EXPLAINING THE INVIDIOUS: HOW RACE INFLUENCES CAPITAL PUNISHMENT IN AMERICA

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"[W]e decline to assume that what is unexplained is invidious."
McCleskey v. Kemp, 481 U.S. 279, 313 (1987)

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INTRODUCTION

McCleskey v. Kemp upheld the death penalty against extraordinary statistical evidence of racial bias in its imposition. With its lofty statement, "[W]e decline to assume that what is unexplained is invidious," the majority also dashed almost all hope that the death penalty would be declared unconstitutional because it is racially biased.[1] Even when made, this statement had a patently ridiculous premise: That the statistical correlation between race and the imposition of the death penalty was anomalous, unexpected, unexplained.

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1 McCleskey v. Kemp, 481 U.S. 279, 313 (1987).

If a study established that the day of the week on which a defendant had been born and the day of the week on which his victim had been born were correlated with the likelihood of a death sentence, *that* statistical disparity reasonably might be characterized as "unexplained." If the correlation were strong, the sample size large, and the study controlled for potential confounders, the possibility that the correlation was spurious still could not be disregarded. Why? First, because the day of defendant and victim birth is not known—let alone salient—to decision makers, including decision makers in capital cases.[2] And second, because there is no known history of discrimination based on that characteristic. Put differently, neither opportunity nor motive to discriminate on the basis of day-of-the-week-of-birth is present. Race, however, is different in both respects. Race is almost always both known and salient to the relevant decision makers. Equally importantly, the entire history of race in this country, and in particular, the history of race and the death penalty in this country, as *Furman v. Georgia*[3] recognized, reek of motive to do racialized harm,[4] and made it entirely predictable that race did and will influence capital sentencing.

Thus, it seems disingenuous for the Court to have asserted that stark racial disparities in the imposition of the death penalty were "unexplained" in the sense of being of mysterious origin, not truly race-based and not "invidious." But racial disparities in capital punishment are, in another sense, "unexplained," or at least not well-explored: What are the mechanisms by which racial bias skews capital sentencing? This Article primarily focuses on *how* racial bias creates nearly ubiquitous racial disparities in the imposition of the death penalty; it does so both to amass further reasons *McCleskey* was wrongly decided, and to point the way forward. Part I provides the necessary foundation by summarizing the history of race and the death penalty in the United States, with a focus on the Supreme Court's treatment of racial discrimination

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2 Indeed, there isn't even a commonly used word or phrase that describes this attribute because none is really needed, given how rarely we speak of it. (That this has not always been the case, see 2 ANNA ELIZA BRAY, TRADITIONS, LEGENDS, SUPERSTITIONS, AND SKETCHES OF DEVONSHIRE 287–88 (London, John Murray 1838) (reprinting the poem "Monday's Child," which tells fortunes based on the day of a person's birth), reflects that what is salient depends at least in part on culture.) There are, however, lots of words, many of them expressing extraordinary animosity, dehumanization, or disparagement, that refer to race.

3 408 U.S. 238 (1972).

4 *Id.* at 364 (Marshall, J., concurring); *id.* at 256–57 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring).

claims in capital sentencing.[5] Part II, the heart of this Article, examines the multiple psychological mechanisms that create racially biased decision making in capital cases. Understanding those mechanisms further undercuts the Supreme Court's reasoning in *McCleskey* and argues for overturning the holding. However, recognizing the reluctance with which today's Court would view overturning *McCleskey*, Part III considers whether and how alternative, case-specific uses of the data described in Part II might ameliorate the influence of racial bias in capital sentencing.[6]

I
RACE, THE AMERICAN DEATH PENALTY, AND THE SUPREME COURT

The history of race in the United States is terrible, complex, and impossible to summarize in an article, or even a book.[7] In contrast, the history of race and capital punishment in America is terrible and complex, yet easily summarized: In this country, race of victim and offender was *always* the driving force behind capital punishment for rape, and from the very beginning, race has heavily influenced the imposition of the death penalty for other crimes. The Supreme Court's acknowledgment of this history, however, has been uneven.

A. Before the Fourteenth Amendment: Open Discrimination

Prior to the Revolutionary War, many states explicitly conditioned eligibility for capital punishment upon both the offense committed and the race and/or enslaved status of the offender.[8] Although all of the northern states had limited

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5 The reader intimately familiar with that history may want to skim Part I, or even skip ahead to Part II.

6 Virtually all of the discussion that follows focuses on African Americans, but not because I believe race only influences the capital sentencing of African-American defendants; rather, the focus on bias against African Americans is driven by the fact that the history, cases, and psychological data are much more limited with respect to other racial minorities. *See generally* Sheri Lynn Johnson, *The Influence of Latino Ethnicity on the Imposition of the Death Penalty*, 16 ANN. REV. L. & SOC. SCI. 421 (2020) (reviewing the literature and urging further research). However, almost all of the psychological phenomena I report are likely to affect other racial minorities facing capital prosecutions, albeit to varying extents.

7 For an excellent recent and in-depth analysis of the Supreme Court's capital punishment jurisprudence, see CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (2016).

8 A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 181–82, 256–57, 262–63 (1978).

capital punishment to the crime of murder before the Civil War began, and in some states there was talk of total abolition, "the debate that took place in the North simply did not occur in the South because of the perceived need to discipline a captive workforce."[9] In the South, the moves toward limiting the death penalty were racially specific; each of the Southern states abolished the death penalty for one or more previously death-eligible crimes, but did so only for crimes committed by whites.[10] For example, in Texas, both enslaved and free African Americans (but not whites) remained subject to capital punishment for insurrection, arson, attempted murder of a white victim, rape or attempted rape of a white victim, robbery or attempted robbery of a white person, assault with a deadly weapon upon a white person, and kidnapping of a white woman.[11] In Virginia, free African Americans (but not whites) could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault, but only when the victim was white, and a slave was eligible for execution if he had committed one of *sixty-six* offenses.[12] In Mississippi, that number was thirty-eight,[13] and though most Southern states had a shorter list of capital felonies for slaves, all had capital punishment statutes that differentiated between crimes committed by a slave and those committed by whites.[14] In every slave state, the rape of a white woman by an African American was a capital crime,[15] but a slave could not be raped by her owner, and even the rape of a slave by another white man was punishable only as a crime against the slaveholder's

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9 STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 137 (2002).

10 *Id.* at 139. Moreover, even states in which non-homicidal crimes remained theoretically death-eligible regardless of the race of the defendant in practice reserved the death penalty for African Americans: "Between 1800 and 1860 the southern states are known to have executed only seven white burglars . . . , six white horse thieves . . . [,] four white robbers" and *no* white rapists. *Id.*

11 *Id.* at 141.

12 *Id.*

13 *Id.*

14 *Id.*; KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 210–11 (1956); GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 75–87 (2d ed. Philadelphia, Henry Longstreth 1856).

