each other and on the minds of the judge and the lawyers trying the case. If for no other reason, mentioning Ferguson and forming appropriate questions about how it might affect their views in deciding the case would have shown the jury venire that Brayer was being honest with them.

The term *voir dire*, used to describe the process of jury selection, comes from the Anglo-Norman “[t]o speak the truth.”²⁵ If some event, like Ferguson or a different issue of race, matters in a client’s case, the defense lawyer should acknowledge the issue to speak truthfully with the jury venire. By speaking truthfully, the lawyer has the best opportunity to obtain truthful and useful responses from the prospective jurors.²⁶ Many colleagues and I have seen and experienced the failure to acknowledge what the lawyer fears, whether it is race or any other troubling issue in a case, which lets the lawyer’s silence create a false, detached environment for the trial. In such an environment, the defense lawyer essentially engages in a tacit agreement with the judge and prosecutor to keep silent on an issue—perhaps the very issue that could drive a verdict of guilt for the client. A trial lawyer knows the importance of saying what is true to the jury, even when the truth involves one of those subjects that we are taught to never talk about, such as money, politics, religion, or sex. In a civil case, a lawyer, whether representing the plaintiff or defendant, has to find the right language to discuss money damages with the jury, and this discussion has to start with jury *voir dire*. In employment discrimination cases, the political views of a government employee, the religion of a client, or an allegation of sexual harassment can be an underlying issue in the case. A lawyer with such a case would be failing his or her client not to raise such a relevant issue during *voir dire* and to explore possible juror biases. The same is true when race is a potential issue in a case. The lawyer has to evaluate whether and how to discuss race or other potentially uncomfortable subjects with prospective jurors in order to develop an effective jury selection strategy.

As Brayer discusses, unconscious biases can influence jurors to make unfair judgments. This fear, that the jury might judge his client unfairly, had to trump Brayer’s own fear that certain *voir dire* discussion topics might be too personal or cause the jurors to dislike him and his client. As he explains in his essay, he had to, and defense lawyers generally have to, confront their own unconscious or hidden biases first, in order to uncover these biases in others.

III. HOW TO DISCUSS FERGUSON

Brayer does not tell us how he discussed Ferguson, but I am going to suggest one way he could have started that conversation with prospective

²⁵ SPENCE, *supra* note 4, at 112; BLACK’S LAW DICTIONARY 1805 (10th ed. 2014) [<http://perma.cc/7G7V-SPUT>].

²⁶ See SPENCE, *supra* note 4, at 115–16.

jurors. This approach is influenced by, and based on, being in the moment—an approach that many lawyers use consciously or unconsciously, and an approach that Gerry Spence explains very well.²⁷ Being in the moment requires both the ability to focus on what is occurring and the ability to listen not only to what others are saying but also to one’s own thoughts and feelings.²⁸ Being in the moment also includes sharing one’s thoughts and feelings with the jury. Spence maintains that “before you can expect people to reveal their feelings, their biases and prejudices, we must first be willing to reveal our own—openly and honestly.”²⁹

Brayer could have begun by sharing his fear with the jury by stating, “I’m a little afraid here. I’m scared. I walked by the police guarding the Justice Center, just as you did. Ferguson has been on the news nonstop, and it is hard not to think about it. Was anyone else a little fearful entering the Justice Center today?”

At that point, a defense lawyer opens up to the jury. The lawyer is sharing a fear that some jurors are likely feeling. The lawyer is showing the jury that the lawyer is telling the truth, and this should help make it easier for the jury to tell the truth when questioned.³⁰

After posing such a question, and others like it, the jury would likely share their feelings about entering court that day, their reactions to the police barricades and the likely increased security at the courthouse, and their thoughts about the scenes in the news of the police and protestors. From that discussion, a defense lawyer could explore prospective juror views of law enforcement and turn that discussion to issues related to the client’s case. Again, the defense lawyer should start by sharing something about his or her views or possible biases, before probing deeper with jurors. In doing this, the lawyer has to be attuned to juror body language and facial expressions, and especially listen to how prospective jurors respond. As long as the lawyer is tapping his or her own genuine feelings and is being respectful of the prospective jurors, the lawyer should be able to avoid a negative or defensive response.

As long as the defense attorney can tie these questions to an issue in the case, the court should permit the questioning. For example, a case may be reversed when a defense lawyer is not allowed to question prospective jurors regarding pro-law enforcement bias when the only witnesses in a criminal case are police officers.³¹ Many cases turn on whether law enforcement officers followed proper procedures or whether their testimony

²⁷ SPENCE, *supra* note 4, at 114–24. Gerry Spence is a well-known trial lawyer with more than fifty years of experience trying criminal and civil cases. *AAJ Recognizes Trial Lawyers for Excellence*, TRIAL, Nov. 2013, at 48.

²⁸ SPENCE, *supra* note 4, at 114.

²⁹ *Id.* at 116.

³⁰ *Id.* at 115–16.

³¹ See, e.g., *State v. Ritter*, 719 N.W.2d 216, 221–22 (Minn. Ct. App. 2006) [<https://perma.cc/RM6S-LPGA>].

is credible. Prospective jurors' attitudes about law enforcement can be relevant in a large percentage of criminal cases.

The same approach, an approach to confront one's fear when it is a fear about race in a case, is extremely important. As I discussed in Part I of this Essay, perhaps more than many other issues in a case, race matters.

IV. CONCLUSION

Given the importance that race and racial bias may play in certain cases, defense counsel has an obligation to determine when and how to discuss race and racial bias during jury selection in order to be effective. Defense lawyers should ask for juror questionnaires, and ask to insert questions that raise issues of racial bias such as those mentioned above.³² In addition, defense lawyers should ask questions to raise awareness about bias during voir dire.

Especially in times when issues of race are on the minds of potential jurors, such as currently in the St. Louis area due to the shooting of Michael Brown and continuing protests in Ferguson and several other cities over racial injustices, failing to question about bias in some cases may result in stacking the jury against the accused. Brayer's essay about talking to prospective jurors about Ferguson serves as a reminder that, to be effective, defense counsel has to confront his or her fears in a case, whether that is a fear about jurors' attitudes toward the police, or fear about jurors' biases. Failing to do so is not just giving in to one's fears, but may in fact be giving up on your client's chance to have the jury decide the case fairly.

³² See *supra* notes 8–11 and accompanying text.

EXHIBIT C

First, Do No Harm:

On Addressing the Problem of Implicit Bias in Juror Decision Making

By Jennifer K. Elek & Paula Hannaford-Agor

Over the past three decades, court leaders across the country have taken aggressive steps to confront racial bias in the courts. Recent efforts include in-depth judicial education and training about how an individual's unconscious attitudes (including culturally learned associations or generalizations that we tend to think of as stereotypes) introduce unjustified assumptions about other people and related evidence that can distort a person's judgment and behavior. This phenomenon is now referred to as *implicit bias* to differentiate it from explicit or intentional bias. Judicial-education programs focus on raising judicial awareness about implicit bias and introducing techniques that judges may use to help minimize the impact of implicit bias on judicial decision making.

Despite high levels of interest and genuine commitment to racial fairness in the justice system, disparate treatment of racial minorities persists and pervades all stages of the criminal justice process. Jury trials are a particularly troubling component of the justice system with regard to the potential for racial bias. Courts have extremely limited opportunities to educate jurors about the pernicious effects of complex psychological phenomena like implicit bias and how these implicit forms of bias may distort jurors' interpretation of trial evidence. Jurors are randomly selected from the local community. Other than statutory qualifications such as U.S. citizenship, age (adults 18 or older), and the ability to speak and understand English, state courts have no educational, occupational, or personal experience requirements to be eligible for jury service. Most jurors in this country serve only for the duration of the trial (typically two to three days) and then are released from service. No time is available during this short period to provide the type of in-depth education on implicit bias that judges and court staff may receive. Instead, judges and lawyers are increasingly looking to existing opportunities within the jury-selection and trial period (e.g., juror orientation, voir dire, jury instructions) in which to inform jurors about the propensity of implicit bias to affect decision making and to provide concrete strategies to minimize the impact of implicit bias on jury verdicts.

This article focuses on several of these interventions and the factors that may increase or undermine their effectiveness. Most Americans are aware of the existence of explicit bias and its effects on decision making generally, but implicit bias is still a relatively new concept about which many people in the justice system are unaware. The first section of this article discusses the difference between explicit bias and implicit bias and why

contemporary researchers have become more convinced that much of the disparity in legal outcomes for African-Americans compared to whites is likely due to implicit bias. We then describe different interventions that have been proposed to reduce the impact of implicit bias, and findings from empirical research about their effectiveness. One complication of these interventions is that some otherwise well-intentioned approaches can provoke a backlash effect in which the individuals exposed to the intervention are actually more likely to make judgments or behave in ways that manifest prejudice. In the context of administering these interventions with trial jurors, there are a number of pros and cons, many of which involve purely logistical concerns. We conclude with an update about interventions that are currently being tried, including a pilot test of an implicit-bias jury instruction.

THE IMPACT OF IMPLICIT BIAS IN THE JUSTICE SYSTEM

Judges, lawyers, and court staff have long recognized that explicit, or consciously endorsed, racial prejudices have no place in the American justice system. The Code of Judicial Conduct in most states expressly prohibits judges from engaging in bias, prejudice, or harassment on the basis of race, gender, ethnicity, or other factors, and the code even extends the prohibition to court employees over which the judges have control and to lawyers appearing in cases before them.¹ In fact, most judicial-performance evaluations include measures of judicial impartiality as a major focus. The underlying justification for this prohibition is that discriminatory speech or behavior undermines public perceptions of judicial impartiality and competence. In contemporary society, most people recognize that explicit racial bias is normatively bad, and they make efforts to suppress biased behaviors or speech, even if they consciously recognize that they have those attitudes.

What often surprises members of the court community and other professionals is that more subtle biases or prejudices can operate automatically, without awareness, intent, or conscious control. Personal attitudes and acquired knowledge often help individuals function more efficiently by making it easier for the brain to recognize and respond quickly to new people or situations. But some attitudes, especially racial and cultural stereotypes, distort decision making by unfairly influencing judgments about others. Although explicit or consciously endorsed racial prejudices in contemporary American society may be on the decline, this subtler form of implicit racial bias persists.

Over the past few decades, a number of specialized tests have

Footnotes

1. ABA MODEL CODE OF JUD. CONDUCT R. 2.3 (2011). Twenty-seven states have adopted the language of Rule 2.3 or substantially similar language.

been developed to help researchers identify, measure, and study implicit forms of bias. One of the most popular is the Implicit Association Test (IAT), developed by researchers in the mid-1990s at Yale University and the University of Washington. The IAT operates under a basic premise of human cognition that when an idea is consistent with a person's attitudes or cultural understanding, he or she will be able to mentally associate concepts related to that idea more quickly and easily than if the idea is inconsistent with a person's attitudes or cultural understanding. In an early version of the IAT, for example, researchers measured the amount of time it took people to associate pictures or words representing flowers or insects with positive attributes ("good") and with negative attributes ("bad") by hitting right or left keys on a computer keyboard. Because flowers are generally viewed as intrinsically good and insects as intrinsically bad (or at least significantly less good), most were able to hit the keys associating flowers and words indicating positive attributes, and insects and words indicating negative attributes, much faster and with fewer errors than when they asked to associate flowers with words indicating negative attributes or insects and words indicating positive attributes.² The difference in the amount of time and the number of errors reflects the strength of the person's preference for flowers over insects. Interestingly, young boys and entomologists tended to show weaker preferences for flowers over insects compared to young girls and people who do not study insects professionally.³ This pattern of stronger preferences for more culturally familiar and socially and individually learned concepts has been found to be consistent for IAT tests measuring implicit biases based on race, gender, ethnicity, sexual orientation, age, religion, disability, body weight, and other characteristics developed and employed over the past 15 years. To try an Implicit Association Test, go to www.implicit.harvard.edu.

A large body of empirical literature now documents the existence of implicit biases and their behavioral implications. One recent meta-analysis of 122 research reports found implicit biases to be valuable, independent predictors of social behavior and judgment.⁴ Implicit racial bias is the most studied type of implicit bias. Research shows that implicit racial bias can predict the quality of social interactions and decision-making outcomes in a variety of contexts, including voting, hiring, performance assessment, budget setting, policing, and medical treatment.⁵ In the context of the American justice system, researchers now point to linkages between implicit racial bias

and disparities in detention decisions, jury verdicts, capital punishment, and other sentencing outcomes.⁶

Research on judicial decision making suggests that judges are affected by implicit bias in ways similar to the general population. In one study of actual trial judges in three jurisdictions, white judges showed strong implicit attitudes favoring whites over blacks (consistent with studies of implicit bias in the general population).⁷ The judges were presented with three vignettes, two of which did not identify the defendant's race but some of which included words designed to trigger an association with African-Americans (e.g., Harlem, dreadlocks). The third vignette explicitly identified the defendant as white or black. The judges were asked to recommend a judgment on guilt, to share their confidence in that judgment, and to predict the defendant's likelihood of future recidivism. Interestingly, judges did not differ in their judgments in the first two vignettes based solely on whether the vignette included cues regarding race, but the judges' Race IAT was a marginally significant predictor of the harshness of the sentence. Judges whose Race IAT indicated a preference for whites over blacks were more likely to convict the defendant, had greater confidence in that judgment, and believed the likelihood of recidivism to be higher than judges whose Race IAT indicated a preference for blacks over whites. In the third vignette, judges with greater implicit bias against blacks convicted black defendants at the same rate as white defendants, but judges with greater implicit bias in favor of blacks convicted black defendants less frequently than they did white defendants.

Studies of juror decision making also demonstrate the impact of implicit bias on judgments. Levinson and Young, for example, conducted a mock-jury experiment in which mock jurors studied 20 pieces of trial evidence including photographs of a crime scene, one of which was a surveillance camera photograph featuring a masked gunman whose hand and forearm were visible. Half the cases showed light skin on the gunman and half showed dark skin.⁸ This subtle manipulation of skin color produced significantly different results in jurors' confidence in their verdict. On a scale of 1 (not at all guilty) to 100 (absolutely guilty), jurors who viewed the dark-skinned gun-

Studies of juror decision making also demonstrate the impact of implicit bias on judgments.

2. Kristin A. Lane, Mahzarin R. Banaji, Brian A. Nosek & Anthony G. Greenwald, *Understanding and Using the Implicit Association Test: IV. What We Know (So Far) About the Method*, in *IMPLICIT MEASURES OF ATTITUDES* (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

3. *Id.*

4. Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 *J. PERSONALITY & SOC. PSYCHOL.* 17 (2009).

5. For reviews, see John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 *RESEARCH ORG. BEHAV.* 39 (2009); Jerry

Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 *UCLA L. REV.* 465 (2010).

6. See, e.g., Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383 (2006); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124 (2012); Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 171 (2007).

7. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 *NOTRE DAME L. REV.* 1195 (2009).

8. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Bias, and Judgments of Ambiguous Evidence*, 112 *W. VA. L. REV.* 307 (2010).

In the discrete area of juror decision making, there is little evidence to suggest a straightforward, simple relationship between defendant race and juror verdict preferences.

man's photograph rated the defendant's guilt at 66.97 on average compared to 56.37 for jurors who viewed the light-skinned gunman's photograph, suggesting that skin color affected how jurors perceived and interpreted the trial evidence. Other measures of explicit racial bias were unrelated to study findings.

Eberhardt and colleagues investigated the extent to which capital felony defendants with stereotypically black facial features are more likely to be sentenced to death

than defendants without such features.⁹ Using a database of death-eligible cases in Philadelphia that advanced to the penalty phase between 1979 and 1999, the researchers identified 44 cases in which a black defendant was convicted of murdering a white victim. They then obtained photographs of these defendants and had neutral observers rate each defendant's looks on a scale of 1 (not at all stereotypically black) through 11 (extremely stereotypical). After controlling for nonracial factors known to influence sentencing,¹⁰ they found that defendants who were rated as having less stereotypically black features were sentenced to death in 24.4% of the cases whereas defendants who were rated as appearing more stereotypically black were sentenced to death in 57.5% of the cases. These findings are consistent with previous research that people associate black physical traits with criminality.

Employing the same methodology, Eberhardt and colleagues also examined death-penalty rates in cases in which a black defendant was convicted of murdering a black victim, but they found no significant difference based on stereotypically black appearances. Noting that juries may view black-on-white crimes as intergroup conflict, rather than interpersonal conflict involved in black-on-black crimes, they concluded that juries may use physical appearance as a powerful cue to in determining whether a defendant deserves to die.

These studies and others¹¹ demonstrate that racial biases in legal decision making often arise in ways not easily or consistently explained by traditional factors such as trial participant demographic characteristics. In the discrete area of juror decision making, there is little evidence to suggest a straightfor-

ward, simple relationship between defendant race and juror verdict preferences. Mock-juror studies such as the ones discussed here show some evidence of in-group biases,¹² but studies that focus on the decision making of actual jurors in actual trials find that the relationship between juror and defendant race accounted for only a very small amount of the variance in jury verdicts. Strength of evidence is generally the overwhelming predictor. Garvey and colleagues, for example, examined decision making by more than 3,000 jurors in nearly 400 non-capital felony trials in four jurisdictions.¹³ Only in the D.C. Superior Court did the defendant's race affect juror's first votes during deliberations, but even this relationship did not survive into the juries' final verdicts. Strength of the evidence, including the credibility of police testimony, was the strongest factor related to final verdicts.¹⁴

Similarly, Visher conducted 90-minute in-person interviews with 331 jurors from 38 forcible-sexual-assault trials to examine the effects of juror characteristics, defendant and victim characteristics, and evidentiary factors on juror decision making.¹⁵ She found that juror characteristics accounted for only 2% of the variance in jury verdicts, and defendant and victim characteristics accounted for only 8% of the variance. In contrast, evidentiary factors, especially the use of force and physical evidence, accounted for 34% of the variance. These findings point away from strict demographic explanations for racial disparities in legal decision making and toward a more complex, nuanced alternative: one that explores how the decision maker's attitudes and cognitive schemas inform the perception and interpretation of a host of evidentiary factors critical to fair legal judgment.

PROMISING STRATEGIES FOR COMBATING IMPLICIT BIAS

Social scientists have made great strides in recent years to identify effective (and ineffective) interventions for combating more insidious forms of racial bias. To reduce the effects of implicit forms of bias in judgment and behavior, several interventions have shown promise. We discuss a few of these in turn.

EDUCATION INTERVENTIONS

In general, basic education about the existence of implicit forms of bias and how these can manifest in judgment is an important first step. Personal awareness of one's own potential for any type of cognitive bias is necessary before an individual is capable of engaging in efforts to correct for it. Although simply being aware of the potential for racial bias may prompt

9. Eberhardt et al., *supra* note 6.

10. The nonracial factors that researchers controlled for included (1) aggravating circumstances; (2) mitigating circumstances; (3) severity of the murder; (4) defendant's socioeconomic status; (5) victim's socioeconomic status; and (6) defendant's attractiveness. Eberhardt et al., *supra* note 6, at 384.

11. See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 *PSYCHOL. PUB. POLY & L.* 201 (2001); Sommers, *supra* note 6.

12. M. Juliet Bonazzoli, *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, 18 *QUINNIPIAC L. REV.* 775 (1998);

Derek Chadee, *Race, Trial Evidence, and Jury Decision Making*, 1 *CARIBBEAN J. CRIM. & SOC. PSYCHOL.* 59 (1996); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 *MICH. L. REV.* 63 (1993).

13. Stephen P. Garvey et al., *Juror First Votes in Criminal Trials*, 1 *J. EMPIRICAL LEGAL STUD.* 371 (2004).

14. See also PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, *ARE HUNG JURIES A PROBLEM?* (2002).

15. Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 *LAW & HUM. BEHAV.* 1 (1987).

some individuals to pursue corrective action, it is not sufficient to ensure that debiasing efforts consistently reduce or prevent expressions of implicit bias.¹⁶ Individuals must understand the nature of implicit bias—what it is and how it can affect judgment—to increase the likelihood that the corrective efforts they engage in are effective.¹⁷ And they must also possess the motivation to fully implement such debiasing efforts.