15 JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 115 (6th ed. 1988). In Georgia, the disparity in penalty was particularly notable; rape of a white woman by a white man was punishable by imprisonment of twenty years or less, and attempted rape, by not more than five years, but rape or attempted rape of a white woman by an African American was punishable by death. Ga. Penal Code 1816, Nos. 380, 508, *reprinted in* COMPILATION OF THE LAWS OF GEORGIA 571, 804 (Lucius Q.C. Lamar 1821).

property;[16] in Louisiana, the rape of a Black woman, slave or free, was no crime at all.[17] After the Civil War, in some states Black Codes punished African Americans by death for crimes that prescribed lesser punishments for white offenders,[18] while in others the same discrimination occurred under facially neutral statutes that made the death penalty available at the discretion of the jury.[19]

B. From Reconstruction to *Furman*: Unbridled Discretion

Although the Fourteenth Amendment did away with discrimination enshrined in statutes,[20] it did nothing to reach disparate applications made possible by discretion. From 1930 (the first year national statistics were gathered) to 1972, when the Supreme Court struck down unguided discretion statutes, about half of all defendants executed in the United States were African-American, an enormously disparate percentage whether considered in comparison to their numbers in the population or to their numbers in the ranks of those convicted of murder.[21] But that overall disparity is dwarfed by the racial disparity in executions for rape: Of the 455 men executed for rape, 405, or 89%, were African-American men,[22] virtually all of whom were accused of raping white women.[23] Moreover, with respect to capital punishment for rape, statistical evidence of racial discrimination was corroborated by the monstrous history of lynching, a history inextricably linked to hysteria

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16 FRANKLIN & MOSS, *supra* note 15, at 114.

17 JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 85–87 (1994).

18 *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 84–85 (1997) (Black Codes in Mississippi, South Carolina, and Alabama); THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 97, 105–06 (1965) (Black Codes in North Carolina).

19 WILSON, *supra* note 18, at 101–02, 113–14.

20 One of the stated motives behind the Fourteenth Amendment was the eradication of these discriminatory statutes. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (May 23, 1866) (describing the purpose of the Fourteenth Amendment as "prohibit[ing] the hanging of a black man for a crime for which the white man is not to be hanged").

21 BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, BULLETIN NO. 45, CAPITAL PUNISHMENT 1930-1968, at 7 (1969).

22 *Id.* Unofficial statistics from the longer period of 1864 to 1972, are similar. Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 38 (2007).

23 JACK GREENBERG, CRUSADERS IN THE COURTS 440 (1994). Indeed, there is no record of any white man ever being executed for the rape of a Black woman. Michael L. Radelet, *Executions of Whites for Crimes Against Blacks: Exceptions to the Rule?*, 30 SOCIO. Q. 529, 537–41 (1989).

over the imagined threat of Black men raping white women.[24] And with respect to capital punishment for both rape and murder, the Supreme Court's docket provided notice through several notorious cases that sometimes little more than a scintilla of evidence was needed to secure death sentences for Black defendants.[25]

C. The Role of Race in *Furman* and *Gregg*.

Several years before *Furman v. Georgia*[26] the Eighth Circuit rejected a statistically based equal protection challenge by a Black death-sentenced rape defendant in *Maxell v. Bishop*, largely by relegating statistically demonstrated discrimination to the past:

> We are not yet ready to condemn and upset the result reached in every case of a [N]egro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice.
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> . . . .
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> We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this. But . . . improper state practice of the past does not automatically invalidate a procedure of the present.[27]

This reasoning would, two decades later, be roughly reprised in *McCleskey*, but in the short run the Supreme Court ducked the issue by granting certiorari (and ultimately, relief) only on narrow nonracial grounds also posed by the case.[28]

By 1972, however, a majority of the Supreme Court was ready to face the broader inequities of capital punishment, and with a five-to-four vote, *Furman* overturned all existing death penalty statutes.[29] Both Justice Brennan and Justice White wrote opinions that deemed the death penalty unconstitutional for nonracial reasons—Brennan because he reasoned that the death penalty was under all circumstances inconsistent with

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24 Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 23–24 (2006).

25 *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932) (rape), Brown v. Mississippi, 297 U.S. 278 (1936) (murder); Hamilton v. Alabama, 368 U.S. 52 (1961) (rape).

26 408 U.S. 238 (1972).

27 Maxwell v. Bishop, 398 F.2d 138, 147–48 (8th Cir. 1968), *vacated and remanded on other grounds*, 398 U.S. 262 (1970).

28 Maxwell v. Bishop, 398 U.S. 262, 267 (1970).

29 *Furman*, 408 U.S. at 239–40.

the evolved standards of decency commanded by the Cruel and Unusual Punishment Clause of the Eighth Amendment and White because he thought that statutes delegating wide discretion to the jury were impermissible, at least when so few defendants were sentenced to death under those statutes. However, the other three Justices in the majority made it plain that racial discrimination played a large role in their votes. Justice Marshall's opinion includes both a lengthy history of the death penalty and a discussion of stark racial statistical disparities.[30] It also opines that if the public knew of those disparities, it would reject the death penalty altogether.[31] Justice Douglas castigated the wide discretion of judges and juries in imposing the death penalty, arguing that this discretion was often responsible for "feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and [for] saving those who by social position may be in a more protected position."[32] Douglas then concluded, "[T]hese discretionary statutes are unconstitutional in their operation [and] are pregnant with discrimination . . . ."[33] Even Justice Stewart, known neither for his pithiness nor his concern for minorities, jabbed in an oft-quoted line, "[I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."[34]

Justice Powell's dissent, signed by all four dissenters, both looks backward to *Maxwell* and foreshadows *McCleskey*. After quoting Maxwell's conclusions, Powell "agree[d] that discriminatory application of the death penalty in the past, admittedly indefensible, is no justification for holding today that capital punishment is invalid in all cases in which sentences were handed out to members of the class discriminated against."[35] His "final comment on the racial discrimination problem" underlined his skepticism regarding the persistence of racial discrimination in capital sentencing:

> The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past

30 *Id.* at 364 (Marshall, J., concurring).
31 *Id.* at 369.
32 *Id.* at 255 (Douglas, J., concurring).
33 *Id.* at 256–57.
34 *Id.* at 310 (Stewart, J., concurring).
35 *Id.* at 450 (Powell, J., dissenting).