In framing an educational message on implicit bias, however, the appeal used has important ramifications. For example, one set of studies has shown that some types of individuals are angered and feel threatened by external pressure to comply with mandatory nondiscrimination standards.¹⁸ When away from the watchful eye of the authority figure setting the standards for compliance, these individuals are more likely to engage in biased decision making, presumably in attempts to “reassert their personal freedom.”¹⁹ Thus if an authority designs the educational message to pressure individuals to comply with social or institutional standards for racial fairness, this *extrinsic* motivation to regulate prejudice can incite hostility and generate backlash that may increase expressions of racial prejudice. Legault and colleagues showed that exposing individuals to educational messages designed to compel adherence to racial fairness generated more explicit prejudice (in the form of self-reported racial attitudes) and implicit prejudice (in the form of reaction time measures like the IAT) than a no-intervention alternative. That approach shows that forced-compliance interventions can actually increase expressions of prejudice over doing nothing.²⁰ In contrast, Legault and colleagues also found that educational messages designed to inform and appeal to personal standards for egalitarianism (i.e., to generate *intrinsic* motivation to regulate prejudice) reduced expressions of explicit and implicit prejudice compared to the no-intervention alternative. Thus interventions designed to educate individuals in an effort to encourage buy-in at a personal level and appeal to these personal egalitarian standards are more likely to reduce expressions of prejudice and avoid harmful backfire effects than programs in which authorities force individuals to comply with external anti-prejudice standards.

In addition, the effectiveness of an educational intervention can depend on the ideology underlying the approach. The traditional institutional approach to racial fairness, referred to in

relevant literature as the colorblindness approach, explicitly directs individuals to ignore race and other differences. This popular colorblindness strategy underlies the mandate that judicial decision makers disregard extralegal factors like race and gender when weighing the evidence. Given the mounting evidence that messages using intrinsic appeals are more

effective at reducing prejudice than messages conveying an external pressure to comply, the colorblindness approach is not an optimal bias-reduction strategy. This approach has been shown to generate greater individual expressions of racial bias on both explicit and implicit measures compared to a multiculturalism approach that promotes the value of diversity and encourages individuals to appreciate group differences.²¹ In addition to other research showing that a colorblindness approach to reducing expressions of racial prejudice often backfires,²² a multiculturalism approach has been shown to improve the likelihood that a person will accurately detect instances of racial discrimination when observed, whereas a colorblindness approach produces a reduced likelihood of detection. This trend suggests that the colorblindness approach may appear to work to improve racial fairness but in actuality may result in an underreporting of incidents of racial discrimination.²³

The counterproductive effects of particular strategies in the promotion of racial fairness can spread beyond individuals in the immediate educational environment. The mainstream popularity of the colorblindness approach can prompt white individuals, in response to implied (but unspoken) social cues to ignore race, to spontaneously adopt a colorblindness strategy to avoid the appearance of racial bias when interacting with a black partner. Strategic demands to ignore race as part of a colorblindness approach to reducing racial prejudice can produce unintentional, “ironic” effects: One study showed that as white individuals devoted mental resources to the task of ignoring race, they had fewer resources available to dedicate toward monitoring and controlling their nonverbal behavior in social interactions with black partners. As a result of this cognitive

In framing an educational message on implicit bias, . . . the appeal used has important ramifications.

16. See Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Krista L. Raymond, Lisa I. Iezzoni & Mahzarin R. Banaji, *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007); Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83 (2003).

17. See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994); Dwayne T. Wegener et al., *Flexible Correction of Juror Judgments: Implications for Jury Instructions*, 6 PSYCHOL. PUB. POLY & L. 629 (2000). For example, engaging in a strategy like perspective-taking (i.e., imagining how one would feel and act if in the stigmatized person's shoes or if seeing the world from their point of view) has been shown to decrease expressions of implicit and explicit bias. Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and Ingroup Favoritism*, 78 J.

PERSONALITY & SOC. PSYCHOL. 708 (2000).

18. E. Ashley Plant & Patricia G. Devine, *Responses to Other-Imposed Pro-Black Pressure: Acceptance or Backlash?* 37 J. EXPERIMENTAL SOC. PSYCHOL. 486 (2001).

19. *Id.* at 486.

20. Lisa Legault et al., *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (But Also Increase) Prejudice*, 22 PSYCHOL. SCI. 1472 (2011).

21. Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417 (2004).

22. Evan P. Apfelbaum et al., *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918 (2008).

23. Evan P. Apfelbaum et al., *In Blind Pursuit of Racial Equality?* 21 PSYCHOL. SCI. 1587 (2010).

More diverse juries tend to produce decisions less biased by the defendant's race

resource strain, white participants actually exhibited less friendly non-verbal behavior toward the black partner than was observed when white participants interacted with a white partner.²⁴ Other research indicates that this kind of discriminatory non-verbal behavior can negatively influence the subsequent perceptions and responses of the stigmatized individual or individuals²⁵ and may hinder future efforts to engage in interracial interaction.²⁶

Thus, educational initiatives promoting racial fairness should focus not just on the individual, but also on the climate of the organization as a whole. When peers and leadership figures demonstrate behavior consistent with the multiculturalism approach, these expressions of egalitarian goals and beliefs will positively influence others in the community.²⁷ Other educational efforts to change racial attitudes through diversity-training courses have also helped to at least temporarily reduce individuals' expressions of implicit and explicit racial biases.²⁸

CONTACT AND EXPOSURE INTERVENTIONS

Generally, increased interracial contact seems to have a positive effect on both implicit and explicit attitudes.²⁹ Exposure to individuals who contradict prevailing cultural or social stereotypes can, in particular, reduce the expression of implicit racial biases. This works when people have an opportunity to see or interact with stigmatized group members in respected leadership roles or as role models, or otherwise observe them behaving in a manner that contradicts prevailing social stereotypes.³⁰

Simply imagining stigmatized group members in counter-stereotypic ways can also reduce the expression of implicit biases.³¹ Even individuals who engage in extensive practice mentally countering or negating stereotypes appear to be able to successfully reduce implicit biases based on those stereotypes over time.³²

More diverse juries tend to produce decisions less biased by the defendant's race, presumably because they force jurors to engage with one another on an equal basis in deliberations and to expressly confront different conclusions about the trial evidence that were reached based on the jurors' unique life experiences and attitudes, including implicit biases.³³ Although more research is needed on the precise mechanisms by which jury diversity affects juror decision making, it appears that the presence of minorities on a jury not only brings more diverse perspectives to the table, but it also increases white juror awareness of race-related concerns in a way that stimulates a more thorough and more factually accurate evaluation and discussion of trial evidence.

INTERVENTIONS THAT CLARIFY STANDARDS FOR JUDGMENT

Discrimination tends to emerge more in ambiguous decision-making contexts than straightforward ones.³⁴ White-majority juries more often convict and recommend harsher sentences for black defendants than white defendants when the prosecution presents weak or ambiguous evidence against them.³⁵ Other studies show that mock jurors are more likely to discriminate against black defendants than white defendants in verdict and sentencing decisions when presented with mixed or incriminating but inadmissible evidence.³⁶ To check for poten-

24. Apfelbaum et al., *supra* note 22.

25. See generally John F. Dovidio et al., *Why Can We Just Get Along? Interpersonal Biases and Interracial Distrust*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88 (2002); Mark Snyder, Elizabeth D. Tanke & Ellen Berscheid, *Social Perception and Interpersonal Behavior: On the Self-fulfilling Nature of Social Stereotypes*, 35 J. PERSONALITY & SOC. PSYCHOL. 656 (1977); Mark Chen & John A. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-fulfilling Nature of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541 (1997).

26. J. Nicole Shelton & Jennifer Richeson, *Intergroup Contact and Pluralistic Ignorance*, 88 J. PERSONALITY & SOC. PSYCHOL. 91 (2005).

27. Henk Aarts, Peter M. Gollwitzer & Ran R. Hassin, *Goal Contagion: Perceiving Is for Pursuing*, 87 J. PERSONALITY & SOC. PSYCHOL. 23 (2004); Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 J. PERSONALITY & SOC. PSYCHOL. 645 (2001).

28. Lauri A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001).

29. See Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006).

30. 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 (2004); 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 (2001); Nilanjana Dasgupta & Luis M. Rivera, *When Social Context Matters: The Influence of Long-Term Contact and Short-Term Exposure to Admired Outgroup Members on Implicit Attitudes and Behavioral Intentions*, 26 SOC. COGNITION 112 (2008); Michael A. Olson & Russell H. Fazio, *Reducing Automatically Activated Racial Prejudice Through Implicit Evaluative Conditioning*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 421 (2006).

31. Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imaging Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY SOC. PSYCHOL. 828 (2001).

32. Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCHOL. 871 (2000).

33. 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).

34. Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474 (2005); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism & Selection Decisions: 1989 and 1999*, 4 PSYCHOL. SCI. 315 (2000).

35. Chadee, *supra* note 12.

36. Gordon Hodson et al., *Aversive Racism in Britain: Legal Decisions and the Use of Inadmissible Evidence*, 35 EUR. J. SOC. PSYCHOL. 437 (2005); James D. Johnson et al., *Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893 (1995).

tial bias, a decision maker may look to determine if he or she has reasonable justification for the decision based on legitimate decision-making factors. However, this research shows that it is difficult for decision makers to realize when their decisions are influenced by race, ethnicity, gender, or other extraneous factors if other selective information can be used to support their decision.

People may not be able to identify and correct for bias in ambiguous contexts because decision-making standards tend to change to rationalize judgments that are actually influenced by extraneous factors. In a seminal series of studies, Uhlmann and Cohen showed that when evaluating male and female job applicants for a gender-stereotypical job (e.g., a stereotypically masculine position as a police chief), people's perceptions about the credentials needed to be successful at the job tended to shift *post hoc* to justify gendered decision making.³⁷ That is, regardless of whether the male had "street smarts" or a strong educational background, people tended to justify their decision to select the male candidate over the female candidate by claiming that whichever credential the male had (but that the female did not) was more important to the job. Most telling is the fact that these decision makers thought they were providing an objective, rational, unbiased decision about the best candidate to hire.

If clear decision-making criteria are defined at the outset, however, the type of "shifting standards" effect that can unintentionally result in discrimination may be eliminated. In a follow-up study by Uhlmann and Cohen, people who committed to clear priorities about the criteria they would use in making the police-chief hiring decision showed no evidence of gendered decision making, but people who did not make such a commitment and relied more on discretionary, selective justification made decisions that were biased by gender. This shows that clarified decision-making standards can reduce stereotyping and discrimination in outcomes.

POTENTIAL APPLICATIONS OF INTERVENTION STRATEGIES FOR USE WITH JURIES

Although interventions have shown promise in reducing the effects of implicit bias on judgment and behavior more generally, not all of these strategies lend themselves well to practical application in jury decision making. We discuss some potential intervention strategies for use with juries below and consider the feasibility of each.

EDUCATE JURORS ON IMPLICIT BIAS

Education or training on the topic of implicit bias has been provided to judges and court staff in some states.³⁸ However,

even the most conservative of these educational initiatives take a significant amount of time to implement and require substantial resources and preparation. To introduce training during jury selection, courts would need to have trainers available to present educational material to prospective jurors, the time to implement a seminar that would likely last one to two hours at minimum due to the complexity of the subject

matter, and the resources to allow prospective jurors to explore the topic through feedback or the opportunity for practice. Moreover, most Americans now live in jurisdictions that employ a one-day/one-trial term of service.³⁹ This system substantially reduces the burden of jury service on individual jurors by distributing it across a much larger pool of prospective jurors. Courts that have implemented this system necessarily had to abandon the earlier practice of summoning prospective jurors for an "Orientation Day" and now conduct a brief juror orientation (typically 20-30 minutes) in the morning when jurors report and before they are sent to courtrooms for jury selection. The combination of resources required for an educational program on implicit bias plus the lack of time in which to present such a program makes it unlikely that any court would pursue this intervention option.

RAISE AWARENESS OF IMPLICIT BIAS WITH IATS OR RACE-RELEVANT VOIR DIRE QUESTIONING

A number of alternative interventions have been suggested for use in jury selection, but little is yet known about their efficacy in reducing bias. For example, the administration of IATs to jurors⁴⁰ and the addition of race-relevant voir dire questioning⁴¹ have been proposed as means of raising juror awareness about implicit bias and alerting jurors to its potential influence on their decisions. Although such approaches may help to reduce expressions of bias, these options are impractical in many courts for many of the same reasons discussed with regard to the educational-seminar option above. Costs associated with these techniques (e.g., printing and processing of questionnaires at a time when states are facing new and significant budgetary challenges) and limited existing court resources (e.g., computer access for potential jurors to take the IAT, or trained staff to code and process a paper-and-pencil version of the test) preclude these options from consideration in many jurisdictions.

A number of alternative interventions have been suggested for use in jury selection, but little is yet known about their efficacy

37. Uhlmann & Cohen, *supra* note 34.

38. See PAMELA M. CASEY ET AL., HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012); Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, & Jennifer K. Elek, *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64 (2013).

39. GREGORY E. MIZE, PAULA L. HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007). Under a one-day/one-trial term of service, prospective jurors report to the courthouse on the sum-

mons date. If a juror is sworn as a trial juror or alternate, he or she serves for that trial and is released from further service at the completion of the trial. If a juror is not selected as a trial juror or alternate, he or she is released at the end of the reporting day.

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

41. 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); Sommers, *supra* note 33.

The potential efficacy of . . . debiasing agents must be examined and demonstrated empirically . . . before courts are encouraged to use them . . .

The National Center for State Courts' State-of-the-States Survey of Jury System Improvement Efforts further illustrates the limited viability of debiasing interventions during voir dire.⁴² In nearly 12,000 jury trials, judges and lawyers reported that they spent two hours on average to select a jury, a task that also involves confirming jurors' qualifications and ability to serve for the length of the trial and investigating each juror's ability to be fair and impartial if selected as a

trial juror. Most judges and lawyers would not embrace new debiasing interventions during voir dire due to the additional time involved. States also vary in the extent to which voir dire is judge-dominated or attorney-dominated, but in either case, voir dire is perhaps the most individualistic stage of the trial. Judges have a great deal of discretion in how they conduct voir dire and are protective of that discretion as a matter of judicial independence. In a judge-dominated voir dire state, the likelihood of training the entire trial bench on how to use debiasing interventions effectively in all cases, and then ensuring that they actually apply that training, is very remote. Doing so in a lawyer-dominated voir dire state is even more remote given the complete absence of a unified bar. For consistent use in the majority of state courts, a realistic practical remedy for implicit bias in juror decision making must be not only effective but also expedient and economical.

ASSEMBLE DIVERSE JURIES

Convention assumes that deliberations among a demographically diverse group of jurors are more likely to facilitate a thorough and fair evaluation of the evidence because different perspectives are presumed to be represented in the discussion. Moreover, as indicated above, research shows that when white jurors expect to engage with a diverse jury, they tend to approach deliberations in a way that promotes a more thorough and factually accurate evaluation of the evidence.⁴³

It is not always possible, however, to ensure a racially diverse jury. This may be of particular concern in jurisdictions with relatively homogeneous jury pools, which comprise the great majority of state courts. For example, the jury-eligible population of black/African-Americans comprises less than 10 percent

of the total jury-eligible population in more than three-quarters of counties in the United States. Those counties encompass more than half of the total U.S. population.⁴⁴ Unfortunately, even in more diverse communities, jury panels often fail to fully reflect community demographic characteristics due to non-systematic exclusion of minorities from jury pools,⁴⁵ reductions in the size of trial juries,⁴⁶ and the pervasive discriminatory use of peremptory challenges.⁴⁷

STRENGTHEN THE JURY DECISION-MAKING PROCESS

The past two decades have seen a dramatic change in judges' management of jury trials. The traditional view that juror impartiality is best served when jurors maintain a strictly passive role has gradually given way to the view that jurors are active learners and perform best when given commonplace decision-making tools to better understand and remember trial evidence. These tools include permitting jurors to take notes, permitting jurors to submit written questions to witnesses, permitting jurors to discuss the evidence before final deliberations, instructing jurors on the basic elements of the law they will be told to apply before the evidentiary portion of the trial, and providing jurors with written copies of jury instructions.⁴⁸ Evaluations of each of these innovations have shown that they are effective decision-making aids in terms of improved comprehension of the evidence and law and increased retention of evidence presented at trial. By emphasizing the importance of juror comprehension of the evidence and law, these types of tools provide jurors with a stronger framework for decision making and lead to greater clarity about the basis for their collective verdict, which theoretically should reduce the potential for implicit bias to skew the verdict. No research has been conducted to explicitly examine the relationship between these jury-trial innovations and implicit bias. Although there is some reason to believe these tools may be helpful for this purpose, it is premature to conclude that these innovations will reduce the impact of implicit bias on jury verdicts. The potential efficacy of these tools as debiasing agents must be examined and demonstrated empirically, through rigorous scientific research, before courts are encouraged to use them as implicit-bias interventions.

USE SPECIALIZED JURY INSTRUCTIONS ON IMPLICIT BIAS

Historically, courts have relied extensively on jury instructions to guide juror decision making because this approach is relatively inexpensive, expedient, and easy to administer to

42. MIZE et al., *supra* note 39.

43. Sommers, *supra* note 33.

44. Paula Hannaford-Agor & Nicole L. Waters, *Safe Harbors from Fair Cross Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool*, 8 J. EMPIRICAL LEGAL STUD. 762 (2011).

45. Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POLY REV. 65 (2008).

46. Shari Seidman Diamond, Mary R. Rose, Beth Murphy & John B. Meixner, *Damage Anchors on Real Juries* (Sept 20, 2011) available

at <http://ssrn.com/abstract=1883861> or <http://dx.doi.org/10.2139/ssrn.188386>.

47. See, e.g., EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* (2010); COUNCIL FOR COURT EXCELLENCE, *DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN WASHINGTON, D.C.* 19-37 (1998); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996).

48. See, e.g., *JURY TRIAL INNOVATIONS* (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead eds., 2d ed. 2006).

each new jury. However, research studies have provided mixed evidence of its utility in practice. On one hand, most studies confirm that jurors take their responsibility to apply the law provided by the trial judge seriously, spending up to one-quarter of their deliberation time focused on jury instructions.⁴⁹ On the other hand, although most jurors in actual trials report that they understand the law relatively well,⁵⁰ research shows that jurors have fairly low levels of comprehension regarding the basic legal principles articulated in jury instructions.⁵¹ But when Diamond and her colleagues observed actual jury deliberations in 50 civil trials, they found that nearly 80% of the jurors' comments about the instructions were accurate and nearly half of the incorrect comments were ultimately corrected during deliberations. This led Diamond and her colleagues to surmise that jurors in actual trials might be "able to assist one another in ways not captured on post-deliberation questions or in studies of individual respondents."⁵² The implication from this research is that to understand the full impact that any jury instruction (including a specialized implicit-bias jury instruction) may have on juror decision making, one should examine it in a context in which group deliberations take place.

It is not yet known whether a well-crafted jury instruction could help to mitigate the effect of implicit racial bias in juror decision making. Studies show that individuals can control the behavioral expression of implicit biases in specific laboratory contexts if provided with a concrete strategy for bias reduction.⁵³ In addition, whether or not jurors are motivated to produce a fair and just outcome can determine whether debiasing instructions are followed. However, pattern jury instructions developed for use in state and federal jury trials rarely incorporate these characteristics, relying instead on the simple admonition that jurors should not let "bias, sympathy, prejudice, or public opinion influence your decision."⁵⁴ Moreover, jury instructions tend to be written in an authoritarian legal style

that, in the context of implicit bias, may ultimately prove counterproductive by triggering a backlash effect.⁵⁵

CONCLUSIONS

It is clear that members of the court community are coming to understand the general problem posed by implicit bias and are clamoring for readily available solutions on which they can act. As the court community has become more knowledgeable about implicit bias and more aware of the potential for harm in judicial decision making, judges and lawyers have expressed a great deal of interest in extending intervention efforts to jurors through the development of a specialized jury instruction on implicit bias. Judge Mark Bennett of the U.S. District Court, Northern District of Iowa, was the first trial judge known to have incorporated this approach in jury trials.⁵⁶ More recently, the Criminal Justice Section of the American Bar Association has convened a committee to develop a toolbox of options intended to reduce the impact of implicit bias in court proceedings, including a jury instruction on implicit bias.⁵⁷ The topic of implicit-bias instructions has also been a recurring theme on listserv discussions among members of pattern jury instruction committees.⁵⁸ Through these efforts and others, several versions of implicit-bias jury instructions are now or will soon be available for use.

Unfortunately, existing research suggests the possibility that an implicit-bias jury instruction may produce a backlash effect that actually exacerbates expressions of both implicit and explicit bias. This effect may not be universal: Specialized

It is not yet known whether a well-crafted jury instruction could help to mitigate the effect of implicit racial bias in juror decision making.

49. Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537 (2012); see REID HASTIE, STEVEN PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983).