> when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have "evolved" in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.[36]

The vote split in *Furman* put abolitionists on notice that their apparent triumph might be short-lived, and resulting worries about the stability of *Furman* proved well-founded. Four years later, Justice Douglas had been replaced by Justice Stevens, and statutes passed in the wake of *Furman* channeled the sentencer's discretion to an extent that caused Justices White and Stewart to switch sides; by a seven-to-two vote, *Gregg v. Georgia*[37] upheld discretion-limiting statutes on the theory that such statutes eliminated the possibility of an arbitrary or capricious imposition of the death penalty while preserving the possibility of individualized sentencing.[38] Justice Stewart's opinion in *Gregg*, in stark contrast to his trenchant observation in *Furman*, abjures any comment on the frequency of race discrimination past or present. Instead, the opinion obliquely asserts that "the proportionality review [required of the Georgia Supreme Court] substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."[39] Justice White's concurring opinion is slightly more direct, but equally sanguine:

> Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish, and has not even attempted to establish, that the Georgia Supreme Court failed properly to perform its task in this case or that it is incapable of performing its task adequately in all cases; and this Court should not assume that it did not do so.[40]

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36 *Id.*

37 428 U.S. 153, 186, 295 (1976).

38 In contrast, states that had opted for mandatory statutes as a cure for arbitrariness saw their statutes overturned for lacking individualized determinations. *See* Woodson v. North Carolina, 428 U.S. 280, 301 (1976).

39 *Gregg*, 428 U.S. at 206.

40 *Id.* at 224 (White, J., concurring).

D. *McCleskey's* Rejection of Both Empirical Data and History

While *Gregg* declined to "assume" the persistence of racial bias in administration of the death penalty, it did not address what would happen were proof of persistent bias supplied. One year after the decision in *Gregg* the Supreme Court faced that question in a challenge to Georgia's imposition of the death penalty for rape. But much as *Maxwell* had, *Coker v. Georgia*[41] sidestepped the racial bias issue by vacating the petitioner's death sentence on another ground, the disproportionality of the death penalty for the crime of rape.[42] Meanwhile, many litigators and academics—in part encouraged by the decision if not the reasoning in *Coker*—believed that *Gregg* left open an opportunity to demonstrate that race remained an important factor in the administration of capital punishment. The decade following *Gregg* therefore produced numerous statistical studies showing that race—both of the defendant and of the victim—played a significant role in the administration of the death penalty.[43]

The most impressive of these studies focused on Georgia, the home of Furman, Gregg, and Coker, and was conducted by Dr. David Baldus of the University of Iowa. Baldus's study examined over 2,000 Georgia murders that occurred during the 1970s. Baldus investigated 230 variables that could have explained the data on nonracial grounds, and after controlling for them all, concluded that defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than defendants charged with killing African Americans, and that Black defendants were 1.1 times more likely to receive the death penalty than other defendants.[44] Thus, Black defendants who, like Warren McCleskey, had

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41 433 U.S. 584, 592 (1977).

42 As I have argued elsewhere, the decision to grant certiorari in the case of a white defendant—despite the fact that Black defendants accounted for 90% of capital rape convictions, and despite the fact that two Black capital rape petitioners with similar claims were pending on certiorari at the same time as was Coker's petition—was a cowardly avoidance of the overwhelming evidence of racial discrimination in the imposition of the death penalty for rape. Moreover, that avoidance made possible the Court's disregard of slightly less stark evidence racial discrimination in the imposition of the death penalty for murder in *McCleskey*. Sheri Lynn Johnson, Coker v. Georgia*: Of Rape, Race, and Burying the Past*, *in* DEATH PENALTY STORIES 171 (John H. Blume & Jordan M. Steiker eds., 2009).

43 *See* GEN. ACCT. OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 1, 5–6 (1990).

44 *See* McCleskey v. Kemp, 481 U.S. 279, 287 (1987). Without controlling for possible confounders, the death-sentencing disparity was even greater: the rate

killed a white victim had the greatest likelihood of receiving a death sentence; regarding McCleskey himself, Baldus concluded that "the jury *more likely than not* would have spared [his] life had his victim been black."[45] McCleskey's case was a particularly good vehicle for the Supreme Court to address racial disparities under post-*Furman* statutes, both because of the prediction Baldus's model made regarding McCleskey himself and because it relied upon a comprehensive statistical study by a well-credentialed statistician who held no ties to the abolitionist community.

Nonetheless, five members of the Court were unimpressed, and in an opinion written by Justice Powell, held that general statistical evidence showing that a particular state's capital punishment scheme operated in a discriminatory manner establish neither an Eighth nor a Fourteenth Amendment violation.[46] The Court characterized the Baldus study as establishing "[a]t most . . . a discrepancy that appears to correlate with race,"[47] which permitted it to pronounce, "[W]e decline to assume that what is unexplained is invidious."[48]

The Court's refusal to "assume" that the statistical evidence of racial discrimination was in fact attributable to such discrimination was not, according to Justice Powell, inconsistent with prior cases in which the Court had found that statistics alone did present sufficient proof of discriminatory intent. He reasoned that ordinarily only when statistics were "stark" could they, without more, establish discrimination,[49] deeming the showing in *McCleskey* less than "stark." That logic, however, was problematic in two related ways. First, the premise behind accepting stark disparities as sufficient proof of discriminatory purpose would seem to encompass the disparities Baldus had documented. *Arlington Heights* had declared, "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation

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for white-victim cases was 11 times greater than the rate for Black-victim cases. *See id.* at 326–27 (Brennan, J., dissenting).

45 *Id.* at 325 (Brennan, J., dissenting) (emphasis in original).

46 *See id.* (majority opinion) at 291–92, 308.

47 *Id.* at 312; *see also id.* at 291 n.7 ("Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision." (emphasis in original)).

48 *Id.* at 313.

49 *Id.* at 293, 297.

appears neutral on its face."[50] But the pattern that had emerged from the Baldus study was both "clear" and "unexplainable on grounds other than race," though not because of its starkness; Baldus's exploration of 230 possible explanations for the racial disparity yielded no race-neutral explanation for strong disparities he found, and the absence of such a race-neutral explanation rendered the pattern "unexplainable on grounds other than race." Second, in jury selection cases the Court previously *had* accepted less-extreme statistical disparities as sufficient to shift the burden of proof to the government; Powell, however, insisted these cases involved both simpler decisions and fewer decision makers,[51] two differences that he claimed decreased the likelihood that other factors were responsible for racial effects in jury selection, and therefore rendered the jury selection precedents inapplicable.[52] Once more, however, Powell ignored the fact that Baldus had explored competing explanations for observed racial disparities; that the decisions were more complicated was addressed by considering a very large number of alternative explanations. Equally telling, neither the state nor the Court suggested what race-neutral variable might explain the disparities, listed a single important variable that Baldus had failed to measure, or offered an alternative model that concluded that the correlations between race and death sentences were spurious.

Ignoring these counterarguments, the majority dismissed the statewide statistics as "clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose."[53] McCleskey had, however, proffered evidence of racial discrimination beyond the Baldus study: an extensive history of race-consciousness in the Georgia criminal justice system. *Arlington Heights* had acknowledged the probative value of a history of discrimination, but the *McCleskey* Court found that because the evidence of facially discriminatory practices lacked recency, it had little probative value in assessing the likelihood of post-*Furman* discrimination.[54] Finally, because McCleskey had "offer[ed] no evidence specific to his own case that would support an inference that racial considerations played a part in

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50 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

51 *McCleskey*, 481 U.S. at 294.