50. See B. MICHAEL DANN, VALERIE P. HANS & DAVID H. KAYE, *TESTING THE EFFECTS OF SELECTED JURY TRIAL INNOVATIONS ON JUROR COMPREHENSION OF CONTESTED mtDNA EVIDENCE: FINAL TECHNICAL REPORT FOR U.S. DEPARTMENT OF JUSTICE* (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/211000.pdf>; Paula Hanaford-Agor, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman, *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627 (2000); Hanaford-Agor, Hans & Munsterman, *supra* note 14.

51. Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?* 52 LAW & CONTEMPORARY PROBLEMS 205 (1989); Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539 (1992); Geoffrey P. Kramer & Doreen M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59 (1998).

52. See Diamond, Rose & Murphy, *supra* note 49.

53. See Kim, *supra* note 16; Saaid Mendoza, Peter Gollwitzer & David Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512 (2010); Brandon D. Stewart & B. Keith Payne, *Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1332 (2008).

54. Judicial Conference Criminal Jury Instructions, CALCRIM No. 101 (2012).

55. See *supra* notes 18-20 and accompanying text.

56. 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 (2010).

57. For a description of the Committee and its work, see http://www.americanbar.org/groups/criminal_justice/voir_dire.html.

58. The PJI Listserv is an online discussion group hosted by the NCSC and composed of chairs and reporters and state and federal pattern-jury-instruction committees.

59. SJI-13-N=082 (Pilot Test of an Implicit Bias Jury Instruction).

implicit-bias jury instructions may successfully reduce expressions of bias with some types of jurors but elicit backlash from others. Consequently, to prevent the dissemination of harmful jury instructions that produce backlash effects, we strongly recommend that new jury instructions be carefully evaluated using rigorous empirical methods to determine their overall and differential effectiveness before they are broadly promoted for use in the courtroom.

To begin this process, the National Center for State Courts (NCSC) is currently engaged in an effort to test the efficacy of an implicit-bias jury instruction. With funding from the State Justice Institute,⁵⁹ the NCSC has undertaken a project to draft a model jury instruction on implicit bias and, using mock-jury methods with a vignette of a fictitious trial, to pilot test the instruction to determine its effectiveness in minimizing the impact of implicit bias in juror decision making. The results of the pilot study, which should be available in late 2013, will help inform the direction of future efforts to address implicit bias in jury trials.



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GENERAL ESSAY: 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

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Text

[*149] INTRODUCTION

At a 1993 meeting of his organization Operation PUSH, on the topic of street crime, the Reverend Jesse Jackson told the audience, "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery . . . Then look around and see somebody white and feel relieved."

¹ Jackson's observation reflects an unfortunate but often held belief, one that even a famous and deeply committed national civil rights leader cannot escape: a white stranger is probably less threatening than a black stranger.

Such a reaction is an example of implicit bias. Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement. Indeed, social scientists are convinced that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases even though we may consciously abhor them.

¹ Mary A. Johnson, *Crime: New Frontier; Jesse Jackson Calls It Top Civil-Rights Issue*, CHI. SUN-TIMES, NOV. 29, 1993, at 4.

My own introduction to implicit bias was deeply unnerving. Associate Dean Russ Lovell of the Drake University Law School, with whom I have co-taught Advanced Employment Discrimination Litigation for many years, suggested that I visit a Harvard University website about Project Implicit. The site, www.implicit.harvard.edu, includes an online test on different types of biases called the Implicit Association Test (IAT). At that time, I [*150] knew nothing about the IAT, but as a former civil rights lawyer and seasoned federal district court judge--one with a lifelong commitment to egalitarian and anti-discrimination values--I was eager to take the test. I knew I would "pass" with flying colors. I didn't.

Strongly sensing that my test performance must be due to the quackery of this obviously invalid test, I set out to learn as much as I could about both the IAT and what it purported to measure: implicit bias. After much research, I ultimately realized that the problem of implicit bias is a little recognized and even less addressed flaw in our legal system, particularly in our jury system. I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. Implicit biases cause subtle actions, like Jackson's reaction to footsteps behind him in the night. But they are also powerful and pervasive enough to affect decisions about whom we employ, whom we leave on juries, and whom we believe. Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.

I have come to the conclusion that present methods of addressing bias in the legal system--particularly in jury selection--which are directed primarily at explicit bias, may only worsen implicit bias. Specifically, judge-dominated voir dire and the *Batson* challenge process² are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish. At the beginning of the jury selection process, judge-dominated voir dire, with little or no attorney involvement, prevents attorneys from using informed strikes to eliminate biased jurors. For a variety of reasons, judges are in a weaker position than lawyers to anticipate implicit biases in jurors and determine how those biases might affect the case. Thus, permitting judges to dominate the initial jury selection causes more biased jurors to remain on a case and exacerbates the role of implicit bias in jury trials. Additionally, the *Batson* process, which permits defendants to challenge a prosecutor's peremptory strikes of jurors if the strikes seem to have been racially motivated, is thoroughly inadequate. It both allows the implicit and explicit biases of attorneys to impact jury composition and may provide a false veneer of racial neutrality to jury trials.

This Article begins with a brief examination of the existence and prevalence of implicit bias, including the history of implicit bias testing and other social science research into the phenomenon. Next, this Article turns to a more detailed examination of the two problematic aspects of jury selection mentioned above--judge-dominated voir dire and the *Batson* challenges--and [*151] the way in which those processes may exacerbate rather than alleviate the problems of implicit bias in jury selection and jury determinations. Finally, this Article considers what lawyers and judges can and should do about implicit bias in the legal system. I propose twin solutions to the problems of judge-dominated voir dire and the flawed *Batson* challenge process. The first solution is to increase lawyer participation in voir dire, thereby placing the primary onus to detect and address the implicit bias of jurors in the hands of the trial participants best equipped to do so. The second solution is the total elimination of peremptory challenges, a solution to the failed *Batson* process perhaps as brutally elegant and effective as Alexander the Great's solution to the Gordian Knot.³ True, there is some tension between increasing lawyer participation in voir dire while stripping

² See *Batson v. Kentucky*, 476 U.S. 79 (1986). In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994), the Supreme Court expressly extended *Batson* to gender-based peremptory challenges, holding that the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race. In this Article, I intend references to "the *Batson* challenge process" to include the process for challenging gender-based peremptory strikes as well as the process for challenging race-based peremptory strikes. Likewise, my arguments in this Article apply with equal force to both types of strikes.

³ Gordius, King of Phrygia, tied his chariot to a hitching post before the temple of an oracle with an intricate knot, which, it was prophesied, none but the future ruler of all Asia could untie. In the course of his conquests, Alexander the Great came to Phrygia and, frustrated with his inability to untangle the knot, simply sliced through it with his sword. His subsequent success in his Asian campaign has been taken to mean that his solution to the "Gordian knot" fulfilled the prophecy. See THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 78 (Viking Press 1979).

lawyers of peremptory challenges. But it is my contention that the two proposed solutions work best in tandem. The implicit bias of *jurors* can be better addressed by increased lawyer participation in voir dire, while the implicit bias of *lawyers* can then be curbed by eliminating peremptory strikes and only allowing strikes for cause.

I. THE EXISTENCE AND PREVALENCE OF IMPLICIT BIAS

A. Explicit Bias Versus Implicit Bias

Society in general and courts in particular have been aware of explicit bias for years. *Price Waterhouse v. Hopkins*⁴ presents an excellent example of explicit bias. In *Price Waterhouse*, when a highly successful woman was denied partnership, her supervisor expressly advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁵ The bias on which the supervisor's comments were based was open and obvious. There are also myriad cases involving actions based on conscious bias that is not explicitly stated, so-called circumstantial evidence cases. For example, in *McDonnell Douglas Corp. v. Green*,⁶ the plaintiff could not offer a "smoking gun" comment revealing racial bias. He was nevertheless given the opportunity to prove his claim of race discrimination by establishing a prima facie case,⁷ and then overcoming the employer's proffered legitimate, non-discriminatory reasons [*152] for its decision with a showing that the proffered reasons were a pretext for intentional race discrimination.⁸ A battery of state and federal laws are aimed at eradicating intentional discrimination, that is, discrimination based on explicit bias, from the workplace, from housing, and from the dissemination of public services.

Implicit biases, on the other hand, are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful. Unfortunately, they are also much more difficult to ascertain, measure, and study than explicit biases. One scientific explanation suggests that implicit bias is formed by repeated negative associations--such as the association of a particular race with crime--that establish neurological responses in the area of the brain responsible for detecting and quickly responding to danger.⁹ While federal and state laws often adopt statutory or judicial doctrines that seek to eradicate intentional discrimination and explicit bias, they may actually exacerbate the impact of implicit bias as it is now understood, perpetuating and reinforcing discrimination more broadly. Lawyers, judges, and other legal professionals need to heighten their awareness and understanding of implicit bias, its role in our civil and criminal justice system, and in particular, the problems that it creates with regard to juries.

B. Testing for Implicit Bias: Project Implicit and the IAT

The centerpiece for research into implicit bias is Project Implicit. Project Implicit was originally launched at Yale University as a demonstration website in 1998. With a grant from the National Institute of Mental Health in 2003, it then operated as a research and virtual laboratory. Project Implicit is now a collaborative effort among research scientists, technicians, and laboratories at Harvard University, the University of Virginia, and the University of

⁴ [490 U.S. 228 \(1989\)](#).

⁵ [Id. at 235](#).

⁶ [411 U.S. 792 \(1973\)](#).

⁷ [Id. at 802](#). The plaintiff's burden to establish a prima facie case required him to show that he was a member of a racial minority, he applied and was qualified for a job for which the employer was seeking applicants, he was rejected, and the employer continued to seek applicants with his qualifications. *Id.*

⁸ [Id. at 807](#).

⁹ See generally Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120 (2006); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COG. NEUROSCI. 729 (2000).

Washington. It exists "to facilitate the research of implicit social cognition: cognitions, feelings, and evaluations that are not necessarily available to conscious awareness, conscious control, conscious intention, or self-reflection."¹⁰ The Project "blends basic research and educational [*153] outreach in a virtual laboratory at which visitors can examine their own hidden biases."¹¹

The description of the IAT format is somewhat technical.¹² However, to give a non-specialist's summary, the IAT pairs an "attitude object" (such as a racial group) with an "evaluative dimension" (such as "good" or "bad") and suggests that the speeds of responses to the association of the two shows automatic attitudes and stereotypes, that is, implicit biases. "The IAT is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with [European American] faces and names than with African American faces and names--and that the same pattern will be found for other traditionally disadvantaged groups."¹³ In other words, implicit bias against African Americans is shown when "African American" is more rapidly paired with "bad" than with "good." Attributes that are associated with some feature are easier and faster to pair than attributes that are not associated. Once the test is completed, you receive ratings like "slight," "moderate," or "strong" as a measure of your implicit bias on the subject tested.

The IAT's general findings, after seven years on the Internet, are summarized here:

. **Implicit biases are pervasive.** They appear as statistically "large" effects that are often shown by majorities of samples of Americans. . . .

. **People are often unaware of their implicit biases.** Ordinary people, including the researchers who direct this project, are found to harbor . . . implicit biases . . . even while honestly . . . reporting that they regard themselves as lacking these biases.

. **Implicit biases predict behavior.** . . . [T]hose who are higher in implicit bias have been shown to display greater discrimination

. **People differ in levels of implicit bias.** Implicit biases vary from person to person--for example as a function of a person's group memberships, the dominance of a person's membership group in society, consciously held attitudes, and the level of bias existing in the immediate environment. This last observation makes clear that implicit attitudes are modified by experience.¹⁴

These findings are deeply troubling not only for our legal profession, but also for society as a whole. While I was surprised by the results of my own [*154] IAT, these general findings show that virtually none of us, despite our best efforts, is free from implicit bias.

Certainly, there are critics who claim that there is no validity to the IAT. One need only cruise the titles of the rapidly growing social science literature and the popular press on the subject to discover the brewing controversy.¹⁵ The

¹⁰ Project Implicit, What is Project Implicit?, <http://www.projectimplicit.net/about.php> (on file with the Harvard Law School Library). Project Implicit currently has tests for race bias, Native American bias, disability bias, age bias, religious bias, weight bias, Arab-Muslim bias, skin tone bias, Asian American bias, sexuality bias, and bias on social and political issues. See Project Implicit, Stimulus Materials, <http://www.projectimplicit.net/stimuli.php> (on file with the Harvard Law School Library).

¹¹ Project Implicit, General Information, <http://www.projectimplicit.net/generalinfo.php> (on file with the Harvard Law School Library).

¹² See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, and Misremembering*, [57 DUKE L.J. 345, 355-56 \(2007\)](#) (describing the test in detail).

¹³ Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, [94 CAL. L. REV. 969, 971 \(2008\)](#).

¹⁴ Project Implicit, General Information, *supra* note 11.

research and methodological criticisms reported in the literature of the IAT, some of which are conceded by supporters of the test, suggest that questions remain about the IAT's validity.¹⁶ On the other hand, a 2009 study suggests that the IAT is valid,¹⁷ and it has been discussed and relied upon by many legal and social science researchers investigating implicit bias.¹⁸

C. A Glimpse at Other Social Science Research Into Implicit Bias

Regardless of the IAT's validity, empirical evidence from other social science studies show that implicit bias is pervasive in our society. I highlight only a few such studies that appear to demonstrate the implications of implicit bias in law enforcement and courtroom contexts.

1. The Seminal Study

Any survey must begin with the 1989 article by Patricia G. Devine, which uncovered a previously unexplored class of racial biases.¹⁹ Devine posited that prior social science work was limited to explicit racial biases, and that it was equally important to study "subconscious" and "automatic biases." Her research revealed that American whites may attribute character [*155] traits such as hostility or aggressiveness to blacks.²⁰ Devine also showed that even the preconscious presentation of racial material (material that is shown so quickly that the perceiver cannot consciously register it) was sufficient to trigger racial stereotypes, and that this was true of individuals with both high and low levels of overt prejudice.²¹

Since Devine's groundbreaking work, there has been an explosion of social science research into implicit bias, but I focus here on those studies that I believe best highlight the reach of implicit bias in society.²²

¹⁵ See, e.g., John Tierney, *In Bias Test, Shades of Gray*, N.Y. TIMES, Nov. 18, 2008, at D1.

¹⁶ See Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, [67 OHIO ST. L.J. 1023, 1056-58 \(2006\)](#) (contending that the IAT and "unconscious processes" should not be the basis for legislative action or litigation until more valid research is done).

¹⁷ In a new meta-analysis of more than 100 studies, Drs. Greenwald, Banaji, and others reviewed 122 research reports with 184 independent samples and 14,900 subjects. As a result, they concluded that the IAT is valid. See generally T. Andrew Poehlman et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & Soc. PSYCHOL. 17 (2009).

¹⁸ See, e.g., Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, [40 CONN. L. REV. 1023 \(2008\)](#); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, [94 CAL. L. REV. 945, 954 \(2006\)](#) (discussing the IAT's predictive validity generally); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, [94 CAL. L. REV. 997, 1035 \(2006\)](#) (describing researchers' discoveries regarding implicit biases); Jolts & Sunstein, *supra* note 13; Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-as Prong of the Americans with Disabilities Act*, [56 UCLA L. REV. 451 \(2008\)](#); Steven R. Pruet & Fong Chan, *The Development and Psychometric Validation of the Disability Attitude Implicit Association Test*, 51 REHABILITATION PSYCHOL. 202, 207 (2006) (involving a study of 223 volunteer students).

¹⁹ Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & Soc. PSYCHOL. 5 (1989).

²⁰ *Id.* at 8-9 (citing studies documenting subjects' perceptions of the personality traits of blacks).

²¹ *Id.* at 12.

²² For additional social science research on implicit bias, see generally 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); Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000); Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007); Joseph Price & Justin Wolfers, *Racial*

2. "Shooter Bias" Studies

A fascinating series of so-called "shooter bias" studies sheds light on implicit bias in critical law enforcement decision making. These studies use custom-designed video games to examine implicit bias in the recognition of proper shooting targets, including both white and black hand-gun-toting bad guys, and improper shooting targets, including unarmed black and white bystanders holding cell phones or other innocuous items. The studies' participants are instructed to shoot the bad guys, regardless of race, but not to fire at the innocent bystanders. Implicit bias emerges, reflecting the operation of racial stereotyping, which here links black persons to danger. These studies are succinctly summarized by Professor Justin D. Levinson in a law review article about implicit memory bias in decision making by judges and juries:

The "shooter bias" refers to participants' propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders. Studies have also shown that participants more quickly identify handguns as weapons after seeing a Black face, and more quickly identify other objects (such as tools) as nonweapons after seeing a White face. ²³

[*156] One recent "shooter bias" follow-up study contains valuable insights regarding implicit bias. In that study, researchers found that greater "shooter bias" existed for community members and university students than for police officers. ²⁴ Community members and university students were faster to shoot armed black persons than armed white persons, and they were faster to decide not to shoot unarmed white persons than unarmed black persons. Both groups were more likely to shoot a black target, armed or unarmed, than a white target. The police officers also showed evidence of racial bias in their reaction times--the presence of an unarmed black target delayed the police officers' responses. However, importantly, the police officers showed no implicit or explicit racial bias in their ultimate decisions to shoot the armed and not shoot the unarmed--regardless of race. The lead author of this study stated, "We don't mean to suggest that this is conclusive evidence that there is no racial bias in police officers' decisions to shoot But we've run these tests with thousands of people now, and we've never seen this ability to restrain behavior in any other group than police officers." ²⁵ Thus, this study suggests that training can restrain responses that might otherwise be affected by implicit bias. This glimmer of hope must not be overlooked!

3. Judicial Decision Making Studies

In a groundbreaking series of studies on judicial decision making, two law professors and a United States magistrate judge studied whether trial court judges primarily engage in deliberative judging, as so-called formalists argue, or intuitive decision making, as so-called realists maintain. ²⁶ The authors suggest that an "intuitive-

Discrimination Among NBA Referees (Nat'l Bureau of Econ. Research, Working Paper No. 13206, 2007), available at <http://www.nber.org/papers/w13206.pdf>.

The last study is particularly interesting to me, as a member of the judiciary, in light of then-Supreme Court nominee John Roberts's observation: "Judges are like umpires. Umpires don't make the rules; they apply them. . . . It is a limited role. Nobody ever went to a ball game to see the umpire." See Press Release, The White House Office of Comm'ns, Fact Sheet: Judges Who Honor the Constitution (Oct. 6, 2008), available at 2008 WL 4460385. I am dubious of Chief Justice Roberts's analogy, but even if he is right that judges are primarily "umpires," the study of NBA referees suggests that not even umpires can escape their implicit biases.

²³ Levinson, *supra* note 12, at 357 (citations omitted).

²⁴ 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, 1015 (2007).

²⁵ Benedict Carey, *Study Finds Police Training Plays Key Role in Shootings*, N.Y. TIMES, June 2, 2007, at A8 (interview with Professor Joshua Correll of the University of Chicago).

²⁶ See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

override" model of judging best reflects how trial court judges judge. This model views trial court judging as neither purely deductive decision making nor purely intuitive rationalization.

The researchers reached these conclusions after administering Shane Frederick's three-question Cognitive Reflection Test (CRT) to 252 Florida circuit (trial court) judges--nearly half of the trial court judges in Florida.²⁷ Additionally, the authors conducted several other studies involving hundreds of federal and state trial judges across the nation. These studies suggest that trial court judges rely heavily on intuitive faculties when deciding traditional problems from the bench. While not explicitly discussing implicit bias the [*157] authors observed, "[I]ntuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system," and that intuitive associations, for example, of African Americans with violence, "seem to reflect automatic, intuitive judgments, while active deliberation limits such biases."²⁸

A still more recent study by the same authors asked whether "judges, who are professionally committed to egalitarian norms, hold [the] same implicit biases" as most other Americans.²⁹ Based on their study involving the participation of 133 judges from various jurisdictions, both elected and appointed, the authors found "that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases."³⁰ Among their most significant observations, the authors concluded that the necessary motivation to avoid the influence of bias can come from codes of judicial conduct that require judges to act impartially and to make unbiased decisions.³¹ The study also suggested that judges "probably engaged in cognitive correction to avoid the appearance of bias."³² Thus, as with some of the "shooter bias" studies, this study suggests that "cognitive correction" may be able to overcome implicit bias.