52 *Id.* at 294–95.

53 *Id.* at 297.

54 *Id.* at 298 n.20.

his sentence,"[55] the Court concluded that he had failed to establish a violation of either the Eighth or Fourteenth Amendment.[56]

There were three dissents,[57] and one, that of Justice Brennan, was joined by all four dissenters. His dissent first points out that under the Court's Eighth Amendment cases, it is not necessary to show that race actually influenced the verdict in a particular case, but only that the evidence poses an intolerable level of risk that it did so.[58] The opinion then goes on to discuss Baldus's findings in detail, arguing that given the extraordinary inquiry into possible confounding variables, the statistical evidence that race influenced the imposition of the death penalty was very strong and that even standing alone, the Baldus study establishes a constitutionally intolerable level of risk that race influences capital sentencing in Georgia. Then the opinion turns to the history of race discrimination in the state of Georgia, which, like all Southern states, at one time "operated openly and formally precisely the type of dual system the evidence shows is still effectively in place."[59] Justice Brennan concludes that "[h]istory and its continuing legacy thus buttress the probative force of McCleskey's statistics."[60]

E. Post-*McCleskey* Litigation

McCleskey does not state the limits of its holding, and there were some who read it narrowly.[61] One reason to do so lies in the opening paragraph of its analysis of the equal protection claim, which suggested that the primary flaw in McCleskey's showing was the absence of evidence "specific to his own case that would support an inference that racial

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55 *Id.* at 292–93.

56 *See id.* at 297.

57 *See id.* at 367 (Stevens, J., dissenting) (writing separately to argue that it was possible to retain capital punishment by narrowing its application to the most aggravated crimes and asserting "that further proceedings are necessary in order to determine whether McCleskey's death sentence should be set aside"). Justice Blackmun's dissent decries the majority's abandonment of ordinary Eighth and Fourteenth Amendment principles, *id.* at 345–50 (Blackmun, J., dissenting), and then focuses on the evidence that prosecutors discriminated in their decisions to seek death, *id.* at 356–58.

58 *Id.* at 322 (Brennan, J., dissenting).

59 *Id.* at 329.

60 *Id.* at 334.

61 I was among the unduly optimistic. *See* John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-*McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1778 (1998); *see also* Amsterdam, *supra* note 22, at 45.

considerations played a part in his sentence,"[62] a flaw that might be remedied by providing case-specific evidence. Moreover, as the majority emphasized, McCleskey's claim threatened hundreds of capital convictions and sentences, and more broadly, "taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[63] However, when a capital defendant offers case-specific proof of discriminatory motive, the stakes decrease dramatically, for that evidence implicates only the past convictions of a single prosecutor or a single prosecutor's office.

But though arguments for a narrow reading of *McCleskey* have been made in cases where statistical proof was augmented with evidence of racial motivation specific to a prosecutor or county, lower courts have uniformly rejected such arguments.[64] Indeed, since *McCleskey,* only one capital defendant has prevailed on a claim that the prosecutor's decision to seek death was influenced by race. That case is ironic in two respects: it did not rely on statistics at all, and it was a Black-victim case where the death sentence was reversed after state postconviction proceedings revealed that the prosecutor's office decided to seek death to counteract perceptions of discrimination from the Black community.[65] Despite numerous studies that find racial disparities, (including a meta-study mandated by Congress and conducted by the General Accounting Office[66]) several of which are extraordinarily rigorous,[67] and some of which have presented

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62 *McCleskey*, 481 U.S. at 292–93.

63 *Id.* at 314–15.

64 *See* Blume, Eisenberg & Johnson, *supra* note 61, at 1780–81.

65 Order Granting Relief at 39, State v. Kelly, 502 S.E.2d 99 (S.C. 1998) (No. 24809) (on file with author).

66 *See* GEN. ACCT. OFF., supra note 43 (reviewing 28 studies of the topic and finding that the race of the victim significantly influenced death sentencing in about four out of five of the studies, and that the race of the defendant significantly influenced it in about half of them).

67 Professor Baldus conducted several more statistical studies of capital sentencing, including two studies in Northern states and one study of the U.S. Military. His study of Philadelphia expanded the controls he had used in the *McCleskey* study of Georgia capital sentencing, employing independent race-blind readings of the transcripts to assess aggravating and mitigating evidence. This increase in controls did not diminish race effects; instead, it increased race of defendant effects. *See* David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1685, 1713–15 (1998).

"stark" statistical disparities,[68] *McCleskey* remains an insurmountable barrier to establishing racial discrimination in the administration of the death penalty. Interestingly, many of these studies find stronger race-of-defendant effects than did the Georgia study.[69]

II
THE MECHANICS OF RACIAL BIAS

Just as *McCleksey*'s pronouncement in 1987 of what is "unexplained" seems difficult if not impossible to square with the history of race and capital punishment in the United States, it is also difficult to reconcile with the Court's statement only a year earlier in *Turner v. Murray*: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."[70] But whatever degree of deliberate blindness was required to say in 1987 that racial disparities were "unexplained," it is impossible to maintain that fiction given the data available today concerning the prevalence and operation of racial and ethnic bias. And this data does not come from death-penalty abolitionists, but from psychologists.

A. Conscious Racial Bias

In 1987, the words "racial bias" for most people would have conjured images of violence and subjugation: Bull Connor turning the fire hoses on the children of Birmingham; the maimed body of Emmett Till; the assassination of Martin Luther King Jr. Even today, the term may first remind a reader of Dylann Roof shooting Black churchgoers, or Derek Chauvin with his knee on George Floyd's neck. But these images squash more complicated reactions to other groups into the question of animus, which is only part of the story. Social psychologists posit at least two dimensions with which we view

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68 Solicitor Holman Gossett's pattern of seeking death is such a case. Gossett was the Seventh Circuit Solicitor in South Carolina from 1985 to 2001. Theodore Eisenberg, a law professor and statistician, examined the death-eligible homicides in the Seventh Circuit from 1985 to 1993. Sheri Lynn Johnson, *Litigating for Racial Fairness After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 182–83 (2008). During that time, Gossett sought the death penalty in 43% of all death-eligible homicides. *Id.* at 182. However, during that time, he *never* sought the death penalty in a case with a Black victim. *Id.* Given the relative number of Black and white victim death-eligible homicides in the circuit during that period, Professor Eisenberg testified that the odds of this happening by chance were a mere 3 in 5,000. *Id.*

69 Baldus, Woodworth, Zuckerman, Weiner & Broffitt, *supra* note 67, at 1661.

70 476 U.S. 28, 35 (1986) (plurality opinion).

groups other than our own: warmth and competence.[71] Groups to which the subjects do not belong but for whom they feel warmth and to whom they attribute competence—war heroes, MacArthur Prize recipients, winning Superbowl quarterbacks—they esteem. Those for whom subjects feel no warmth but deem competent—Asians, Jews, the teacher's pet—they envy; those about whom subjects feel warmth, but think of as incompetent—persons with disabilities, the elderly—they pity. And groups towards whom subjects—particularly those in the dominant group—feel no warmth and also deem incompetent—African Americans, ex-convicts, child molesters—they despise. If it seems horrible to lump African Americans with child molesters—it *is*, but the psychological dynamics are similar when both affect and attributions are negative.

1. *Differential Affect (Warmth)*

The first measurements of "prejudice" or bias were measurements of warmth, or affect. Social scientists deemed people who expressed hostility toward minority racial groups "prejudiced." Compared to the 1960s, or maybe even to the 1980s, the number of people expressing such hostility is declining; it is less socially acceptable (though its acceptability is by no means constant), and less reported on surveys. But it would be a mistake to think that prejudice has totally disappeared, even in its most violent forms, as hate crime reports make plain.[72] Moreover, the decrease in racial animus is not linear, and animus towards a particular racial group may spike for a variety of reasons.[73]

Historically the successor to hostility was the desire for distance. Observing "New Racism" or "Aversive Racism," psychologists measured "social distance" in several ways: with whom are you willing to work, have your children go to school,

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71 *See* Amy J.C. Cuddy, Susan T. Fiske & Peter Glick, *Warmth and Competence as Universal Dimensions of Social Perception: The Stereotype Content Model and the BIAS Map*, 40 ADVANCES EXPERIMENTAL SOC. PSYCH. 61, 63 (2008).

72 Southern Poverty Law Center, *SPLC Calls for Concerted Action as FBI Hate Crime Report Documents Highest Numbers Since 2008* (Sept. 2, 2021), https://www.Splcenter.Org/Presscenter/Splc-Calls-Concerted-Action-Fbi-Hate-Crime-Report-Documents-Highest-Numbers-2008 [https://perma.cc/N99Y-L5LW].

73 *Id.* For example, the spike in anti-Asian violence is likely related to perceptions about—and hatemongering focused on—the origins of the Covid pandemic. Kimmy Yam, *Anti-Asian Hate Crimes Increased 339 Percent Nationwide Last Year, Report Says*, NBC NEWS (Feb. 14, 2022), https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-increased-339-percent-nationwide-last-year-repo-rcna14282 [https://perma.cc/UVA4-F678].

share your neighborhood, have close friendships, have become part of your family. The progress has been uneven. As with hostility, there has been both fading of the negative emotions and faking because those negative emotions are now socially stigmatized.[74]

2. *Stereotypes (Including Competence)*

Stereotypes—broad generalizations about characteristics, preferences, or behaviors—are a second source of consciously racially biased decision making, as the Supreme Court recognized prior to *McCleskey*. Substantial numbers of people still endorse racial stereotypes, including stereotypes related to ability, criminal propensity, morality, and animality. As *Turner v. Murray* had explained a year before *McCleskey*, both stereotypes and animosity are critically important in capital cases:

> [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. . . . 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.[75]

Recently, in *Buck v. Davis* the Supreme Court again acknowledged the importance of such stereotypes, observing that an expert's testimony that a capital defendant was more likely to be dangerous in the future because of his race "appealed to a powerful racial stereotype—that of black men as 'violence prone.'"[76] This observation is well-supported by the literature tracking stereotypes: "[T]he stereotype of blacks as violent and criminally inclined is one of the most pervasive, well-known, and persistent stereotypes in American culture."[77]

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74 Harold Sigall & Richard Page, *Current Stereotypes: A Little Fading, A Little Faking*, 18 J. PERSONALITY & SOC. PSYCH. 247, 253–54 (1971) (finding that social desirability affects agreement with racial stereotypes).

75 476 U.S. 28, 35 (1986) (plurality opinion).

76 137 S. Ct. 759, 776 (2017) (quoting *Turner*, 476 U.S. at 35).

77 Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide"*, 45 L. & SOC'Y REV. 69, 73 (2011) [hereinafter Lynch & Haney, *Empathic Divide*]; *see* Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOCIO. 717 (2001) (finding correlation between "percentage [of] young black men in a neighborhood" and "perceptions of the neighborhood crime level").

Moreover, although other negative stereotypes about African Americans have significantly diminished, stereotypes regarding violence and criminality remain both strong and influential, particularly among whites.[78]

Because *Turner* (and later, *Buck*) set forth the way that the mechanisms of conscious racism—stereotyping and animosity—could create disparity, the only way to imagine that the disparities the Baldus study documented were "unexplained" was to posit that potential jurors with racist views would all be eliminated by voir dire. *Turner* held that in interracial capital cases, due process required the trial court to permit defense counsel to inquire about racial prejudice. In theory then, a juror who admitted hostility or stereotyping that he or she was unable to set aside would indeed be disqualified.

But reliance on voir dire to neutralize the animosity and stereotyping *Turner* recognized (and thereby render the statistical disparities "unexplained") was, even at the time *McCleskey* was decided, dubious for several reasons. Voir dire was quite unlikely to remove all consciously biased jurors because: social disapproval made it unlikely that jurors influenced by animosity or stereotypes would admit their biases; many defense lawyers were reluctant to voir dire jurors on race; even more defense lawyers were inept at prompting disclosure of racial bias; even defense lawyers who might have been able to elicit bias with sufficient leeway in questioning were often granted only a single generic race question by the trial judge (because that was all *Turner* seemed to require); and *Turner* only guaranteed questioning in interracial crime cases. However, even assuming that the *McCleskey* majority honestly believed that voir dire would eliminate biased jurors, the last 20 years of psychological research have blown even that fragile defense of the "unexplained" characterization out of the water.

B. Subconscious Racial Bias (a.k.a. Unconscious Racism, Biased Cognition, or Implicit Bias)

McCleskey was bitterly criticized in the legal literature, but most of the criticism attacked the opinion either for its ahistoricity or for its doctrinal departures from Eighth and Fourteenth Amendment precedents,[79] and did not address the

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78 Lynch & Haney, *Empathic Divide*, *supra* note 77, at 73–74; Mark Peffley & Jon Hurwitz, *The Racial Components of "Race-Neutral" Crime Policy Attitudes*, 23 POL. PSYCH. 59, 60 (2002).

79 *See, e.g.*, Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988)

relevance of unconscious racial bias.[80] In part the relative absence of such commentary is attributable to the fact that in the mid 1980s awareness of the growing literature in the field of psychology documenting the rise of new forms of racism was still limited. Even at that time the literature was not insubstantial,[81] but since then it has grown enormously. Whether to call the prevalent, subconscious influence of race "unconscious racial bias," "unconscious racism," "biased cognition," "implicit bias," or "biased cognition" varies by subfield as well as personal preference, but today the evidence from social, cognitive and neuropsychology, taken together, is overwhelming on two issues: 1) Racially influenced decision making is very common; and 2) Most decision makers who are influenced by race are unaware that their judgment has been skewed.