Finally, a recent law review article concludes that implicit bias causes judges and jurors to unknowingly misremember case facts in racially biased ways.³³ This article draws upon a wide array of studies into implicit social cognition, human memory, and legal decision making. The researcher conducted an empirical study "to examine whether people's recollections of legal stories are shaped by the race of the actors in the stories."³⁴ He found that systematic and implicit stereotyping-driven memory errors affect legal decision making and that the nature of group deliberations appears unlikely to alter this phenomenon. The researcher concluded, "[S]o long as implicit biases go unchecked in legal decision-making, it is hard to be confident that social justice is at hand."³⁵

²⁷ The CRT's three questions are: (1) A bat and a ball cost \$ 1.10 in total. The bat costs \$ 1.00 more than the ball. How much does the ball cost? (2) If it takes five machines five minutes to make five widgets, how long would it take one hundred machines to make one hundred widgets? (3) In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes forty-eight days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? [Id. at 10.](#)

²⁸ [Id. at 31.](#)

²⁹ Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, [84 No-TRE DAME L. REV. 1195, 1195 \(2009\).](#)

³⁰ *Id.* See also [id. at 1205-06](#) for characteristics of the participating judges.

³¹ [Id. at 1223.](#)

³² *Id.* Explaining why black judges are more likely to acquit black defendants than white judges, the authors suggest that both black and white judges were motivated to avoid an appearance of racial bias in the form of favoring white defendants, but that black judges might be less concerned with appearing to favor the black defendants. [Id. at 1223-24.](#)

³³ Levinson, *supra* note 12, at 391-95.

³⁴ *Id.* at 390.

³⁵ *Id.* at 421.

These last studies of judicial decision making should disabuse the legal profession of the notion that donning a black robe somehow relieves judges of their implicit biases. To the contrary, judges and other participants in the legal system are as susceptible to implicit biases as anyone else. It is unrealistic to expect attorneys to be free of implicit biases in, for example, their [*158] selection of jurors, or to expect that jurors, who are given only crude instructions about how to decide a case, will somehow overcome their implicit biases in considering questions presented to them. Indeed, combining these social science studies and law review articles with a smattering of common sense suggests that implicit bias likely permeates our civil and criminal justice system--from the pretrial decision to detain the accused, to the selection of a jury, to the jury's rendering of a verdict or damage award, to appellate review.

II. THE IMPLICATIONS OF IMPLICIT BIAS IN JURY SELECTION

Although the problem of implicit bias goes beyond jury selection, I will examine it alone to demonstrate the larger reach of implicit bias in the legal system as a whole. This focus is appropriate because the process of selecting fair and impartial jurors in both civil and criminal cases goes to the very heart of the principle of trial by jury that the founders enshrined in the Sixth and Seventh Amendments. Indeed, two decades ago, before much research into implicit bias had even begun, Justice Thurgood Marshall described discrimination in jury selection as "perhaps the greatest embarrassment in the administration of our criminal justice system."³⁶

Because there has been so little recognition of the role of implicit bias by either federal or state courts, the judiciary remains complicit, albeit perhaps unknowingly, in permitting continued discrimination. As I indicated at the outset of this Article, judge-dominated voir dire and the *Batson* challenge process are prime examples of well-intentioned methods of attempting to eradicate bias from the judicial process that, unfortunately, actually perpetuate legal fictions that allow implicit bias to flourish. Judge-dominated voir dire at the beginning of the jury selection process may exacerbate implicit bias in the selected jury's determinations because it prevents detection and removal of implicitly biased jurors. The *Batson* challenge process, at the end of the jury selection, may create further implicit bias in jury selection by "sanitizing" or providing "cover" for the biased selections that it is purportedly designed to detect and eliminate, thus failing to prohibit explicitly and implicitly biased peremptory strikes.

Ordinarily, in civil and criminal cases in both state and federal courts, the panel of jurors that decides a case is selected from a much larger pool. Voir dire is the process of questioning prospective jurors about their qualifications to serve on the jury panel to decide the case. The rules of almost all courts, state and federal, provide that the questioning of prospective jurors may be conducted by the judge, the attorneys for the parties, or both.³⁷ In the course of the questioning, both the parties and the court may strike potential [*159] jurors for cause when the prospective juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."³⁸ At the conclusion of voir dire, the parties are also ordinarily authorized to make a certain number of "peremptory challenges" to strike jurors without stating a reason for doing so.³⁹ Both the voir dire process and the exercise of peremptory strikes pose particular problems for eradication of implicit bias from the jury selection process.

A. Judge-Dominated Voir Dire

State and federal procedural rules allow, and court practice may often result in, judge-dominated voir dire--that is, voir dire with little or no attorney involvement. As the following chart demonstrates, federal district courts generally allow far less attorney involvement in voir dire than state courts. FIGURE 1: WHO CONDUCTS VOIR DIRE?⁴⁰

³⁶ *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari).

³⁷ See, e.g., [FED. R. CRIM. P. 24](#); [FED. R. CIV. P. 47](#).

³⁸ [Wainwright v. Witt](#), 469 U.S. 412, 424 (1985).

³⁹ See, e.g., [FED. R. CRIM. P. 24\(b\)](#); [FED. R. CIV. P. 47\(b\)](#).

I suspect that most trial court judges who dominate voir dire do so because of perceived efficiency and local legal tradition rather than any mis [*160] guided belief that the judge is more adept at ferreting out biases, whether explicit or implicit. However, judge-dominated voir dire allows jurors with undetected and undeterred implicit biases to decide cases by preventing attorneys from using preemptory or for cause strikes to eliminate such jurors. Because lawyers almost always know the case better than the trial judge, lawyers are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome. Moreover, trial lawyers have greater access than trial court judges to cognitive psychologists, jury consultants, and other resources to develop voir dire strategies to address both explicit and implicit biases of prospective jurors. Using such resources, trial lawyers can formulate questions that may reveal prospective jurors' biases and can more thoroughly and realistically evaluate the jurors' answers. In contrast, judges commonly ask questions such as, "Can all of you be fair and impartial in this case?" This question does not begin to address implicit bias, which by its nature is not consciously known to the prospective juror. Thus, a trial court judge schooled in the basics of implicit bias would be delusional to assume that this question adequately solves implicit bias.

Still more troubling, empirical research suggests that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges. ⁴¹ As a district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can "be fair." I find it remarkable when a juror has the self-knowledge and courage to answer that he or she cannot be fair in a particular case, and even more remarkable when the juror's explanation for that inability is based on a factor that neither I, nor the parties, have raised. There is also a temptation, not always resisted on my part, to pose questions with the intent of educating jurors about proper responses, in light of the presumption of innocence or other considerations in the trial. Thus, the trial judge is probably the person in the courtroom least able to discover implicit bias by questioning jurors. As a result, jurors unknowingly make crucial determinations in cases that are influenced by their implicit biases.

Recent social science research suggests that implicit bias is a potential problem in juror determinations. But it was clear to some much longer ago that even good faith answers to the question of whether or not one is prejudiced may be unhelpful--particularly when the question comes from a figure of authority, such as a judge. In 1921, Lena Olive Smith, the first African American woman licensed to practice law in Minnesota, recognized the effect of unconscious racial preferences. In the case of a black man convicted by an all-white jury of raping a white woman, Smith argued for a new trial based on racial prejudice, explaining that:

The Court fully realizes I am sure, that the very fact that the defendant was a colored boy and the prosecutrix a white woman, and [*161] the entire panel composed of white men--there was a delicate situation to begin with, and counsel for the State took advantage of this delicate situation. . . . Perhaps [the jurors] were, with a few exceptions, conscientious in their expressions [of no racial prejudice]; yet it is common knowledge a feeling can be so dormant and subjected to one's sub-consciousness, that one is wholly ignorant of its existence. But if the proper stimulus is applied, it comes to the front, and more often than not one is deceived in believing that it is justice speaking to him; when in fact it is prejudice, blinding him to all justice and fairness. ⁴²

I believe that implicit bias has the potential to influence many jury trials in both state and federal courts. This effect may extend beyond criminal cases involving minority defendants to tort cases involving minority parties, patent and other business litigation cases involving foreign or minority-owned corporations or foreign or minority officers and

⁴⁰ GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 27 fig.1, (2007), available at http://www.ncsconline.org/D_research/cjs/pdf/SOSCompendiumFinal.pdf.

⁴¹ See, e.g., Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & Hum. BEHAV. 131 (1987).

⁴² Def.'s Mot. for New Trial, *Minnesota v. Hayward* (4th Dist. Ct. 1928) (No. 26421) (filed June 18, 1928), at 7-8, quoted in Ann Juergens, *Lena Olive Smith: A Minnesota Civil Rights Pioneer*, 28 WM. MITCHELL L. REV. 397, 447-48 (2001).

employees, and the full range of discrimination and civil rights cases. Such cases are just the more obvious examples.

B. The Batson Challenge Process

In 1986, the United States Supreme Court held in *Batson v. Kentucky* that the Equal Protection Clause "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."⁴³ *Batson* and its progeny established a three-step process for assessing purportedly race-based (or gender-based) peremptory strikes. Step one requires that a defendant raise an inference that a prosecutor's peremptory challenge was race-based. Step two requires the prosecutor to proffer a race-neutral reason for the challenge. If the prosecutor meets this burden of production, not persuasion, then step three requires the trial court judge to decide whether the prosecutor's exercise of the peremptory challenge is nevertheless purposeful discrimination.

Because *Batson's* framework is flawed, it has produced the lingering and tragic legacy that the courts almost always *do not* find purposeful discrimination, regardless of how outrageous the asserted race-neutral reasons are. Although *Batson* and its progeny purportedly prohibit striking members of a protected class on account of class membership alone, this limitation is easily circumvented if the prosecutor proffers a facially class-neutral justification and the defendant cannot establish purposeful discrimination to the court's satisfaction. Moreover, the *Batson* challenge process may allow the implicit biases of the judges and attorneys to go unchecked during jury selection. Thus, while judge-dominated voir dire may result in implicitly biased [*162] jurors deciding cases, the *Batson* challenge process may result in implicitly biased courtroom actors selecting jurors.

In his concurring opinion in *Batson*, Justice Marshall foreshadowed the discovery of implicit bias, stating:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels--a challenge I doubt all of them can meet.⁴⁴

In the most comprehensive and thoughtful article on the relationship between implicit bias and *Batson* challenges, Professor Anthony Page agreed, concluding, "Not surprisingly, *Batson* has engendered an enormous amount of often virulent criticism. . . . One even less charitable commentator has said, '*Batson* is either a disingenuous charade or an ill-conceived sinkhole.'"⁴⁵ *Batson* and its progeny appear to remain ineffective, despite the fact that other members of the Court have recognized the role of implicit bias in the legal system.⁴⁶

The promise of *Batson* remains illusory for two reasons in particular: trial judges are reluctant to doubt prosecutors' proffered reasons for their challenged strikes, and appellate courts are highly deferential to the trial courts' decisions on these matters. Here, I consider these tendencies in more detail.

⁴³ [Batson v. Kentucky, 476 U.S. 79, 97 \(1986\)](#).

⁴⁴ [Id. at 106](#) (Marshall, J., concurring).

⁴⁵ Anthony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, [85 B.U. L. REV. 155, 178-79 \(2005\)](#) (citations omitted).

⁴⁶ See, e.g., [Grutter v. Bollinger, 539 U.S. 306, 345 \(2003\)](#) (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias . . . remain alive in our land, impeding realization of our highest values and ideals."); [Georgia v. McCollum, 505 U.S. 42, 68 \(1991\)](#) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.").

1. Trial Judges' Reluctance to Reject Proffered Explanations

The third step of a successful *Batson* challenge requires the trial judge to reject a prosecutor's justification. As one state appellate court observed, "[T]he defendant's practical burden [is] to make a liar out of the prosecutor."⁴⁷ Most trial court judges will only find such deceit in extreme situations. For example, a federal district court found no *Batson* violation, even though the prosecutor struck a potential juror, perceived to be Indian and probably Hindu, because "Hindus tend . . . to have feelings a good bit different [*163] from us" and the prosecutor preferred an "American juror."⁴⁸ Likewise, neither a state trial court nor a federal appellate court on habeas appeal found a *Batson* violation when a prosecutor struck the lone African American in the jury pool because he "worked" in an unknown capacity at a community college and gave "short form" answers on the juror questionnaire. The prosecutor claimed that he routinely struck everyone "involved in education," yet he left a retired schoolteacher on the panel. In addition, other prospective jurors who gave "short form" answers remained on the panel, and the judge even admitted that he "encouraged" the rapid completion of the forms by potential jurors.⁴⁹ Finally, another state trial court found no *Batson* violation where a black potential juror was struck, in part, for dying her hair blonde, where the prosecutor claimed that black women who dye their hair blonde are "not cognizant of their own reality and existence" and are, therefore, undesirable jurors.⁵⁰ Some of the purportedly race-neutral explanations for peremptory strikes, accepted despite *Batson* challenges, have an uncanny similarity to the explicit gender stereotyping considered unlawful in *Price Waterhouse*.⁵¹ These examples corroborate one court's observation that [a]ny neutral reason, no matter how implausible or fantastic, even if it is silly or superstitious, is sufficient to rebut a prima facie case of discrimination."⁵²

At the same time some prosecutors are explicitly trained to subvert *Batson*. For example, the Third Circuit Court of Appeals detailed a prosecutor training session that encouraged striking black people from juries because, among other reasons, "blacks from the low-income areas are less likely to convict."⁵³ Another court's experience with prosecutor justifications led it to remark, "[W]e wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"⁵⁴

2. Appellate Courts' Deference to Trial Judges' *Batson* Determinations

The reluctance of judges to find *Batson* violations is only part of the reason that *Batson* is ineffective in addressing explicit and implicit biases. [*164] Another reason is that appellate courts give trial court judges considerable deference on appeal. Consequently, the reporters are filled with appellate decisions affirming flimsy justifications.

⁴⁷ [Munson v. State, 774 S.W.2d 778, 780 \(Tex. Crim. App. 1989\)](#).

⁴⁸ [States v. Clemmons, 892 F.2d 1153, 1160 \(3d Cir. 1990\)](#).

⁴⁹ [Rankins v. Carey, 36 F. App'x 296, 297 \(9th Cir. 2002\)](#) (reversing a federal district court for granting relief to a state prisoner pursuant to [28 U.S.C. § 2254](#) for a *Batson* violation).

⁵⁰ [Davis v. State, 596 So. 2d 626, 628 \(Ala. Crim. App. 1991\)](#).

⁵¹ Compare the proffered "race-neutral" reasons in [Clemmons, 892 F.2d at 1160](#), and [Davis, 596 So. 2d at 628](#), with the explicitly biased comments in [Price Waterhouse, 490 U.S. 228, 235 \(1989\)](#). See *infra* Part I(A).

⁵² [Pruitt v. McAdory, 337 F.3d 921, 928 \(7th Cir. 2003\)](#) (internal quotation marks and citations omitted).

⁵³ [Wilson v. Beard, 426 F.3d 653, 656 \(3d Cir. 2005\)](#).

⁵⁴ [People v. Randall, 671 N.E.2d 60, 65 \(Ill. App. Ct. 1996\)](#). Another frightening question is whether the race-neutral explanation, offered with a smile, is received with a wink by an equally consciously or unconsciously biased judge.

⁵⁵ Indeed, each of the decisions rejecting a *Batson* challenge described in the preceding section was affirmed by an appellate court. ⁵⁶

Given the emerging knowledge of implicit bias, it is perhaps just as troubling that some appellate courts have held that "a juror's demeanor and body language may serve as legitimate, race-neutral reasons to strike a potential juror." ⁵⁷ In this context, some reviewing courts have been willing to affirm the trial court's acceptance of a "demeanor and body language" rationale, because the trial court was purportedly in the best position to evaluate the credibility of the proffered reason. However, they have sometimes done so without requiring the trial court to develop or evaluate the factual basis for the "demeanor" objection, thus apparently taking the explanation as credible on its face. ⁵⁸ Yet we now know that implicit biases can lead members of different races to perceive members of other races as lazy, or hostile, or threatening. ⁵⁹ Thus, accepting "body language or demeanor" as a purportedly legitimate reason for a peremptory challenge provides another "Handy Race-Neutral Explanation" because it disregards the effect of implicit bias upon perceptions of body language or demeanor.

The Sixth Circuit Court of Appeals has advanced a more tenable version of the rule that body language and demeanor may provide race-neutral grounds to strike a potential juror, at least in the context of implicit bias. The rule requires the trial judge independently assess the potential juror's body language and demeanor to determine the validity of the proffered explanation. ⁶⁰ In practice, when a district court does not merely credit the explanation of the prosecutor, but itself finds that the juror was, for example, passive and disinterested, then the defendant will be unable to demonstrate that the district court clearly erred in dismissing his *Batson* challenge. ⁶¹

The Supreme Court has indicated that a potential juror's demeanor may be a race-neutral reason for striking the juror. However, the Court has also recognized that when demeanor is the offered reason, "the trial court's firsthand observations [are] of even greater importance" as to the demeanor of *both* the potential juror and the attorney making the peremptory strike. ⁶² The [*165] Court also found that the prosecutor's credibility can best be judged by his own demeanor. So, "the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." ⁶³

In sum, it ought to be obvious that the *Batson* standards for ferreting out lawyers' potential explicit and implicit bias during jury selection are a shameful sham. The rapid growth of social science knowledge about implicit biases has only affirmed Justice Marshall's prediction that *Batson* would become "irrelevant" and that "racial discrimination in

⁵⁵ See, e.g., [United States v. Clemmons, 892 F.2d 1153, 1162 \(3d Cir. 1989\)](#) (Higginbotham, J., concurring) ("[I]n appeal, even a flimsy explanation may appear marginally adequate and be sustained.").

⁵⁶ See also [Rankins v. Carey, 36 F. App'x 296, 298 \(9th Cir. 2002\)](#) (Hawkins, C.J., dissenting) (describing the prosecutor's accepted explanations as "gossamer at best and smack[ing] of pretext").

⁵⁷ [United States v. Maxwell, 473 F.3d 868, 872 \(8th Cir. 2007\)](#), cert. denied, **550 U.S. 952 (2007)**.

⁵⁸ See, e.g., [Bell-Bey v. Roper, 499 F.3d 752, 758 \(8th Cir. 2007\)](#).

⁵⁹ See, e.g., Devine, *supra* note 19, at 8-9.

⁶⁰ See [Braxton v. Gansheimer, 561 F.3d 453, 461-62 \(6th Cir. 2009\)](#).

⁶¹ *Id.* (citing [McCurdy v. Montgomery County, Ohio, 240 F.3d 512, 521 \(6th Cir. 2001\)](#)).

⁶² [Snyder v. Louisiana, 128 S. Ct. 1203, 1208 \(2008\)](#); see also [United States v. McMath, 559 F.3d 657, 666 \(7th Cir. 2009\)](#) (citing *Snyder*).

⁶³ [Snyder, 128 S. Ct. at 1208](#).

jury selection. . . would go undeterred." ⁶⁴ Because *Batson* is ineffectual in addressing bias in jury selection, it permits implicit bias--and probably even explicit bias--to have an impact on jury selection.

III. WHAT WE CAN AND SHOULD Do ABOUT IMPLICIT BIAS IN THE LEGAL SYSTEM

Carl Gustav Jung, the great Swiss psychiatrist and founder of analytical psychology, wrote, "All the greatest and most important problems of life are fundamentally insoluble. They can never be solved, but only outgrown." ⁶⁵ If this is true, it may take a very long time indeed for society to outgrow the problem of implicit bias. While we wait, I suggest we follow wisdom attributed to Voltaire: no problem can stand the assault of sustained thinking. Somewhere between Jung and Voltaire, there should be something that the legal profession can do now to address implicit bias in jury selection specifically and, perhaps, in the legal system more generally.

A. Addressing Implicit Bias in Judge-Dominated Voir Dire

Once trial court judges recognize the pervasiveness of implicit bias in juror decision making, I believe that they will consider significantly expanded lawyer participation in jury selection. Expanded lawyer participation in jury selection will help eliminate jurors' tendency to give socially acceptable answers to questions by judges. ⁶⁶ It will also address two particular flaws in the current system: (1) judges do not have the same access as lawyers to resources to develop voir dire strategies to address both explicit and implicit biases of prospective jurors; and (2) judges generally do not have the knowledge of the case that would indicate the possible impact or jurors' implicit biases. Trial lawyers can formulate questions that more thoroughly [*166] and realistically evaluate the effect of the jurors' possible biases on the case. Few arguments for greater lawyer participation in the voir dire process seem more persuasive than implicit bias. ⁶⁷

The obvious counterargument is that increased lawyer participation simply puts selectors who are potentially explicitly or implicitly biased in charge of the jury selection process. Moreover, lawyers may have an incentive to *keep* a juror whose biases increase the lawyer's chances of winning. As explained more fully below, however, both problems can be addressed by the elimination of peremptory strikes. The hopeful implications of "shooter bias" and "judicial bias" studies further suggest that training and "cognitive correction" can help individuals recognize their implicit biases and refuse to act upon them. ⁶⁸ Even lawyers acting as advocates should be motivated by a sense of professional duty, ethics, or fairness. Another counterargument is that lawyer-dominated voir dire will be more expensive and time-consuming. ⁶⁹ However, guaranteeing a fair trial by eradicating implicit bias seems an overriding constitutional priority. ⁷⁰

B. Addressing Implicit Bias in the *Batson* Challenge Process

⁶⁴ *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari).

⁶⁵ JAMES B. SIMPSON, SIMPSON'S CONTEMPORARY QUOTATIONS 230 (Houghton Mifflin Co. 1988).

⁶⁶ See, e.g., Jones, *supra* note 42.

⁶⁷ For additional arguments for increased participation of lawyers in voir dire, see, for example, John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1254-55 (2001) (increased juror impartiality); Paula Hannaford-Agor, *When All Eyes Are Watching: Trial Characteristics and Practices in Notorious Trials*, 91 JUDICATURE 197, 199 (2008) (increased perceptions of fairness).

⁶⁸ See Correll et al., *supra* note 24, at 1017, 1020-22; Rachlinski et al., *supra* note 30, at 1223.

⁶⁹ See, e.g., Ryan Brett Bell & Paula Odysseos, *Sex, Drugs, and Court TV? How America's Increasing Interest in Trial Publicity Impacts our Lawyers and the Legal System*, 15 GEO. J. LEGAL ETHICS 653, 665 (2002).

⁷⁰ *Id.*

As Justice Marshall suggested, one solution for managing implicit bias in the persons selecting or striking jurors would be the total elimination of peremptory challenges, permitting only challenges for cause.⁷¹ While other scholars seem to have more faith in the unfulfilled promise of *Batson*, I endorse Justice Marshall's view that eradication of discriminatory peremptory challenges "can be accomplished only by eliminating peremptory challenges entirely."⁷²

More specifically, Justice Marshall reasoned that [m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.⁷³ This was so because challenges to peremptory strikes would only be successful when the strikes were so flagrant as to demonstrate a prima facie case and because trial courts were ineffective in assessing the prosecutors' motives, in part because of their own conscious or [*167] unconscious racism.⁷⁴ Subsequent studies of implicit bias strongly suggest that Justice Marshall was correct. Justice Marshall then argued that elimination of peremptory challenges entirely was the only adequate solution. Only that course would maintain the balance between freedom from bias against the accused and freedom from prejudice against the prosecution. His proposal recognized the potential for bias inherent in the defendant's challenges as well as in the prosecution's.⁷⁵ Again, subsequent studies indicate that Justice Marshall was correct that *neither side* is free from the effects of implicit bias.

Justice Marshall has not been alone among Supreme Court Justices to call for the elimination of peremptory challenges. Twice in recent years, Justice Breyer has called for such a remedy.⁷⁶ Justice Breyer questions:

Batson asks prosecutors to explain the unexplainable, so how can it succeed? . . . [N]o one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype. How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?⁷⁷

Thus, I join Justice Marshall and Justice Breyer's call for banning peremptory challenges entirely as the only means to eliminate lawyers' tendency to strike jurors due to stereotype and bias. Permitting only for cause strikes avoids many of the problems with *Batson*. The court would not simply evaluate whether the proffered reason was a pretext for discriminatory animus as the last step of a burden-shifting analysis weighted in favor of upholding the peremptory strike. It would instead evaluate the sufficiency of the proffered reason as a basis for striking the juror in the first place. The onus of justifying the strike would always lie with the party that *wished* to strike, rather than the one resisting the strike. In that context, courts are far less likely to accept implausible or marginally adequate reasons.

Such a simple solution to a complex problem--akin to slashing through the Gordian Knot--is not my usual approach to complex problems.⁷⁸ Moreover, for the reasons explained more fully below, elimination of peremptory

⁷¹ [Batson v. Kentucky, 476 U.S. 79, 103 \(1986\)](#) (Marshall, J., concurring).

⁷² *Id.*

⁷³ [Id. at 105.](#)

⁷⁴ [Id. at 105-06.](#)

⁷⁵ [Id. at 108.](#)

⁷⁶ [Rice v. Collins, 546 U.S. 333, 342-44 \(2006\)](#) (Breyer, J., concurring); [Miller-El v. Dretke, 545 U.S. 231, 266-73 \(2005\)](#) (Breyer, J., concurring).

⁷⁷ [Rice, 546 U.S. at 343](#) (citing his concurrence in [Miller-El, 545 U.S. at 267-68](#)).

challenges alone is not likely to be sufficient; that solution would work most effectively in tandem with increased lawyer participation in voir dire.

Nevertheless, short of elimination of peremptory challenges--a solution for which there has admittedly been little support from courts or legislatures⁷⁹--there is no lack of suggested alternatives. These other solutions [*168] include a variety of sanctions against offending lawyers, category-conscious jury selection,⁸⁰ and changing the *Batson* three-step analysis.⁸¹ Most of these solutions, however, are incompatible with the constitutional right of jurors to serve on a jury irrespective of race or gender. Or like the *Batson* process, they are unlikely to discover even biased peremptory challenges.⁸²

C. The Need for Tandem Remedies to Implicit Bias in Jury Selection and Jury Determinations

Expanded lawyer participation in jury selection, with appropriate training of lawyers to avoid implicit biases, and the elimination of peremptory challenges must be adopted together for either remedy to be fully effective.⁸³ Without this coupling, expanded lawyer participation in jury selection could allow lawyers to unwittingly expand their implicitly biased reactions to greater information obtained from potential jurors. In this sense, expanded lawyer participation in jury selection is a double-edged sword. The more information a lawyer obtains from a potential juror, the better informed the lawyer and the judge are on challenges for cause, but the greater the likelihood that the lawyer would exercise a peremptory challenge based upon the lawyer's own explicit and implicit biases.

It is only by using the two remedies together that the flaws of judge-dominated voir dire and of the *Batson* challenge process both can be alleviated. Where expanded attorney participation in voir dire might seem to put biased selectors in control of the jury selection process, the selectors' ability to act on their own biases will be inhibited by the necessity of demonstrating cause for any strikes of prospective jurors. Similarly, where elimination of peremptory challenges might seem to increase the chances that biased jurors will not be stricken, increased lawyer participation in voir dire will increase the information about juror biases on which strikes for cause can be based.

Thus, the two remedies work in tandem to prevent attorneys from exercising challenges in an implicitly biased way, but allow attorneys to use their resources to eliminate jurors who would make determinations based on their implicit biases. Thus, each solution, while independently beneficial, aids in curbing the other's unintended consequences. That is not to say each is pointless without the other. Even without the elimination of peremptory challenges, increased lawyer participation in voir dire should increase the information about jurors' biases and beliefs and debunk the more fanciful justifications for strikes. And even without increased lawyer participation, the *Batson* challenge process [*169] would be more effective if trial courts required stronger showings of legitimate grounds for strikes and if appellate courts gave less deference to trial courts' *Batson* determinations.

D. Other Remedies

There are additional steps to address implicit bias, either while awaiting implementation of the remedies suggested above or as standalone measures.

⁷⁸ See, e.g., [Rural Water Sys. No. 1 v. City of Sioux Center, 967 F.2d 1483, 1510 \(N.D. Iowa 1997\)](#); [Terra Int'l, Inc. v. Miss. Chem. Corp., 922 F. Supp. 1334, 1339 \(N.D. Iowa 1996\)](#).

⁷⁹ See, e.g., Page, *supra* note 46, at 246.

⁸⁰ For example, one method would secure greater representation of defendant's race on a jury in a criminal case through a "reverse of the peremptory challenge system" that allows parties the right to affirmatively choose some or all of the potential jurors on the basis of race or other protected characteristics.

⁸¹ See Page, *supra* note 46, at 245-62.

⁸² See *id.*

⁸³ See *id.* at 245, 262.

1. Jury Selection Presentations and Jury Instructions on Implicit Bias

I suggested above that common questions by judges in voir dire, such as "Can all of you be fair and impartial in this case?", are inadequate to address implicit bias in jury determinations. Nevertheless, I do think that there are things judges can do in jury selection and in jury instructions to minimize the likelihood that jurors will act on their implicit biases. First, efforts can be made to educate attorneys and potential jurors of the possible impact of implicit biases. For example, I now include a slide about implicit bias in the PowerPoint presentation that I show before allowing attorneys to question potential jurors. As some of the "shooter bias" studies and the recent study of unconscious racial bias in trial judges have demonstrated, such information may mitigate the effect of the bias.⁸⁴ Beyond informing various participants at the start of trial, jury instructions could include a brief discussion of implicit bias and urge jurors to attempt to control or eliminate them.⁸⁵ Many of my colleagues are unreceptive to this idea, fearing that implicit biases will only be exacerbated if we call attention to them. However, the positive outcomes of studies attempting to teach actors about their implicit biases leave me undeterred.

2. Recognition, Investigation, Training, and Testing

As Justice O'Connor observed, "That the Constitution does not give federal judges the reach to wipe all marks of racism from every courtroom in the land is frustrating, to be sure."⁸⁶ Thus, we simply cannot rely on judges [*170] alone to remedy the problem of implicit bias. That does not mean that the legal system is powerless. Other remedies besides those discussed above range from the conceptual to the concrete.

First, we need to recognize that implicit bias is both real and pervasive in our legal system. Without this recognition, solutions are impossible.

Second, each and every member of the legal community who has Internet access should immediately visit www.implicit.harvard.edu and perform an implicit bias "Demonstration Test." I am confident that the test will be an enlightening experience for lawyers, judges, and other court personnel, regardless of their skin color, gender, or other immutable traits. We must then be mindful of our experience in our everyday practice of the law or judging or working in a courthouse.

Third, with the recognition that implicit bias is both real and pervasive, various legal organizations, state bar associations, and the states' highest courts could take the concrete step of adopting standing committees to study implicit bias. Failing the standing-committee approach, each of these entities should make a formal commitment to the ongoing study of the implications of implicit bias and engage in state-of-the-art implicit bias training on at least an annual basis.

Finally, we could also routinely attempt to assess the implicit biases of potential jurors. Courts could administer computer or hand-written bias sensitivity tests to potential jurors and share the results with the lawyers before voir dire. Such a procedure would be a judge-neutral and lawyer-neutral method to attempt to discover and address implicit bias of jurors, without placing the burden on attorneys, for example, to use other expensive resources to develop strategies to address the implicit biases of prospective jurors. The tests would also eliminate some

⁸⁴ See Correll, *supra* note 24, at 1017, 1020-22; Rachlinski et al., *supra* note 30, at 1223.

⁸⁵ I use the following jury instruction before opening statements in all civil and criminal jury trials: As we discussed in jury selection, growing scientific research indicates each one of us has "implicit biases," or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.

⁸⁶ [*Georgia v. McCollum*, 505 U.S. 42, 69 \(1992\)](#).

concerns about lawyers using additional information gained from extensive lawyer-dominated voir dire to act on their own implicit biases in selecting jurors.

IV. CONCLUSION

Early civil rights pioneers like Lena Olive Smith, who intuitively recognized the possibility of unconscious biases, and more recent pioneers in the field of implicit bias, including social scientists and lawyers, have planted the seeds that will germinate solutions to the daunting problems of implicit bias in the civil and criminal justice systems. The outlook is not entirely bleak. President John F. Kennedy observed, "[E]very area of trouble gives out a ray of hope-- and the one unchangeable certainty is that nothing is certain or unchangeable."⁸⁷ There is great promise from the most recent "shooter bias" study from 2007 indicating that police officers are able to completely overcome implicit racial bias with adequate training and in the [*171] 2009 study of judges indicating that judges are able to apply a "cognitive correction" to their implicit biases.⁸⁸ While the legal profession has come a long way from the days of *Ex parte Virginia*,⁸⁹ when the United States Supreme Court affirmed a federal conviction of a state court judge for systematically excluding qualified black jurors from grand and petit juries, there is still a long road to travel. Through greater appreciation of the problem by the legal profession and creative problem solving, I am optimistic that the ray of hope will outshine the darkness of implicit bias.

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⁸⁷ John F. Kennedy, President, Second State of the Union Address (Jan. 11, 1962), in "LET THE WORD Go FORTH": THE SPEECHES, STATEMENTS, AND WRITINGS OF JOHN F. KENNEDY, 1947-1963, at 230 (Theodore C. Sorensen ed., Dellacore Press 1988).

⁸⁸ See Correll, *supra* note 24, at 1017, 1020-22; Rachlinski et al., *supra* note 30, at 1223.

⁸⁹ [*Ex parte Virginia*, 100 U.S. 339, 348-49 \(1879\).](#)

Jackson v. Scripps Media, Inc.

United States District Court for the Western District of Missouri, Western Division

December 5, 2019, Decided

Case No. 18-00440-CV-W-ODS

Reporter

2019 U.S. Dist. LEXIS 209462 *; 104 Empl. Prac. Dec. (CCH) P46,428; 2019 WL 6619859

DEMETRICE JACKSON, Plaintiff, vs. SCRIPPS MEDIA, INC., Defendant.

Counsel: [*1] For Demetrice Jackson, also known as Dee Jackson, Plaintiff: Cooper Scott Mach, Popham Law Firm, Kansas City, MO; Martin M Meyers, The Meyers Law Firm, LC, Kansas City, MO; Dennis E Egan, The Popham Law Firm, P.C., Kansas City, MO.

For Scripps Media, Inc., doing business as KSHB TV-41, Defendant: Eric L Barnum, LEAD ATTORNEY, PRO HAC VICE, BakerHostetler LLP - Atlanta, Atlanta, GA; Julianne P. Story, LEAD ATTORNEY, Husch Blackwell LLP - KCMO, Kansas City, MO; Michael Scott McIntyre, Cincinnati, OH, LEAD ATTORNEYS, PRO HAC VICES, BakerHostetler LLP - Cincinnati, Cincinnati, OH; Benjamin Andrew McMillen, Husch Blackwell LLP - KCMO, Kansas City, MO.

Judges: ORTRIE D. SMITH, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: ORTRIE D. SMITH

Opinion

ORDER AND OPINION (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO EXCLUDE EXPERT TESTIMONY, (2) GRANTING DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY, (3) GRANTING IN PART AND DENYING

IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND (4) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO AMEND COMPLAINT

Pending are Plaintiff's Motion to Exclude Testimony and Opinions of Defendant's Expert Susan Willower (Doc. #106), Defendant's Motion to Exclude Testimony [*2] and Opinions of Dr. Monica Biernat (Doc. #109), Defendant's Motion for Summary Judgment (Doc. #111), and Plaintiff's Motion to Amend Complaint (Doc. #133). For the following reasons, Plaintiff's motion to exclude expert testimony is granted in part and denied in part, Defendant's motion to exclude expert testimony is granted, Defendant's motion for summary judgment is granted in part and denied in part, and Plaintiff's motion to amend his complaint is granted in part and denied in part.¹

I. BACKGROUND

In September 2013, Plaintiff Demetrice Jackson began working as a sports anchor/multi-media journalist and reporter for KSHB-TV 41, a television station in Kansas City, Missouri. The station is owned by Defendant Scripps Media, Inc. In this lawsuit, Plaintiff, who identifies as African-American, alleges he was denied promotions based on his race and in retaliation for filing of charge of discrimination in violation of the *Missouri Human Rights Act* (the "MHRA") and [42 U.S.C. § 1981](#).

II. MOTIONS TO EXCLUDE EXPERT TESTIMONY

A. Standard

[Rule 702 of the Federal Rules of Evidence](#) governs the admission of expert testimony:

¹ Plaintiff's request for oral argument is denied.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion [*3] or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

[Fed. R. Evid. 702](#). The district court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts in issue." [Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 \(1993\)](#). The Court uses a three-part test when determining the admissibility of expert testimony:

First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. This is the basic rule of relevancy. Second, the proposed witness must be qualified to assist the finder of fact. Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires.

[Lauzon v. Senco Prods., Inc., 270 F.3d 681, 686 \(8th Cir. 2001\)](#) (internal quotations and [*4] citations omitted). "Courts should resolve doubts regarding usefulness of an expert's testimony in favor of admissibility." [Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 758 \(8th Cir. 2006\)](#) (citations omitted).

B. Plaintiff's Motion to Exclude Expert Testimony

Defendant's expert, Susan Willower, proposes to offer opinions on television news industry standards and practices. Doc. #107-1. According to her report, Willower will testify at trial to the following opinions:

- "Based on my experience, it would be highly unusual and not consistent with industry practice for a News Director to promise any applicant a promotion, let alone that someone hired into the lowest position in a department would jump over someone else to the highest position in the department."

- "Mr. Jackson should not have been surprised that Mr. Boal was promoted to Sports Director after Mr. Boal told him he was going to talk to Ms. Hofmann about the position. In fact, when Mr. Jackson was asked if he had complained about Mr. Boal receiving the Sports Director position Jackson acknowledged that...I didn't push it in that regard."

- "Nothing indicates that race was a factor in the selection process."

- "Utilization of [the application and hiring process] would not be consistent if Ms. [*5] Hofmann was basing her decision on race. If that were the case, she could have just interviewed the candidates herself and made the decision unilaterally."

- "I found no evidence that Ms. Hofmann treated the applicants differently or applied different definitions of merit to them in the selection process."

- "There was no evidence provided to substantiate that race bias played a role in the failure to promote Mr. Jackson."

- "There was no basis in the materials reviewed to confirm [Hofmann made a statement about "passing over the old white guy" other than the allegation of Mr. Jackson. Even if Ms. Hofmann made this statement, it is very vague and does not directly indicate that she considered Mr. Jackson's race when she made the decision to promote Mr. Boal."

Doc. #107-1, at 3-11. Plaintiff moves to exclude Willower's testimony because (1) she is not qualified; (2) her testimony is irrelevant; (3) her testimony invades the province of the jury; and (4) her testimony provides speculative conclusions and credibility assessments. Doc. #106.

(1) Qualifications

It is well-established that an expert's specialized knowledge based on experience in the field at issue suffices to show the expert is [*6] qualified to testify. [Fed. R. Evid. 702](#). Willower is a consultant in human resources ("HR") with thirty-four years of HR experience. Doc. #107-1, at 2.² She has experience relevant to the TV news industry as the former Vice President of HR for Raycom Media and Regional Vice

² Willower is also a licensed attorney. *Id.*

President of HR for Comcast. *Id.* Now, Willower has her own HR consulting company. *Id.*

Plaintiff argues Willower is not qualified to testify about TV news industry standards and practices. Doc. #107, at 1-4. In support, Plaintiff cites the "Top Skills" identified in Willower's LinkedIn profile. *Id.* Defendant maintains "Willower's experience is highly relevant to explore the industry standards and policies of the highly specialized TV news industry at issue in this lawsuit." Doc. #119, at 6.

The Court disagrees with Plaintiff's argument. The information Willower chooses to include in her LinkedIn profile is irrelevant in determining whether she is qualified to testify as an expert. Plaintiff's argument ignores Willower's extensive TV news industry experience detailed in her report. Plaintiff makes no further attempt to show Willower lacks qualifications. Based upon the record, the Court finds Willower possesses the requisite experience [*7] and knowledge to qualify as an expert on TV news industry standards and practices. Accordingly, Plaintiff's request to exclude Willower's expert testimony based on her qualifications is denied.

(2) Relevance and Invading the Province of the Jury

Plaintiff seeks to exclude Willower's testimony because her testimony is irrelevant and invades the province of the jury. Expert testimony must be helpful to the jury, and "courts must guard against invading the province of the jury on a question which the jury was entirely capable of answering without the benefit of expert opinion." [Am. Auto Ins. Co. v. Omega Flex, Inc., 783 F.3d 720, 725 \(8th Cir. 2015\)](#) (quotation omitted); see also [Youa Vang Lee v. Andersen, 616 F.3d 803, 808-09 \(8th Cir. 2010\)](#); [Fed. R. Evid. 702\(a\)](#).

Plaintiff argues Willower's opinions do not inform the jury of the relevant standards, but instead provide her conclusions as to how or why Defendant complied with those standards. Defendant argues the jury is entitled to consider industry norms and what role they may have played in the decision at issue.

Willower will be permitted to testify about TV news industry standards at the relevant time. But she will not be permitted to opine on whether Defendant's actions violated industry standards. Counsel may make that argument in summation. Furthermore, the jury is capable of determining [*8] whether Defendant's

actions violated industry standards.