1. *Unconscious Associations: The Evidence from Social Psychology*

Once social psychologists recognized that norms against racial bias inhibited subjects from honestly describing how race influenced their decision making, they began to develop tools to covertly measure bias. The literature on unconscious

(criticizing *McClesky* on equal protection grounds); Case Comment, *Death Penalty—Racial Discrimination*, McClesky v. Kemp, 101 HARV. L. REV. 149, 155–59 (1987) (referring to the Court's "equal protection standard of personal discriminatory intent" as "unrealistic" and "t[aking] no account of . . . systemic racism"); Sheri L. Gronhovd, Note, *Social Science Statistics in the Courtroom: The Debate Resurfaces in* McCleskey v. Kemp, 62 NOTRE DAME L. REV. 688, 689 (1987); Hugo Adam Bedau, *Someday* McCleskey *Will Be Death Penalty's* Dred Scott, L.A. TIMES, (May 1, 1987), https://www.latimes.com/archives/la-xpm-1987-05-01-me-1592-story.html [https://perma.cc/9FFJ-4KZT]. As Kennedy notes, the intense criticism of the Supreme Court's decision repeated the strongly negative response to the lower courts' decisions in the case. Kennedy, *supra*, at 1389; *see also* Stephen L. Carter, Comment, *When Victims Happen to be Black*, 97 YALE L.J. 420, 440–47 (1988) (criticizing majority opinion for its callousness to Black victims, but accepting the outcome for McCleskey as inevitable).

80 *But see* Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1016–17 (1988) (referring to *McClesky*'s "blindspot" as the "empirical reality of unconscious racism"); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 (2005) (relying on social science data to describe how "race alters intrapersonal, interpersonal, and intergroup interactions").

81 *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (summarizing some of the then-newer literature for legal audiences).

associations is vast,[82] so I mainly summarize its outlines, and stop to point out a few studies of particular significance.

a. *Early Controlled Experiments: Mock Jury Studies*

The first tools designed to detect bias subjects were unwilling to report were controlled studies in which experimental subjects faced scenarios that required decisions (or other actions), such as deciding whether to help an individual in an emergency situation. The studies' authors then varied the race of one of the characters in the scenario to determine whether race had a significant effect on the subjects' decisions. For example, experimental manipulation revealed that "selective empathy" continues to skew affect towards racial outgroups in negative ways; studies show racially selective helping behavior in emergency situations,[83] and greater willingness to inflict pain for benefit.[84] As a general matter, selective empathy is inevitable and even functional; if we felt as much grief at the death of every child who perished as we would at the death of our own children, we could not survive. The problem is not selectivity, but racial selectivity.[85] It does not take much imagination to surmise that racially selective empathy for victims may contribute to race of victim disparities, and concomitantly, that racially selective empathy for defendants contributes to race of defendant disparities.

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82 For comprehensive summaries of that literature, see the Annual Reports of the Kirwan Institute. https://kirwaninstitute.osu.edu/ (choose "Research Initiatives" from the banner; then choose a topic to see relevant annual reports).

83 Samuel L. Gaertner, *The Role of Racial Attitudes in Helping Behavior*, 97 J. SOC. PSYCH. 95, 95–101 (1975) (reviewing the literature).

84 Knud S. Larsen, Leonard Colen, Doug Von Flue & Paul Zimmerman, *Situational Pressure, Attitudes Toward Blacks, and Laboratory Aggression*, 2 SOC. BEHAV. & PERSONALITY 219, 220 (1974); Edward Donnerstein, Marcia Donnerstein, Seymore Simon & Raymond Ditrichs, *Variables in Interracial Aggression: Anonymity, Expected Retaliation, and a Riot*, 22 J. PERSONALITY & SOC. PSYCH. 236, 243 (1972) (finding that "white subjects delivered significantly less general direct aggression to black targets under conditions favoring the opportunity for either immediate . . . or future . . . counteraggression than under conditions minimizing such opportunity").

85 Black people are the magical faces at the bottom of society's well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us. Surely, they must know that their deliverance depends on letting down their ropes. Only by working together is escape possible. Over time, many reach out, but most simply watch, mesmerized into maintaining their unspoken commitment to keeping us where we are, at whatever cost to them or to us.

DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM, at v (1992).

The mock jury studies, however, leave no need for imagination or surmise. Mock jury studies supply subjects with conflicting evidence concerning whether a defendant had committed a crime, and ask them to determine his guilt, or they provide aggravating and mitigating evidence and ask subjects to determine the appropriate sentence. As I reviewed at some length before *McCleskey* was decided, many mock jury studies had already established significant effects of race of defendant and race of victim on both guilt and sentence, particularly in ambiguous evidence cases.[86]

Since *McCleskey*, the mock jury literature has grown both more abundant and richer.[87] Thus, for example, one study found that white subjects reported less empathy for Black defendants and assigned them harsher punishments.[88] Another found that white male subjects were more likely to focus on empathy for white male defendants during jury deliberation and more likely to downplay the importance of empathy for Black male defendants—and that the increased focus on empathy in white defendant cases led to significantly more life sentences.[89] More generally, an early meta-analysis of existing experimental studies on race-of-defendant effects in mock jury sentencing reported that, despite some inconsistent findings in individual studies, overall Black defendants tended to be sentenced more harshly than others, and that "studies

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86 *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1626 (1985) (reviewing the literature).

87 Professors Phoebe Ellsworth and Sam Sommers conducted a number of sophisticated studies on guilt attribution, which taken together explore conditions under which racial bias skews guilt determinations. *See, e.g.*, 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, 1006 (2003) (examining mock juror studies demonstrating white juror bias). We focus here, however, on the literature on bias in sentencing, even though racially biased guilt attribution also affects capital sentencing, both in the cases of factually innocent defendants, and in cases where determination of mental state, degree of participation in a crime, or credibility of alleged prior criminal behavior affects sentencing.

88 James D. Johnson et al., *Rodney King and O.J. Revisited: The Impact of Race and Defendant Empathy Induction on Judicial Decisions*, 32 J. APPLIED SOC. PSYCH. 1208, 1215–16 (2002); *see also* Ruben T. Azevedo et al., *Their Pain Is Not Our Pain: Brain and Autonomic Correlates of Empathic Resonance with the Pain of Same and Different Race Individuals*, 34 HUM. BRAIN MAPPING 3168, 3179 (2013).

89 Mona Lynch & Craig Haney, *Emotion, Authority, and Death: (Raced) Negotiations in Mock Capital Jury Deliberations*, 40 L. & SOC. INQUIRY 377, 402 (2015) [hereinafter Lynch & Haney, *Emotion, Authority, and Death*].

demonstrating greater methodological rigor more consistently uncovered racial bias in sentencing decisions."[90]

Professors Mona Lynch and Craig Haney have created a body of work that both documents prevalent racial bias in capital sentencing and explains how it occurs.[91] Their studies of mock jurors found that Black defendants were sentenced to death more frequently than white defendants and that the biased results were solely attributable to white male mock jurors.[92] Lynch and Haney then—in a study with over 500 subjects—examined what lay behind the propensity of white males to sentence Black defendants to death at higher rates, even under carefully controlled circumstances. In virtually every respect, white men—unlike men of color or women of any race—viewed the exact same penalty phase differently depending on the race of the defendant.[93] White men were significantly less likely to consider each of the four types of mitigating evidence with which they were presented as favoring

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90 Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 191 (1992).

91 *See, e.g.*, Lynch & Haney, *Emotion, Authority, and Death*, *supra* note 89 (presenting the results of a mock jury study indicating that the expression of emotion in jury deliberations disadvantages Black defendants); Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. HUM. BEHAV. 481, 492–93 (2009) (discussing the results of a mock jury study that indicated jury deliberations do not reduce the disparate treatment of Black defendants); Lynch & Haney, *Empathic Divide*, *supra* note 77, at 78 (arguing that a mock jury study demonstrated that white, male jurors are significantly more likely to convict Black defendants to death); Mona Lynch, *Stereotypes, Prejudice, and Life-and-Death Decision Making: Lessons from Laypersons in an Experimental Setting*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 182, 184–200 (Charles J. Ogletree, Jr., & Austin Sarat eds., 2006) (collecting previous studies conducted by Lynch and Haney); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUM. BEHAV. 337, 349 (2000) (presenting a study linking instructional comprehension of jury instructions and discrimination against Black defendants).

92 Lynch & Haney, *Empathic Divide*, *supra* note 77, at 78. These mock jury findings are consistent with those of the Capital Jury Project, which interviewed jurors who actually had sat on capital cases:

> Specifically, when the jury included five or more white men, the jury was significantly more likely to sentence the defendant to death than when it included four or fewer white men (71 percent versus 30 percent ending in death sentences). Conversely, the same study also uncovered what the researchers termed a "black male presence" effect, such that the presence of one or more black men on the jury significantly reduced the likelihood of a death sentence in the case.

Id.

93 *Id.* at 80.

life for the Black defendant as compared to the white defendant.[94] They weighed the aggravating evidence about the murder itself and the testimony that the defendant did not express any remorse for the crime significantly more in favor of death for the Black defendant than the white defendant.[95] Unlike other participants, white male jurors also viewed the Black defendant as less remorseful and more coldhearted.[96]

Participants also answered questions about the defendant's motivations for committing the capital crime.[97] White male participants were significantly more likely to agree with internal, aggravating attributions for the Black defendant compared to the white defendant, and significantly less likely to agree with several of the mitigating attributions for the Black defendant, particularly those central to the hypothetical case they were evaluating: that the defendant committed the crime due to a traumatic childhood and that he committed the crime because he suffered from mental illness.[98] White male jurors also were significantly more likely to agree that the Black defendant enjoyed harming others and that he was violent by nature.[99]

The evidence from mock jury studies, plus the history of race and capital punishment in this country should convince a fair-minded reader that results of numerous statistical studies showing correlations between race and death sentences are not "unexplained." But there is much more; since *McCleskey*, social psychologists have also developed new tools to measure bias that, like mock jury studies, do not rely on self-reports. These tools include implicit attitudes tests, the shooter studies, stereotypicality assessments, and animal association studies, all of which provide significant confirmation of the prevalence of racial bias, particularly subconscious bias.

b. *Implicit Association Tests*

Developed in the 1990s, Implicit Association Tests, or "IATs," are now familiar measures of unconscious bias.[100] The IAT was developed to measure the relative strength with which

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94 *Id.* at 88.
95 *Id.* at 88–89.
96 *Id.*
97 *Id.* at 89.
98 *Id.*
99 *Id.* at 90–91.
100 Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464 (1998).

racial groups are associated with positive and negative evaluations and has since been employed to measure attitudes about varied issues, including gender, age, and politics. All variations of the IAT use some form of response latency to assess which attitudes that are "automatic," i.e., not subject to intentional control, and they are premised on the assumption that it is easier—and therefore faster—to make the same behavioral response to concepts that are associated than to concepts that are not associated. In the race IAT, the subjects are asked to complete two trials; in one they must pair a series of "good" words (such as flower, pretty, love) with pictures of white faces and "bad" words (such as hate, vomit, ugly) with pictures of Black faces, and in the other, pair Black faces with good words and white faces with bad words.[101] If the subject can more quickly complete the task in the white or good (and Black or bad) pairing than in the Black or good (and white or bad) pairing, it means that the subject automatically pairs white with good—and Black with bad.

About 80% of white adults are significantly faster at the white/good and Black/bad pairing than at the Black/good and white/bad pairing.[102] Educated subjects are no less likely to display implicit racial bias than are subjects without college educations, and even legal training does not diminish the frequency of Black/bad bias.[103] Implicit bias is only weakly correlated with racial attitudes the subject consciously endorses;[104] thus, questioning a person about the stereotypes

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101 Computer versions of the IAT that confront the subject with a series of words and faces are most common. For one part of the test, the computer asks the subject to press one key for white-or-good and another for Black-or-bad, and for the other part of the test, the computer asks the subject to press one key for Black-or-good and another for white-or-bad. Half of the subjects receive the white-or-good/Black-or-bad pairing first, and half the Black-or-good/white-or-bad to make sure the order of the pairings is not producing spurious correlations. A paper and pencil version of the test is also available. In the paper and pencil version, subjects are faced with a column of words and faces, which they are asked to categorize as quickly as possible without making too many mistakes in twenty seconds.

102 Greenwald, McGhee & Schwartz, *supra* note 100, at 1474.

103 *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545 (2004) (presenting the results of an IAT with lawyers as subjects); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1208 (2009) (presenting the results of an IAT with judges as subjects).

104 Whether this weak correlation stems from a difference between conscious and unconscious bias, or from subjects' unwillingness to admit or endorse bias is unclear. Bertram Gawronski, *Six Lessons for a Cogent Science of Implicit Bias and Its Criticism*, 14 PERSPS. ON PSYCH. SCI. 574, 575–78 (2019) (reviewing the relevant literature).

he or she holds is very unlikely to reveal implicit bias. As a group, African Americans are neutral in their associations between Black or white and good or bad, though there is individual variation.[105] This is particularly unfortunate because most capital juries are all-white or nearly all-white.[106]

The IAT literature is now vast. In the early years of IAT studies, it was unclear whether these implicit associations predicted discriminatory behavior. In the last 15 years or so, however, IAT scores have been correlated with a wide set of judgments and behaviors,[107] including cardiologists' diagnoses[108] and employment decisions by HR professionals,[109] though no work of which we are aware correlates those scores with decisions with criminal justice outcomes. One particularly pertinent study, however, asked pediatricians to read identical case vignettes to examine how their implicit racial attitudes affect treatment recommendations; as pediatricians' pro-white implicit biases increased, they were more likely to prescribe painkillers for vignette white patients as compared to Black patients.[110]

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105 Eisenberg & Johnson, *supra* note 103, at 1540 (reviewing the literature and replicating the finding). Asian Americans look very much like white Americans in their responses.