(3) Credibility Assessment

Plaintiff argues Willower's testimony should be excluded because it attempts to use TV news industry practice and standards to call into question the truthfulness and reasonableness of Plaintiff's testimony. Doc. #127, at 5. In her report, Willower states it would "not be consistent with industry practice for a News Director to promise any applicant a promotion." Doc. #107-1, at 6. Plaintiff argues this statement undercuts and calls into question his version of events, and thus, improperly tells the jury how to weigh the evidence. s. Doc. #127, at 5. Defendant argues Willower is permitted to contradict Plaintiff's preferred version of the facts.

"An expert may not opine on another witness's credibility." [Engesser v. Dooley, 457 F.3d 731, 736 \(8th Cir. 2006\)](#) (citation omitted). Plaintiff's motion is granted. Willower will be permitted to testify that a News Director promising a promotion would not be consistent with industry practice. However, she may not testify as to the credibility of Hofmann or Plaintiff or testify in such a way that impugns or supports either individual's version of events.

(4) Speculation and Conclusions

Plaintiff further argues Willower's [*9] testimony should be excluded because it provides speculative, defense-tilted conclusions. Doc. #107, at 4. Defendant contends Willower's testimony is not proffered to give legal conclusions, but to explain "TV news specific industry concepts such as the importance of ratings, revenue, audience growth and market share on industry selection practices and considerations for the on air anchor positions, as well as the role of interview and performance evaluations in this specific industry centered on communications." Doc. #119, at 10.

"Opinions that are phrased in terms of inadequately explored legal criteria or that merely tell the jury what result to reach are not deemed helpful to the jury,...and thus, are not admissible" under [Rule 702 of the Federal Rules of Evidence, United States v. Whitted, 11 F.3d 782, 785 \(8th Cir. 1993\)](#) (citation and internal quotations omitted). The Court concludes Willower may not testify about the following matters:

- "Based on my review of the materials provided, my

expertise in industry experience, and reasoning set forth within this report, I do not believe that Mr. Jackson has been discriminated against based on his race." Doc. #107-1, at 11. This is a legal conclusion that merely tells the jury what result to reach.

- "Race is not a part of that business [*10] decision." *Id.* at 10. Willower speculates Hofmann "would have been aware that the game was already being covered for the news broadcast as was noted in Mr. Jackson's complaint." *Id.* Willower provides her opinion on a factual issue that must and can be determined by the jury.

- "No evidence was provided to infer that Ms. Hofmann had implicit racial bias or that she was unable to control it. The reverse was actually presented...." *Id.* Willower does not demonstrate she has expertise to evaluate implicit racial bias. Moreover, this is a matter the jury can determine for itself.

- "Mr. Jackson should not have been surprised that Mr. Boal was promoted to Sports Director after Mr. Boal told him he was going to talk to Ms. Hofmann about the position. In fact, when Mr. Jackson was asked if he had complained about Mr. Boal receiving the Sports Director position Jackson acknowledged that...I didn't push it in that regard." *Id.* at 5. This opinion is speculative and is a factual determination about Plaintiff's mindset. Additionally, Willower does not have expertise on these issues, and the jury can determine these issues for itself.

As a general matter, Plaintiff' motion to exclude is denied with respect to Willower's [*11] testimony about standards in the TV news industry. Plaintiff's motion to exclude is granted with regard to Willower's credibility assessments. Further, Plaintiff's motion to exclude is granted with regard to Willower's opinions that equate to legal conclusions and determinations of fact. Finally, Plaintiff's motion to exclude is granted with regard to Willower's opinions on implicit bias and other areas for which she does not possess expertise. Plaintiff is not foreclosed from making additional arguments about the admissibility of specific aspects of Willower's testimony.

C. Defendant's Motion to Exclude Expert Testimony

Plaintiff's expert, Dr. Monica Biernat, is a Professor of Psychology and a social psychologist. She has researched race and discrimination, "particularly on how race and gender affect evaluations of individuals, as in academic and work settings." Doc. # 110-1, at 1. Biernat

proposes to opine on background information about social science research on racial stereotyping, prejudice, and discrimination, and when and how that research might be relevant to events outlined in Plaintiff's complaint. *Id.* at 2. Defendant moves to exclude Biernat's testimony because (1) she is not qualified; [*12] (2) her methodology is unreliable; and (3) her testimony on implicit bias is unnecessary and irrelevant. Doc. #109.

(1) Qualifications

Defendant argues Biernat is not qualified to testify about racial stereotyping, prejudice, and discrimination. According to Defendant, Biernat has testified as an expert once, and her testimony was limited to the purported academic use of a social media article concerning a claim of retaliatory termination arising from the sharing of that article. Doc.#110, at 7. Defendant maintains Biernat has limited knowledge of the facts of this case relevant to her purported expert testimony. *Id.* In reaching her opinions, Biernat reviewed Plaintiff's Charge of Discrimination, Complaint, and portions of three deposition transcripts from *Benson Cooper v. KSHB-TV et al.*, 4:17-cv-00041-BP (W.D. Mo. Jan. 17, 2019). Based upon the record presented at this time, the Court finds Biernat possesses the requisite experience and knowledge to be an expert regarding racial stereotyping, prejudice, and discrimination. Accordingly, Defendant's request to exclude Biernat's expert testimony based on her qualifications is denied.

(2) Methodology

Defendant moves to exclude Biernat's testimony [*13] because (1) she did not rely on any information specific to this case, and (2) her testimony is not based on sufficient facts or data. Doc. #110, at 14. Plaintiff argues Biernat is qualified with specialized knowledge in the area of implicit bias and she has familiarized herself with the specific facts of this case. Doc. #122, at 4.

The Eighth Circuit has admonished district courts that weigh or assess the correctness of an expert's opinion. [*Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557, 562 \(8th Cir. 2014\)](#) (citation omitted). "As long as the expert's scientific testimony rests upon 'good grounds, based on what is known' it should be tested by the adversary process with competing expert testimony and cross-examination, rather than excluded by the court at the outset." *Id.* (quoting [*Daubert*, 509 U.S. at 590](#)). An

expert opinion should be excluded only if the "opinion is so fundamentally unsupported that it can offer no assistance to the jury." *Synergetics, Inc. v. Hurst*, 477 F.3d 949, 956 (8th Cir. 2007).

Moreover, "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1014 (8th Cir. 2012) (citation omitted). A party's dispute with an expert's methodology or the facts or documents upon which the expert relied [*14] (or did not rely) does not result in exclusion of the expert's testimony. *EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 739 (8th Cir. 2000) (finding the district court did not err in admitting experts' conflicting testimonies and leaving the jury to decide which expert's theory was sounder). The disagreeing party should utilize cross-examination to attack the expert's testimony. *Synergetics*, 477 F.3d at 956 (citations omitted).

The Court finds Biernat's opinion rests on her experience, research, and the facts of this case. Further, Biernat's opinion is not "so fundamentally unsupported that it can offer no assistance to the jury." *Synergetics*, 477 F.3d at 956. As with any expert witness, Defendant will have the opportunity to cross-examine on the methodology and/or the facts utilized. The jury can decide if the methodology was sound, and whether the opinion sufficiently supported. For these reasons, Defendant's motion to exclude Biernat's testimony based on her methodology is denied.

(3) Implicit Bias

Defendant argues Biernat's generalized views concerning implicit bias are not relevant to this case and cannot aid the jury. Doc. #110, at 9. When considering whether to allow expert testimony on implicit bias in cases alleging intentional discrimination, several courts have focused on the absence of any apparent [*15] connection between a person's subconscious beliefs, and that person's intent. See, e.g., *White v. BNSF Ry. Co.*, 726 F. App'x 603, 604-05 (9th Cir. 2018); *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 84-85 (3d Cir. 2017) (finding the district court did not abuse its discretion in excluding expert testimony on implicit bias); *Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States*, 34 F. Supp. 3d 896, 898-901 (N.D. Ill. 2014); *Kimble v. Wis. Dep't of Dev.*, 690 F. Supp. 2d 765, 776-78 (E.D. Wis. 2010) (considering evidence of

implicit bias because a supervisor "behaved in a manner suggesting the presence of implicit bias."); *Johnson v. Seattle Pub. Utils.*, 3 Wash. App. 2d 1055, 2018 WL 2203321, at *6-8 (2018) (affirming the trial court's exclusion of expert testimony on implicit bias); *but see* *Samaha v. Wash. State Dep't of Transp.*, No. cv-10-175-RMP, 2012 U.S. Dist. LEXIS 190352, 2012 WL 11091843, at *4 (E.D. Wash. Jan. 3, 2012) (finding an expert's testimony on "concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee.") (citation omitted).

Significantly, Biernat was not allowed to testify about implicit bias in a similar case before the Court. See *Benson Cooper*, 4:17-cv-00041-BP (W.D. Mo. Jan. 17, 2019) (Doc. #110-3). In *Benson Cooper*, the Court held Biernat's testimony about people unintentionally acting on stereotypes would not help the jury resolve the issues in the case, which alleged intentional acts, and her testimony was more likely to create confusion. *Id.* at 8. The Court held, "the fact that people can make decisions based on race without consciously knowing it is [*16] a factor in their decision does not help the jury determine whether Defendant intentionally discriminated." *Id.* at 7. The Court further stated, "Biernat's opinion is that individuals are subconsciously biased and unknowingly act on those biases; the fact that those implicit biases may arise from stereotypes does not make her testimony about implicit bias admissible." *Id.* at 8. Similarly, in this case, the issue is whether Defendant intentionally discriminated against Plaintiff. Biernat proposes to opine that people make decisions without realizing they are affected by subconscious beliefs derived from stereotypes. This testimony will not help the jury resolve the issues in this case and is more likely to create confusion.

Plaintiff argues he intends to use Biernat's testimony to show "background information" about discrimination. But labeling Biernat's opinions about implicit bias as "background information" does not render her opinions admissible. Additionally, Biernat's opinions about implicit bias are not relevant to Plaintiff's retaliation claims, which have nothing to do with race. For these reasons, the Court grants Defendant's motion to exclude Biernat's testimony about implicit bias.

(4) Same [*17] Actor Inference

Finally, Defendant argues Biernat should not be allowed to testify the "same actor inference" is flawed and

should be disregarded. Plaintiff did not respond to this argument in his opposition. The Court agrees with Defendant. Biernat is not a lawyer, and the "same actor inference" is based on binding case law. See, e.g., [Fitzgerald v. Action, Inc., 521 F.3d 867, 877 \(8th Cir. 2008\)](#). Therefore, Biernat will not be permitted to give her opinion of the "same actor inference" doctrine.

Biernat's report does not offer any other opinions other than those discussed in this Order. Therefore, the Court concludes Biernat's testimony is inadmissible. Accordingly, Defendant's motion is granted.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Standard

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Williams v. City of St. Louis, 783 F.2d 114, 115 \(8th Cir. 1986\)](#). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 \(1986\)](#). Thus, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law [*18] will properly preclude the entry of summary judgment." [Wierman v. Casey's Gen. Stores, 638 F.3d 984, 993 \(8th Cir. 2011\)](#) (quotation omitted). The Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-89, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#); [Tyler v. Harper, 744 F.2d 653, 655 \(8th Cir. 1984\)](#). "[A] nonmovant may not rest upon mere denials or allegations but must instead set forth specific facts sufficient to raise a genuine issue for trial." [Nationwide Prop. & Cas. Ins. Co. v. Faircloth, 845 F.3d 378, 382 \(8th Cir. 2016\)](#) (citations omitted).

B. Discrimination Claims

Defendant presents two arguments related to Plaintiff's

discrimination claims.³ First, it argues Plaintiff cannot recover for acts that occurred outside the statute of limitations. Second, it contends Plaintiff cannot prevail on his timely filed claims.

(1) MHRA Discrimination Claims Arising Prior to Limitations Period

Defendant argues the Court should dismiss Plaintiff's MHRA claims related to the denial of a promotion in 2015 because those claims are untimely. Doc. #112, at 15-17. When responding to Defendant's summary judgment motion, Plaintiff did not address this argument. The "failure to oppose a basis for summary judgment constitutes waiver of that argument." [Satcher v. Univ. of Ark. at Pine Bluff Bd. of Trs., 558 F.3d 731, 735 \(8th Cir. 2009\)](#) (citation omitted). *Id.* at 735. By not responding to this argument, Plaintiff [*19] has waived any argument in opposition to Defendant's summary judgment motion on Plaintiff's MHRA claims arising prior to the limitations period. Accordingly, Defendant's motion for summary judgment on Plaintiff's MHRA claims arising prior to the limitations period is granted.

Even if it were to consider the merits of Defendant's argument, the Court's decision would be the same. An administrative charge must be filed with the Missouri Commission on Human Rights within 180 days of the alleged violation. *Mo. Rev. Stat. § 213.075.1*. Plaintiff filed his charge of discrimination on July 13, 2017; thus, all events occurring on or after January 14, 2017, assuming they were included in his charge of discrimination, were timely. Plaintiff cannot extend his claims under the MHRA to events that occurred before the limitations period. For this additional reason, Defendant's motion for summary judgment is granted with regard to Plaintiff's untimely MHRA claims.

(2) Other Discrimination Claims

With respect to Plaintiff's timely discrimination claims, Defendant argues (1) the "same-actor presumption" creates a "strong inference" of non-discrimination, (2) Plaintiff cannot present a prima facie case, (3) Defendant had legitimate [*20] non-discriminatory reasons for its actions, and (4) Plaintiff cannot establish Defendant's explanations are pretextual. Regarding

³ Defendant presents these arguments with respect to Plaintiff's [section 1981](#) claims and his MHRA claims.

Plaintiff's discrimination claims, the Court finds there are disputed issues of material fact that must be resolved by a jury. The Court will not itemize all factual disputes. But, for example, there are factual disputes regarding why Plaintiff was not offered the sports anchor position in 2017, including whether he was qualified for the position, and whether Defendant had legitimate non-discriminatory reasons for not offering the job Plaintiff. Therefore, Defendant's motion for summary judgment on Plaintiff's timely discrimination claims is denied.

C. Retaliation Claims

Defendant argues Plaintiff fails to establish a prima facie case of retaliation in that he cannot establish he suffered a materially adverse employment action, and even if he could, Plaintiff fails to demonstrate pretext.

Under the *McDonnell-Douglas* framework, an employee has the initial burden of establishing a prima facie case of retaliation. [Kasper v. Federated Mut. Ins. Co., 425 F.3d 496, 502 \(8th Cir. 2005\)](#). To establish a prima facie case, an employee must show (1) he engaged in protected conduct; (2) he suffered a materially adverse employment action [*21] that would deter a reasonable employee from making a complaint of discrimination or harassment; and (3) the materially adverse action was causally linked to the protected conduct. [Weger v. City of Ladue, 500 F.3d 710, 726 \(8th Cir. 2007\)](#).

Defendant argues criticism in a performance review is not a materially adverse employment action. Plaintiff argues downgraded performance reviews can constitute an adverse employment action. He further argues there are genuine issues of material fact related to his retaliation claim, including Defendant singling him out by (a) differing terms and conditions in his evaluations, and (b) third parties conducting "suspicious and harassing" investigations.

Viewed in the light most favorable to Plaintiff, the record contains evidence that would allow a jury to find Defendant treated Plaintiff differently in privileges, terms, and conditions of his employment in retaliation of filing a charge of discrimination in July 2017. Thus, the Court denies Defendant's motion for summary judgment on Plaintiff's retaliation claims.

IV. PLAINTIFF'S MOTION TO AMEND COMPLAINT

On October 17, 2019, Plaintiff moved to amend his

complaint. Doc. #133. Plaintiff seeks to include retaliation and discrimination claims based on Defendant's [*22] decision not to renew Plaintiff's Employment Contract in September 2019 and add conduct that allegedly occurred in 2017 and 2018. Doc. #133-2. Defendant argues Plaintiff's motion is untimely and he has not shown "good cause." Doc. #138. Defendant argues Plaintiff's decision to wait until October to seek amendment despite arguing these claims in his response to Defendant's summary judgment motion is not good cause. Additionally, Defendant argues Plaintiff did not request an amendment until more than a year after the deadline to amend.

[Rule 15 of the Federal Rules of Civil Procedure](#) directs that the Court "should freely give leave" to amend the pleadings "when justice so requires." [Fed. R. Civ. P. 15\(a\)\(2\)](#). But [Rule 15](#) is not a free pass allowing Plaintiff to ignore deadlines. "A district court may appropriately deny leave to amend where there are compelling reasons such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment." [Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc., 406 F.3d 1052, 1065 \(8th Cir. 2005\)](#) (quotations omitted).

[Rule 16](#) governs scheduling orders. When seeking to modify a deadline in a scheduling order, a party must show "good cause." [Fed. R. Civ. P. 16\(b\)\(4\)](#). The "interplay" between [Rules 15\(a\)](#) and [16\(b\)](#) is "settled" in the Eighth Circuit: [*23] "[i]f a party files for leave to amend outside of the court's scheduling order, the party must show cause to modify the schedule." [Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 715 \(8th Cir. 2008\)](#) (citation omitted).

The Court finds Plaintiff has established good cause with regard to amending his complaint to include claims that arose in September 2019. Plaintiff received notice of the non-renewal of his Employment Contract in September 2019. A few weeks later, he filed a motion for leave to amend his complaint to include claims arising from the non-renewal of his Employment Contract. Plaintiff exercised diligence in filing his motion to amend. In addition, there is no evidence of undue delay, bad faith, or dilatory motive. Plaintiff is granted leave to amend his complaint to include discrimination and retaliation claims under [section 1981](#) related to Defendant's actions in September 2019.

However, the Court denies Plaintiff's request to amend his complaint to include events that occurred before the filing of his complaint and/or before the amendment deadline expired on October 15, 2018. Plaintiff's allegations about and purported claims concerning conduct in 2017 and 2018, such as the "evaluation in 2017, which was delivered to plaintiff on 2/8/18," the investigation[*24] that allegedly began on May 13, 2018, and an allegation concerning Paid Time Off that allegedly occurred on September 22, 2018, are not permitted. Thus, those allegations must be removed from Plaintiff's proposed amended complaint before it is filed. Plaintiff shall file his Amended Complaint within seven calendar days of the date of this Order.

The parties may conduct discovery limited to the non-renewal of Plaintiff's Employment Contract in September 2019. The parties shall meet and confer to determine whether it is necessary to amend the Scheduling and Trial Order (Doc. #17), and if so, what discovery is necessary and how much time it will take the parties to complete that discovery. By no later than December 9, 2019, the parties shall jointly file a report indicating (1) whether the Scheduling and Trial Order should be amended, (2) what discovery is necessary, and (3) how much time the parties need to complete that discovery.

The Court will not entertain dispositive motions based on the merits (such as a motion under [Rule 56](#)) of Plaintiff's claims arising from the non-renewal of his Employment Contract in September 2019, and therefore, the Court will not include a briefing schedule for [*25] such motions in any amended scheduling and trial order.

V. CONCLUSION

For the foregoing reasons, Plaintiff's motion to exclude expert testimony is granted in part and denied in part, Defendant's motion to exclude expert testimony granted, Defendant's motion for summary judgment is granted in part and denied in part, and Plaintiff's motion to amend his complaint is granted in part and denied in part. In addition, Plaintiff shall file his amended complaint within seven days of this Order. By no later than December 9, 2019, the parties shall jointly file a report about additional, limited discovery.

IT IS SO ORDERED.

/s/ Ortrie D. Smith

ORTRIE D. SMITH, SENIOR JUDGE

UNITED STATES DISTRICT COURT

DATE: December 5, 2019

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Sanders v. Terrace Park

District Court of Colorado, Arapahoe County

June 4, 2018, Decided; June 4, 2018, Filed

Case Number: 2017CV31616

Reporter

2018 Colo. Dist. LEXIS 697 *

Marta Sanders, Plaintiff(s), v. Terrace Park, LLLP,
COMCAP Management, LLC, Defendant(s).

Judges: [*1] Elizabeth A. Weishaupl, District Court
Judge.

Opinion by: Elizabeth A. Weishaupl

Opinion

Order

THIS MATTER comes before the Court on Plaintiffs Marta Sander's ("Plaintiff") Motion *in Limine* to Preclude Evidence or Argument that Terrace Park is a Low-income Community. The Court, having reviewed the Motion, Response, Reply, and applicable law, FINDS and ORDERS as follows.

LEGAL STANDARD

The Colorado Rules of Evidence require that evidence presented at trial is admissible if found to be relevant. *C.R.E. 402*. For evidence to be deemed "relevant," the evidence must have a tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence. *C.R.E. 401*. However, relevant evidence may be inadmissible if its probative value is "substantially outweighed" by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *C.R.E. 403*.

DISCUSSION

On May 31, 2018 and June 1, 2018, the Court issued an Order regarding the Defendant's Motion for a Determination of Law and an amended Order ("Determination of Law"). The Court determined that the Plaintiff was a licensee and established the proper burden of proof for the case. The finding in the Determination of Law limits the relevance of the [*2] evidence that Terrace Park is a low-income community. Prior to this finding, the fact that Terrace Park is a low-income community helped the Defendant apply the rules of residents to the Plaintiff. Having found that the Plaintiff is a licensee, the Defendant can no longer apply the terms of a resident to her.

The Defendant also argues that the low-income community fact is relevant because not abiding by the lease terms risks the subsidies of all residents. The Defendant hopes to use this fact to show the consequences of identifying herself as a resident or tenant. As previously stated, the Plaintiff was not a resident or tenant, but a licensee. She need not face the consequences of a resident because she did not hold this legal status.

If the evidence the Defendant wishes to admit was relevant, it would still not be admissible because its probative value is sufficiently outweighed by the danger of unfair prejudice to the Plaintiff and would mislead the jury. The fact that Terrace Park is a low-income community would lead to unfair prejudice because jurors are likely to hold implicit biases against those who live in subsidized housing. Also, a jury may place an unjustified amount of weight [*3] on this fact that has no probative value to the Defendant's argument.

CONCLUSION

Based on the above analysis, the Court must GRANT Plaintiffs' Motion *in Limine*.

Dated: June 4, 2018

BY THE COURT:

/s/ Elizabeth A. Weishaupl

Elizabeth A. Weishaupl

District Court Judge

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Fleshner v. Pepose Vision Inst., P.C.

Supreme Court of Missouri

February 9, 2010, Opinion Issued

No. SC90032

Reporter

304 S.W.3d 81 *; 2010 Mo. LEXIS 11 **; 30 I.E.R. Cas. (BNA) 534; 159 Lab. Cas. (CCH) P60,952

MICHELLE FLESHNER, Respondent, v. PEPOSE VISION INSTITUTE, P.C., Appellant.

Prior History: **[**1]** APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY. The Honorable Mark D. Seigel, Judge.

[*Fleshner v. Pepose Vision Inst., P.C., 2009 Mo. App. LEXIS 27 \(Mo. Ct. App., Jan. 20, 2009\)*](#)

Counsel: For APPELLANT: Mr. Robert A. Kaiser, Mr. Thomas B. Weaver, Mr. Jeffery T. McPherson, Armstrong Teasdale, LLP, St. Louis, Missouri.

For RESPONDENT: Mr. Jerome J. Dobson, Ms. Michelle Dye Neumann, Mr. Jonathan C. Burns, Mr. Gregory A. Rich, Dobson, Goldberg, Berns & Rich, LLP, St. Louis, Missouri.

For AMICUS CURIAE: Mr. J. Bennett Clark, Ms. Emma Harty, Mr. James M. Weiss, St. Louis, Missouri; Mr. John D. Lynn, Sedey Harper, P.C., St. Louis, Missouri; Ms. Marie L. Gockel, Bratcher Gockel & Kingston, L.C., Kansas City, Missouri.

Judges: Mary R. Russell, Judge. All concur.

Opinion by: Mary R. Russell

Opinion

[*85] en banc

Michelle Fleshner sued her former employer, Pepose Vision Institute, P.C. ("PVI"), for damages resulting from its wrongful termination of her. A jury found PVI liable on Fleshner's claim and awarded her \$ 30,000 in actual damages and \$ 95,000 in punitive damages. This Court granted transfer after disposition by the court of appeals. Jurisdiction is vested in this Court pursuant to article V, section 10 of the Missouri Constitution.

Among its allegations of error, PVI claims that the trial court erred in failing to hold a hearing on its motion for a new trial based on juror misconduct. PVI contends that one juror's anti-Semitic comments about a defense witness deprived it of a jury of 12 fair and impartial jurors. This Court finds that if a juror makes statements evincing ethnic or religious bias or prejudice during jury deliberations, the parties are deprived of their right to a fair and impartial jury and equal protection of the law. Accordingly, the trial court should have held a hearing to determine whether the alleged anti-Semitic comments **[**2]** were made. The overruling of the motion for a new trial was error. The judgment is reversed, and the case is remanded.

PVI also claims that the trial court erred in rejecting its proposed verdict director that would have instructed the jury that the proper causal standard in a wrongful discharge action based on the **[*86]** public-policy exception was "exclusive causation." Instead, the trial court directed the jury that it should find for Fleshner if it believed she was fired "because" she spoke with a government investigator. This Court finds that the proper instruction for the causal standard is "contributing factor." In the future, trial courts should use a modified MAI 31.24, applying the "contributing factor" analysis, until a specific instruction for the public-policy exception is adopted. PVI, however, cannot show prejudice

resulted from the instruction given.

I. Background

Fleshner worked for PVI, a refractive surgery practice. During the course of her employment, the U.S. Department of Labor investigated PVI to determine whether it failed to pay its employees overtime compensation when they worked more than 40 hours a week. Fleshner received a telephone call at home from a Department ^[**3] of Labor investigator seeking background information about PVI. Fleshner told the investigator about the hours worked by PVI's employees. The next morning she reported her telephone conversation to her supervisor.

Fleshner's employment with PVI was terminated the day after she reported the telephone conversation. Fleshner filed an action against PVI, asserting wrongful termination of employment in violation of public policy and failure to pay overtime compensation in violation of [section 290.505, RSMo Supp. 2003](#).¹ As noted, the jury found in favor of Fleshner and awarded her \$ 125,000.

PVI filed motions for a new trial on several bases, including juror misconduct. After the jury was dismissed, a juror approached PVI's attorneys and reported that another juror made anti-Semitic statements during jury deliberations. According to the juror's affidavit, another juror made the following comments directed at a witness for PVI:² "She is a Jewish witch." "She is a Jewish bitch." "She is a penny-pinching Jew." "She was such a cheap Jew that she did ^[**4] not want to pay Plaintiff unemployment compensation."

According to an affidavit by one of PVI's attorneys, another juror approached PVI's attorneys and indicated that several anti-Semitic comments were made during deliberations but did not specify what was said. In overruling PVI's motions, the trial court concluded that jury deliberations are sacrosanct and that the juror's alleged comments did not constitute the kind of jury misconduct that would allow the trial court to set aside the verdict and order a new trial.

¹ Fleshner voluntarily dismissed the failure to pay overtime count prior to trial and proceeded to trial only on the claim for wrongful termination.

² The witness is the wife of the president and sole owner of PVI. She serves as PVI's corporate secretary and as a consultant to PVI.

II. Analysis

A. Jury Misconduct in the Form of Anti-Semitic Remarks

PVI alleges that its right to a fair and impartial jury trial was denied when the trial court overruled its motions for a new trial because a juror allegedly made anti-Semitic comments about a witness during jury deliberations. PVI contended in its motions for new trial that, as a result of the anti-Semitic comments, it was deprived of its due process rights and did not receive a fair trial.

Standard of Review

This Court will not disturb a trial court's ruling on a motion for a ^[**5] new trial ^[*87] based on juror misconduct unless the trial court abused its discretion. [Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226, 246 \(Mo. banc 2001\)](#). A trial court abuses its discretion if its ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." [Wingate by Carlisle v. Lester E. Cox Med. Ctr., 853 S.W.2d 912, 917 \(Mo. banc 1993\)](#).

Analysis

Both the United States Constitution and Missouri Constitution provide that "no person shall be deprived of life, liberty or property without due process of law." [U.S. Const. amend. V](#); [Mo. Const. art. I, sec. 10](#). "It is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'" [Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 \(2009\)](#) (quoting [In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 \(1955\)](#)). Moreover, the Missouri Constitution provides for the right to a trial by jury for civil cases. [Mo. Const. art. I, sec. 22\(a\)](#). As this Court has recognized, the right to a trial by jury does not simply provide that 12 jurors will decide the case. If the right to trial by jury is to mean anything, ^[**6] all 12 jurors must be "fair and impartial." See [Catlett v. Ill. Cent. Gulf R.R. Co., 793 S.W.2d 351, 353 \(Mo. banc 1990\)](#); [Lee v. Balt. Hotel Co., 345 Mo. 458, 136 S.W.2d 695, 698 \(Mo. 1939\)](#). Each juror must "enter the jury box disinterested and with an open mind,

free from bias or prejudice."³ [Catlett, 793 S.W.2d at 353](#) (internal quotation marks omitted). While every party is entitled to a fair trial, as a practical matter, our jury system cannot guarantee every party a *perfect* trial.

The general rule in Missouri, referred to as the Mansfield Rule, is that a juror's testimony [**7] about jury misconduct allegedly affecting deliberations may not be used to impeach the jury's verdict. [Joy v. Morrison, 254 S.W.3d 885, 889 \(Mo. banc 2008\)](#). "A juror who has reached his conclusions on the basis of evidence presented for his consideration may not have his mental processes and innermost thoughts put on a slide for examination under the judicial microscope." [Baumle v. Smith, 420 S.W.2d 341, 348 \(Mo. 1967\)](#). In other words, juror testimony is improper if it merely alleges that jurors acted on improper motives, reasoning, beliefs, or mental operations, also known as "matters inherent in the verdict."⁴ [Neighbors v. Wolfson, 926 S.W.2d 35, 37 \(Mo. App. 1996\)](#). There are two major policy considerations for this rule. First, there would be no end to litigation if verdicts could be set aside because one juror reportedly did not correctly understand the law or accurately weigh the evidence. [Baumle, 420 S.W.2d at 348](#). Second, there is no legitimate way [**88] to corroborate or refute the mental process of a particular juror. *Id.*

Over the years, an exception to the rule prohibiting juror testimony has been adopted. Jurors may testify about juror misconduct occurring outside the courtroom. [Travis v. Stone, 66 S.W.3d 1, 4 \(Mo. banc 2002\)](#). This exception has been used to allow jurors to testify as to whether they gathered evidence independent to that

presented at trial. See [id. at 3](#) (where juror visited accident scene during a trial recess); [Middleton v. Kansas City Pub. Serv. Co., 348 Mo. 107, 152 S.W.2d 154, 156 \(Mo. 1941\)](#) (where juror visited several used car dealerships measuring the type car involved in the accident). When a juror obtains extrinsic evidence, the trial court conducts a hearing to determine whether the extrinsic evidence prejudiced the verdict. See [Travis, 66 S.W.3d at 4](#).

Here, PVI did not allege juror misconduct occurring outside the courtroom. Instead, PVI asked for a new trial on the basis of juror misconduct occurring *inside* the jury room. PVI alleges that comments made by a juror revealing religious and ethnic bias or prejudice [**9] during deliberations prevented it from receiving its constitutional right to a trial by a fair and impartial jury.

Specifically, PVI alleges that, during jury deliberations, a juror made the following statements about the defense witness, who is also the wife of the president of PVI: "She is a Jewish witch." "She is a Jewish bitch." "She is a penny-pinching Jew." "She was such a cheap Jew that she did not want to pay Plaintiff unemployment compensation." Those alleged comments, PVI claims, demonstrate it did not receive a trial by a fair and impartial jury.

While jurors' mental processes and innermost thoughts or beliefs may not be examined, see [Baumle, 420 S.W.2d at 348](#), this Court has never considered whether the trial court may hear testimony about juror statements during deliberations evincing ethnic or religious bias or prejudice.

Other jurisdictions that have analyzed similar situations have decided that juror testimony is admissible. The Wisconsin Supreme Court in [After Hour Welding, Inc. v. Laneil Management Co.](#) determined a trial court may hear juror testimony if it learns that the verdict may have been a result of racial, national origin, religious, or gender bias. [108 Wis. 2d 734, 324 N.W.2d 686, 690 \(Wis. 1982\)](#). [**10] In that case, the defendant moved for a new trial on the basis of jury misconduct. [Id. at 688](#). The defendant supported its motion with a juror's affidavit stating that other jurors called a witness who was an officer of the defendant corporation "a cheap Jew." *Id.* In making its decision, the court recognized that "[w]hile the rule against impeachment of a jury verdict is strong and necessary, it is not written in stone nor is it a door incapable of being opened." [Id. at 689](#). The rule "competes with the desire and duty of the judicial system to avoid injustice and to redress the

³ Voir dire is the tool for trial courts to weed out those potential jurors who are not fair and impartial. [State v. Edwards, 116 S.W.3d 511, 529 \(Mo. banc 2003\)](#). Ideally, the potential jurors' answers to questioning during voir dire would reveal every bias or prejudice. Those potential jurors expressing biases or prejudices would be stricken, while those venirepersons who did not reveal any biases or prejudices would be impaneled to hear and decide the case. In reality, potential jurors are not likely to admit their biases or prejudices, especially those concerning ethnicity and religion, in open court proceedings like voir dire.

⁴ Matters inherent in the verdict include a juror not understanding the law as stated in the instructions, a juror not joining in the verdict, a juror voting a [**8] certain way due to misconception of the evidence, a juror misunderstanding the statements of a witness, and a juror being mistaken in his calculations. [Baumle, 420 S.W.2d at 348](#).

grievances of private litigants." *Id.* The court balanced the interest of privacy for juror discussion against the right to a fair trial and found that when the right to a trial by an impartial jury is impaired by a juror's material prejudice, the interest of juror privacy yields to the right to a fair trial. [Id. at 739-40.](#)

Similarly, the Florida Supreme Court considered whether a trial court could hear juror testimony about racial remarks made in jury deliberations. [Powell v. Allstate Ins. Co., 652 So. 2d 354, 355 \(Fla. 1995\).](#) The trial court held an in-court interview of a juror, who revealed that during deliberations [**11] several jurors made derogatory remarks about the plaintiffs, both of whom [*89] were black citizens of Jamaican birth. [Id. at 355 n.2.](#) The jury foreperson stated the following, considering it a "joke": "There's a saying in North Carolina, hit a [n****] and get ten points, hit him when he's moving, get fifteen." *Id.* The court recognized that a juror may not testify as to "any matter which essentially inheres in the verdict or indictment." [Id. at 356.](#) However, jurors may testify about "overt acts" that might have prejudicially affected the jury's verdict. *Id.* The court concluded that "appeals to racial bias . . . made openly among jurors" constitute "overt acts," and the trial court may hear juror testimony to impeach the verdict. [Id. at 357;](#) see also [Marshall v. State, 854 So. 2d 1235, 1240-41 \(Fla. 2003\)](#) (finding that racial jokes told during deliberations do not inhere in the verdict and remanding for evidentiary hearing); [Wright v. CTL Distrib., Inc., 650 So. 2d 641, 642-43 \(Fla. Dist. Ct. App. 1995\)](#) (remanding for evidentiary hearing where juror stated that plaintiff was "a fat black woman on welfare"); [Sanchez v. Int'l Park Condo. Ass'n, 563 So. 2d 197, 198-99 \(Fla. Dist. Ct. App. 1990\)](#) [**12] (remanding for new trial where juror made derogatory remarks about persons of Cuban descent).

In *Evans v. Galbraith-Foxworth Lumber Co.*, the Texas Court of Civil Appeals found that when jurors made anti-Semitic comments during jury deliberations, litigants did not receive a fair and impartial trial by jury. [31 S.W.2d 496, 500 \(Tex. Civ. App. 1929\).](#) During deliberations, a juror stated that one of the plaintiffs was "a Jew," that one of the jurors was "a Jew," but that he could not understand why other jurors would be "partial to a Jew." [Id. at 499.](#) The court explained that, in a situation where jurors make anti-Semitic comments during deliberations, setting aside the verdict is proper:

It may be clear that eleven (or a lesser number) of the jurors were not, to any degree, influenced by the improper conduct; yet if it remains reasonably doubtful whether one (or a larger number) was, or

was not, influenced, the vice remains and the verdict must be set aside because each juror can rightly agree to the verdict only when guided solely by the instructions of the trial judge and the evidence heard in open court.

[Id. at 500](#) (internal citations omitted).

When a juror makes statements evincing ethnic [**13] or religious bias or prejudice during deliberations, the juror exposes his mental processes and innermost thoughts. What used to "rest alone in the juror's breast" has now been exposed to the other jurors. See [Baumle, 420 S.W.2d at 348.](#) The juror has revealed that he is not fair and impartial. Whether the statements may have had a prejudicial effect on other jurors is not necessary to determine. Such statements evincing ethnic or religious bias or prejudice deny the parties their constitutional rights to a trial by 12 fair and impartial jurors and equal protection of the law. See [Powell, 652 So. 2d at 358.](#) The Florida Supreme Court, in criticizing a juror's expression of racial bias, commented, "neither a wronged litigant nor society itself should be without a means to remedy a palpable miscarriage of justice." [Id. at 356.](#)

Accordingly, if a party files a motion for a new trial alleging there were statements reflecting ethnic or religious bias or prejudice made by a juror during deliberations, the trial court should hold an evidentiary hearing to determine whether any such statements occurred. Juror testimony about matters inherent in the verdict should be excluded. See [Baumle, 420 S.W.2d at 348.](#) [**14] If the trial court finds after conducting a hearing that such biased or prejudicial statements were made [*90] during deliberations, then the motion for a new trial should be granted as the parties would have been deprived of their right to a trial by 12 fair and impartial jurors.

Jurors are encouraged to voice their common knowledge and beliefs during deliberations, but common knowledge and beliefs do not include ethnic or religious bias or prejudice. The alleged anti-Semitic comments made during deliberations in this case are "not simply a matter of 'political correctness' to be brushed aside by a thick-skinned judiciary." [Powell, 652 So. 2d at 358.](#) As stated in *United States v. Heller*, "A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires." [785 F.2d 1524, 1527 \(11th Cir. 1986\).](#) Such

stereotyping has no place in jury deliberations.

The ethnicity or religion of any party or witness unrelated to the evidence should have no bearing on the outcome of a trial. To allow the verdict to stand without holding [\[**15\]](#) a hearing to determine whether the alleged comments were made undermines public confidence in the justice system. The courts must zealously guard the right to a fair and impartial trial and equal protection under the law.

The trial court abused its discretion in failing to hold an evidentiary hearing to determine whether the alleged juror misconduct occurred. The trial court's judgment is reversed, and the case is remanded.

B. Standard for Causation of Termination

PVI also argues that the trial court improperly instructed the jury on the causal requirement for wrongful discharge under the public-policy exception. PVI claims that the trial court's failure to give its proffered instruction constitutes prejudicial error requiring reversal and remand for a new trial.

Both PVI and Fleshner proposed verdict directors with different causal standards. The trial court rejected PVI's proffered instruction, which would have directed the jury to find for Fleshner if it found that her communication with the investigator was the "exclusive cause" of her discharge.⁵ Fleshner offered two verdict directors. The first instructed the jury that the communication with the investigator was a "contributing [\[**16\]](#) factor" to Fleshner's termination.⁶ The trial court rejected the instruction. The second instructed the jury that Fleshner was fired "because" she communicated with the investigator.⁷ The trial court gave this instruction.

The issue before this Court is how the jury should be instructed as to the appropriate causation standard when an at-will employee is discharged in violation of the public-policy exception.

⁵ PVI's proposed verdict director was patterned after MAI 23.13, the instruction for a retaliatory discharge based on filing a workers' compensation claim.

⁶ Fleshner's first proposed verdict director was patterned after MAI 31.24, the instruction for an employment discrimination action based on the Missouri Human Rights Act.

⁷ Fleshner's second proposed verdict director was a not-in-MAI instruction.

Standard of Review

Whether a jury is properly instructed is a matter of law subject to *de novo* review. [Edgerton v. Morrison, 280 S.W.3d 62, 65 \(Mo. banc 2009\)](#). To reverse a jury verdict on the ground of instructional [\[*91\]](#) error, the party challenging the instruction must show that: (1) the instruction as submitted misled, misdirected, or confused the jury; and (2) prejudice resulted from the [\[**17\]](#) instruction. [Sorrell v. Norfolk S. Ry. Co., 249 S.W.3d 207, 209 \(Mo. banc 2008\)](#).

Analysis

Fleshner was an at-will employee at PVI. Generally, at-will employees may be terminated for any reason or for no reason. [Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 663 \(Mo. banc 1988\)](#). As a matter of law, the discharged at-will employee has no cause of action for wrongful discharge. *Id.*

Since [Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 \(Mo. App. 1985\)](#), the court of appeals has recognized the public-policy exception to the at-will-employment rule. The *Boyle* court described the public-policy exception as "narrow" and articulated it as follows:

[W]here an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, or because the employee reported to his superiors or to public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.

[Id. at 871, 878](#). Further, [\[**18\]](#) the court explained that public policy "is the principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good." [Id. at 871](#).

This Court has never explicitly recognized the public-policy exception. See [Dake v. Tuell, 687 S.W.2d 191, 193 \(Mo. banc 1985\)](#) (holding that the prima facie tort theory may not be used to circumvent the employment-at-will doctrine); [Johnson, 745 S.W.2d at 663](#) (refusing to consider whether to create a public-policy exception to the employment-at-will doctrine because the employee did not implicate a constitutional provision,

statute, or regulation based on a statute); [Johnson v. Kraft Gen. Foods, Inc.](#), 885 S.W.2d 334, 335 n.1 (Mo. banc 1994) (declining to rule on the propriety of a common law cause of action for wrongful discharge based on public policy articulated in the statute at issue because the employee did not argue it on appeal); [Luethans v. Washington Univ.](#), 894 S.W.2d 169, 171 n.2 (Mo. banc 1995) (determining that the Court has never expressly defined or adopted the public-policy exception but recognizing that it exists for the purpose of that opinion). While this Court has not found the [**19] need to reach the question of adopting or rejecting the public-policy exception for 25 years, the issue at hand necessarily requires this Court to determine the validity of the public-policy exception.⁸

[*92] Although the general rule in Missouri is that an at-will employee may be terminated for any reason or no reason, the at-will-employment doctrine is not static. It may be modified [**20] directly by or through public policy reflected in the constitution, a statute, a regulation promulgated pursuant to statute, or a rule created by a governmental body. See [Johnson](#), 745 S.W.2d at 663. To find otherwise would allow employers to discharge employees, without consequence, for doing that which is beneficial to society. For this reason, this Court expressly adopts the following as the public-policy exception to the at-will employment doctrine: An at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities. See [Porter v. Reardon Mach. Co.](#), 962 S.W.2d 932, 936-37 (Mo. App. 1998); see also [Boyle](#), 700 S.W.2d at 878. If an employer terminates an employee for either reason, then the

⁸In its amicus brief, the National Employment Lawyers Association argues that this Court recognized the public-policy exception to the employment-at-will doctrine in [Smith v. Arthur Baue Funeral Home](#), 370 S.W.2d 249 (Mo. 1963). In *Smith*, the discharged employee claimed that he was terminated because of his membership in a labor organization. *Id.* at 251-52. The employee argued that his former employer violated his right to organize and to bargain collectively under the Missouri Constitution. *Id.* at 252 (citing [Mo. Const. art. I, sec. 29](#)). This Court recognized that the employment-at-will doctrine was modified by the adoption of [article I, section 29](#) so that if the employee was discharged because he exercised his constitutional right to collectively bargain, the employee may bring an action for damages. *Id.* at 254.

employee has a cause of action in tort for wrongful discharge based on the public-policy exception.

What is not reflected in *Boyle*, though, is how the jury should be instructed as to the proper causal standard for the [**21] public-policy exception. There is no MAI for trial courts to follow. PVI argues that the trial court erred in instructing the jury that it had to find that PVI terminated Fleshner "because she communicated with the United States Department of Labor." PVI claims that by the trial court instructing the jury with the "because" standard, it rejected precedent. PVI contends that the trial court should have used the "exclusive cause" standard, following prior decisions regarding wrongful termination for filing a workers' compensation claim.

PVI's proffered jury instruction was modeled after MAI 23.13, which directs jurors to find for the plaintiff if they believe "the exclusive cause of such discharge was the plaintiff's filing of the workers' compensation claim." That instruction's origin is found in [Hansome v. Northwestern Cooperage Co.](#), 679 S.W.2d 273 (Mo. banc 1984). In *Hansome*, an employee brought a statutory⁹ action for wrongful discharge as a result of exercising his rights under the Missouri workers' compensation act. *Id.* at 274. When identifying the elements to the statutory action, the causal requirement was described as "an exclusive causal relationship between plaintiff's actions [**22] and defendant's actions." *Id.* at 275. Nowhere in the workers' compensation laws does "exclusive causal" or "exclusive causation" language appear. Yet in *Crabtree v. Bugby*, the causal requirement once again was described as "an exclusive causal relationship."¹⁰ [967 S.W.2d 66, 70 \(Mo. banc 1998\)](#).

The court of appeals, following *Hansome* and *Crabtree*, applied the "exclusive causation" standard to wrongful discharge under the public-policy exception in [Lynch \[*93\] v. Blanke Baer & Bowey Krimko, Inc.](#), 901 S.W.2d

⁹The statute that authorizes a suit for wrongful discharge as a result of exercising rights under the Missouri workers' compensation act has remained the same since 1973. See [section 287.780](#). All statutory references are to RSMo 2000 and Supp. 2008 unless otherwise noted.

¹⁰Judge White's dissent in *Crabtree* objects to the majority's and *Hansome's* pronouncement that the proper causal standard is "exclusive causation." [Crabtree](#), 967 S.W.2d at 73-74 (White, J., dissenting). Judge White describes the exclusive causation standard as "plucked out of thin air" by *Hansome*, noting that none of the cases relied on by this Court or the statute used the word "exclusive." *Id.* at 74.

[147 \(Mo. App. 1995\)](#). [****23**] In *Lynch*, the employee claimed that he was discharged for notifying his supervisor about irregularities in the company's products. *Id. at 149-50*. The court noted that the public-policy exception is narrow and cited the *Hansome* case as authority for its decision. *Id. at 151-52*. Since *Lynch*, several court of appeals decisions have reiterated that "exclusive causation" is the proper standard. See, e.g., [Faust v. Ryder Commercial Leasing & Servs., 954 S.W.2d 383, 391 \(Mo. App. 1997\)](#); [Bell v. Dynamite Foods, 969 S.W.2d 847, 852 \(Mo. App. 1998\)](#); [Grimes v. City of Tarkio, 246 S.W.3d 533, 536 \(Mo. App. 2008\)](#).

As observed in *Brenneke v. Department of Missouri, Veterans of Foreign Wars*, there is a key distinction between workers' compensation retaliation cases and public-policy exception cases. [984 S.W.2d 134, 140 \(Mo. App. 1998\)](#). Workers' compensation cases arise under statute, while public-policy exception cases arise under the common law of torts. *Id.* An exclusive causation standard is inconsistent with the proximate cause standard typically employed in tort cases. While prior cases indicate that "exclusive causation" is the appropriate standard for cases asserting retaliation in the workers' [****24**] compensation statutory context, "exclusive causation" is not the proper standard for wrongful discharge based on the public-policy exception. To the extent that *Lynch*, *Faust*, *Bell*, and *Grimes* used an "exclusive causation" standard in wrongful discharge under the public-policy exception cases, they are incorrect.

Further, public policy requires rejection of "exclusive causation" as the proper causal standard for the public-policy exception. Employees would be discouraged from reporting their employers' violations of the law or for refusing to violate the law if "exclusive causation" were the standard. An employee who reported violations of the law or who refused to violate the law could be terminated, without consequence, by the employer. Upon a lawsuit alleging wrongful termination in violation of public policy, the employer could assert that, while the employee's reporting or refusal played a part in the decision to terminate, the employee was also fired for another reason, such as reporting for work late or failing to follow the dress code. "Exclusive causation" would result in an exception that fails to accomplish its task of protecting employees who refuse to violate the law or [****25**] public policy.

The majority of jurisdictions have not required proof of "exclusive causation" for wrongful discharge based on the public-policy exception. See, e.g., [Teachout v.](#)

[Forest City Cmty. Sch. Dist., 584 N.W.2d 296, 301-02 \(Iowa 1998\)](#) (determinative factor); [Guy v. Mut. of Omaha Ins. Co., 79 S.W.3d 528, 535 \(Tenn. 2002\)](#) (motivating factor); [Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 405 \(Utah 1998\)](#) (substantial factor); [Cardwell v. Am. Linen Supply, 843 P.2d 596, 600 \(Wyo. 1992\)](#) (significantly motivated).¹¹

Fleshner presented two options for the causal standard: "because" or "contributing factor." The "because" standard, which was submitted to the jury, has authority. *Boyle* itself insinuates [****26**] that the causal standard is "because." [700 S.W.2d \[*94\] at 878](#). *Boyle* simply articulates the public-policy exception, without stating how the jury should be instructed with respect to the causal requirement. Further, pattern jury instructions for federal retaliation causes of action use "because of" as the causal connection required. See, e.g., 3C KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 172.24 (5th ed. 2001) (retaliation claim by employee who opposed a practice made unlawful by the Americans with Disabilities Act); *Id.* § 173.23 (retaliation claim by employee who opposed a practice made unlawful by the Age Discrimination Employment Act); *Id.* § 174.23 (retaliation claim by employee who opposed a practice made unlawful by the Equal Pay Act).

The "contributing factor" causation standard has been articulated in other recent employment discharge cases. In [Daugherty v. City of Maryland Heights, 231 S.W.3d 814 \(Mo. banc 2007\)](#), a former police captain sued the department that terminated his employment, alleging that he was terminated on account of his age and perceived disability in violation of the Missouri Human Rights Act ("MHRA"). *Id. at 817-18*. This Court noted that [****27**] before its 2003 decision holding that jury trials are available under the MHRA, the causation standard was whether the employment decision was "motivated by" an illegitimate purpose. *Id. at 819*. The adoption of MAI 31.24 in 2005 brought a new causal standard: whether the illegitimate purpose was a

¹¹ Perhaps seeing the weakness in its argument for an exclusive causation standard, PVI alternatively argues that this Court should adopt the but-for standard articulated in [Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 \(Mo. banc 1993\)](#), and require trial courts to instruct the jury using the causal standard in MAI 19.01, "directly caused or directly contributed to cause." PVI did not preserve the issue for appeal by submitting it as a proposed jury instruction. See [Rule 84.13\(a\)](#).

"contributing factor" in the employment decision. *Id. at 820*. *Daugherty* found that the "contributing factor" language used in MAI 31.24 is consistent with the plain meaning of the MHRA. *Id.*; see also *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 666 (Mo. banc 2009) (prevailing on a hostile work environment sexual harassment claim requires proof that gender was a "contributing factor" in the harassment).

Essentially, the MHRA modifies the at-will employment doctrine by instructing employers that they can terminate employees, but their reason for termination cannot be improper. The MHRA's employment provisions mandate that employees may not terminate employees on the basis of their race, color, religion, national origin, sex, ancestry, age, or disability. *Section 213.055.1*. The public-policy exception is the same: it modifies the at-will employment doctrine by mandating that employers may not terminate [**28] employees for reporting violations of law or for refusing to violate the law or public policy.

Likewise, cases involving both the MHRA and the public-policy exception turn on whether an illegal factor played a role in the decision to discharge the employee. The evidence in both types of cases directly relates to the employer's intent or motivation. The employer discharges the employee,¹² asserting a reason for the termination that may or may not be pretextual. Under the MHRA, if race, color, religion, national origin, sex, ancestry, age, or disability of the employee was a "contributing factor" to the discharge, then the employer has violated the MHRA. The employer's action is no less reprehensible because that factor was not the only reason. Similarly, if an employee reports violations of law or refuses to violate the law or public policy as described herein, it is a "contributing factor" to the discharge, and the discharge is still reprehensible [**95] regardless of any other reasons of the employer.

PVI does not argue that "because" is an easier standard than "contributing factor." Prejudice is required to reverse a jury verdict on the ground of instructional error. PVI cannot show prejudice resulted from the "because" verdict director. As used here, this Court cannot find error with the "because" instruction as it did

not mislead, misdirect, or confuse the jury, nor did it prejudice the result. In the future, though, trial courts should use a modified MAI 31.24, applying the "contributing factor" analysis until this Court adopts a specific instruction for wrongful discharge based on the public-policy exception.

C. Motions for Directed Verdict and for Judgment Notwithstanding the Verdict

PVI further claims that the trial court erred in overruling its motions for directed verdict and for judgment notwithstanding the verdict ("JNOV"). It argues that either a directed verdict or a JNOV was proper because *Fleshner's* public policy argument was preempted by the Fair Labor Standards Act ("FLSA"). In addition, PVI asserts that the trial court should have granted a directed verdict or a JNOV [**30] because *Fleshner* did not present substantial evidence to support her claim for wrongful termination under the public-policy exception.

Standard of Review

The standard of review for failures to sustain motions for directed verdict and for JNOV is essentially the same. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007). This Court must determine whether the plaintiff presented a submissible case by offering evidence to support every element necessary for liability. *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 590 (Mo. banc 2007). Evidence is viewed in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences and disregarding all conflicting evidence and inferences. *Id.* If the challenge is that an affirmative defense precludes recovery for the plaintiff, this Court must determine whether the moving party proved the affirmative defense as a matter of law. *Jablonski v. Barton Mut. Ins. Co.*, 291 S.W.3d 345, 348 (Mo. App. 2009); *Damon Pursell Constr. Co. v. Mo. Highway & Transp. Comm'n*, 192 S.W.3d 461, 475 (Mo. App. 2006). Neither a motion for directed verdict nor for JNOV should be granted unless there are no factual issues remaining [**31] for the jury to decide. *Damon Pursell*, 192 S.W.3d at 475.

Fair Labor Standards Act Preemption

PVI contends that *Fleshner's* claim for wrongful termination based on public policy is preempted by the FLSA. It argues that, as a matter of Missouri law,

¹²An employer can violate the MHRA by making an employment decision other than discharge. *Section 213.055.1* ("To fail to hire or to discharge any individual, or otherwise to discriminate [**29] against any individual with respect to his compensation, terms, conditions, or privileges . . .").

Fleshner may not bring the public policy claim because the FLSA provides an adequate remedy for her grievance, displacing the Missouri common law remedy. This Court has consistently held that "a statutory right of action shall not be deemed to supersede and displace remedies otherwise available at common law in the absence of language to that effect unless the statutory remedy fully comprehends and envelops the remedies provided by common law." [*Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 668 \(Mo. banc 1999\)](#) (emphasis and internal quotation marks omitted). A statutory remedy does not "comprehend and envelop" the common law if the common law remedies provide different remedies from the statutory scheme. *Id.* For example, if the common law remedy provides punitive damages, [*96] but the statutory scheme does not, then the common law scheme is not preempted. See *id.*

Punitive damages are available for wrongful discharge claims brought under [**32] the public-policy exception at common law. See [*Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 849-51 \(Mo. App. 2007\)](#). To preempt the public-policy exception, the FLSA must provide for punitive damages. This Court recognizes that there is a split of authority among the federal courts as to whether the FLSA provides punitive damages. Compare [*Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108, 111-12 \(7th Cir. 1990\)](#) (finding the FLSA provides for punitive damages), with [*Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 934 \(11th Cir. 2000\)](#) (finding the FLSA does not provide for punitive damages). As the circuits are not in agreement and the United States Supreme Court has not resolved this contradiction, it is not certain that punitive damages are available. Until this issue is resolved by legislation or a court ruling, it cannot be assumed that the FLSA provides punitive damages, and it does not preempt recovery for wrongful termination under the public-policy exception.

Public-Policy Violation

PVI next asserts that Fleshner failed to make a submissible case because she did not present any evidence that she engaged in an activity protected by Missouri public policy. Because Fleshner [**33] spoke with a federal investigator rather than a state investigator, PVI claims that Missouri's minimum wage law, [sections 290.500 to 290.530](#), is inapplicable to Fleshner. It argues that Fleshner cannot rely on the minimum wage law as the basis for her public policy claim because her activity was not protected by that law.

PVI contends that the minimum wage law reflects the public policy of encouraging employees to speak with state, not federal, investigators without fear of being discharged. Essentially, PVI argues that to bring a wrongful discharge claim based on the public-policy exception, Fleshner must rely on a direct violation of a statute that retaliation against her violated.

The minimum wage law regulates the payment of overtime compensation. [Section 290.505](#). The law also gives state officials the authority to investigate employers for their failure to pay overtime compensation. [Section 290.510](#). Any employer who discharges an employee who has notified the appropriate state officials that the employer failed to pay overtime compensation, who has instituted proceedings against the employer seeking overtime compensation, or who has testified or will testify against the employer [**34] regarding overtime compensation is guilty of a class C misdemeanor. [Section 290.525\(7\)](#).

PVI's view of the reach of the public-policy exception is too narrow. Public policy is not to be determined by "the varying personal opinions and whims of judges or courts . . . as to what they themselves believe to be the demands or interests of the public." [*In re Rahn's Estate*, 316 Mo. 492, 291 S.W. 120, 123 \(Mo. 1926\)](#). Instead, public policy must be found in a constitutional provision, a statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. See [*Johnson*, 745 S.W.2d at 663](#). But as found in [*Kirk v. Mercy Hospital Tri-County*](#), a plaintiff need not rely on an employer's *direct* violation of a statute or regulation. [851 S.W.2d 617, 621 \(Mo. App. 1993\)](#). Instead, the public policy must be *reflected* by a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. See [id. at 621-22](#).

[*97] Moreover, there is no requirement that the violation that the employee reports affect the employee personally, nor that the law violated prohibit or penalize retaliation against those reporting its violation. See, e.g., [Porter](#), [962 S.W.2d at 938-39](#) [**35] (recognizing that one can make a claim under the public-policy exception not just where the statute or regulation specifically prohibits retaliation but also in other cases where the employee reports a violation or refuses to violate a clear mandate of public policy as reflected in a statute or regulation).

The public policy reflected by the minimum wage law is that employees should be encouraged to communicate with government labor investigators about their

employers' overtime compensation without fear of retaliation. While a prosecution for violation of the law requires communication with state government labor investigators, a suit for wrongful termination is not so constrained. The public policy expressed by the statute covers communications made to federal or state officials or to the employee's superiors.¹³ The disclosure here came well within these parameters. The trial court did not err in overruling PVI's motions for directed verdict and JNOV on the ground that public policy reflected in the minimum wage law did not extend to communications with federal investigators.

D. Admission of Evidence and Rejection of Limiting Instruction

PVI next claims that the trial court erred [^{**37}] in overruling its motion for a new trial in admitting evidence regarding PVI's enforcement of the non-competition agreement¹⁴ and rejecting PVI's proposed limiting instruction on that evidence. PVI argues that the limiting instruction would have directed the jury not to consider the evidence about the non-competition agreement in determining whether PVI wrongfully discharged Fleshner.¹⁵

¹³As noted in *Brenneke*, "under *Boyle* the whistleblower exception protects employees that appropriately report [^{**36}] to superiors or other proper authorities." [984 S.W.2d at 139](#) (emphasis omitted). The public-policy exception explicitly recognizes that an employee's superiors can constitute the proper authority to whom to blow the whistle and that an employee who is fired for informing his superiors of wrongdoing by other employees is entitled to bring suit. [Faust, 954 S.W.2d at 390-91](#); see also [Boyle, 700 S.W.2d at 878](#); [Lynch, 901 S.W.2d at 150-51](#) (stressing that a plaintiff need not report or threaten to report his concerns to outside authorities). *Porter* reaffirmed *Faust's* recognition of internal whistleblowing. [962 S.W.2d 932](#). That case specifically held that a plaintiff's reports to his supervisor that wrongdoing occurred were adequate to meet the whistleblowing requirement. [Id. at 937-38](#). There was no requirement that the reports be made to outside, as opposed to internal, authorities. *Id.*; accord [Adolphsen v. Hallmark Cards, Inc., 907 S.W.2d 333 \(Mo. App. 1995\)](#) (invoking whistleblower exception when employee was fired after reporting to supervisor and CEO about violation of FAA regulations).

¹⁴Because PVI failed to timely object to this evidence when it was offered at trial, the issue is not preserved for appeal. See [Hancock v. Shook, 100 S.W.3d 786, 802 \(Mo. banc 2003\)](#).

¹⁵At the time of her termination, Fleshner asked if PVI would

A trial court's refusal to give an instruction is reviewed for abuse of discretion. See [Swartz v. Gale Webb Transp. Co., 215 S.W.3d 127, 129-30 \(Mo. banc 2007\)](#). "A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so [^{**98}] arbitrary [^{**38}] and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." [Id. at 130](#).

The trial court decided the jury could use the non-competition agreement and PVI's enforcement of it to show PVI's motivation in discharging Fleshner. The trial court's refusal to give PVI's proposed limiting instruction is not an abuse of discretion.

III. Conclusion

The judgment is reversed, and the case is remanded.

Mary R. Russell, Judge

All concur.

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release her from a non-competition agreement, but PVI declined. PVI filed a lawsuit seeking an injunction to prohibit Fleshner from working for a general ophthalmology practice. Eventually, Fleshner and PVI entered into a settlement agreement.