106 The small number of African Americans serving on juries is not solely attributable to their numbers in the population; they are disproportionately removed from the jury pool by challenges for cause and by prosecutor's peremptory challenges. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1554 (2012); *see also* Lynch & Haney, *Empathic Divide*, *supra* note 77, at 73 (reviewing the literature and concluding that, compared to juries seated in non-death cases, death-qualified jury pools are disproportionately white, male, older, and more religiously and politically conservative).

107 For several years the Kirwan Institute of Ohio State University has published summaries of these and other implicit bias findings. *See, e.g.*, KIRWAN INSTITUTE, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014, http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf [https://perma.cc/4TWC-UN96] (presenting the summaries of implicit-bias studies conducted in 2014). Perhaps because the amount of implicit bias literature has become overwhelming, it appears that these reports have been discontinued.

108 *See* Chloë FitzGerald & Samia Hurst, *Implicit Bias in Healthcare Professionals: A Systematic Review*, 18 BMC MED. ETHICS 19, 23–24 (2017).

109 Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCH. 553, 561 (2005).

110 Janice A. Sabin & Anthony G. Greenwald, *The Influence of Implicit Bias on Treatment Recommendations for 4 Common Pediatric Conditions: Pain, Urinary Tract Infection, Attention Deficit Hyperactivity Disorder, and Asthma*, 102 AM. J. PUB. HEALTH 988, 992 (2012).

c. *The Shooter Studies*

The best-known evidence of unconscious associations is the IAT data. The next best-known—especially after the rash of highly publicized police shootings of African Americans—are the shooter studies.[111] Subjects play a video game with a target who is carrying an object, either a gun or a tool, and the subject is asked to "shoot" if the object is a gun and to refrain from shooting if it is a tool. As several studies have found, when the target is African-American, there are high rates of errors in mistaking a tool to be a gun; when the individual is white, there are substantial errors in mistaking a gun to be a tool.[112] Whites, African Americans, Asian Americans, and Latinos all make these mistakes.[113]

d. *Stereotypicality Studies*

Consider two crime scenarios. The first is an armed robbery of a gas station, a violent robbery with lots of threats, the firing of a gun, and the theft of $170; the second is fraud committed upon an elderly woman where the culprit, posing as an agent for a charity, swindles $170 from the woman. In the description of both crimes to experimental subjects, the perpetrator's face is portrayed as being seen only in passing by a bystander. The subjects are briefly shown a photo of a crowd, told the perpetrator had been in the crowd, and then shown a photo array and asked to determine which man was the perpetrator.

When subjects—including judges—are asked to read the robbery scenario, they tend to select the man with the most stereotypically Black appearance. In contrast, if the subjects

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111 *See, e.g.*, B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCH. SCI. 287, 287–89 (2006) (describing the methodology of shooter studies).

112 *E.g.*, *id.* at 290 (raising potential implications of the results of shooter studies); Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314, 1319 (2002) (discussing the racially disparate results of a shooter study); Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1015 (2007) (analyzing a shooter study conducted amongst police officers); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181, 187 (2001) (aggregating a series of shooter studies).

113 Melody S. Sadler, Joshua Correll, Bernadette Park & Charles M. Judd, *The World is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286, 301 (2012).

are told the fraud story, they most commonly select the photo of the man with the least stereotypically Black appearance.[114]

Thus, it is not difficult to imagine the influence of stereotypically Black appearance on the conviction of the innocent, at least in circumstances where there is limited evidence of the identity of the perpetrator. True, most capital defendants are not innocent, but significant numbers are,[115] and exoneration data suggests that African Americans are disproportionately wrongly convicted.[116]

Moreover, stereotypicality is strongly correlated with the imposition of death sentences. Stanford Professor Jennifer Eberhardt and her coauthors obtained independent ratings of the stereotypicality of capital defendants' cases in Philadelphia from their mug shots.[117] Using data from a Baldus study of Philadelphia capital trials to control for offense severity and other possible confounders, Eberhardt found that in white victim cases defendants who looked more "Black" was twice as likely to be sentenced to death as defendants whose appearance was less stereotypically Black.[118]

e. *Non-human Associations Studies*

Dehumanizing representations of people with African ancestry as animals or animal-like date back nearly to Europeans' first contact with West Africa,[119] and in the not-so-distant past, open comparisons of African Americans to non-human animals were common. Explicit references to African Americans as animals have not disappeared,[120] but they have

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114 Unpublished data on file with Professor Jeffrey Rachlinski, Cornell Law School.

115 176 death row inmates have been exonerated since 1976. *Death Row Exonerations*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/policy-issues/innocence [https://perma.cc/99TH-QPPE] (last visited July 11, 2022).

116 *Id.*

117 Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 384 (2006).

118 *Id.* at 385.

119 Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCH. 292, 292 (2008).

120 *See, e.g.*, Bennett v. Stirling, 842 F.3d 319, 327 (4th Cir. 2016) (holding that the defendant's sentencing was tainted with racially coded references, such as referring to the defendant as "King Kong," to a degree that made a fair proceeding impossible); Sylvia Wynter, *"No Humans Involved": An Open Letter to My Colleagues*, 1 F. N.H.I.: KNOWLEDGE FOR 21ST CENTURY 1, 1 (1994) (discussing the use of the acronym "N.H.I.," meaning "no humans involved," by California

become widely disapproved,[121] and much less common. However, even for those who would disavow them, such associations persist, and have consequences relevant to capital punishment.

In one study, participants were subliminally primed with Black faces, white faces, or a nonface control image.[122] Then they were presented with a series of degraded images of animals (line drawings of apes and non-apes), which they were asked to identify as quickly as possible.[123] As the subject viewed the image, the image quality was made increasingly better, making the animal easier to identify.[124] Regardless of the race of the participant, subliminal priming with Black faces or names enabled discernment of degraded images as being apes faster.[125] Moreover, participants required *more* frames to identify the ape images when primed with White male faces than when not primed at all.[126] Thus, participants' ability to identify apes was both facilitated by Black male faces and inhibited by white male faces.[127] Another study by the same authors found that priming white participants with ape images caused them to look at Black faces, whereas in the absence of the ape prime, white participants directed their eyes toward white faces.[128]

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police to refer to African Americans); *Judge Says Remarks on 'Gorillas' May Be Cited in Trial on Beating*, N.Y. TIMES (June 12, 1991), https://www.nytimes.com/1991/06/12/us/judge-says-remarks-on-gorillas-may-be-cited-in-trial-on-beating.html [https://perma.cc/6NKW-9RBK] (ruling admissible a police officer's comments likening a domestic dispute among African Americans to the movie "Gorillas in the Mist" in the trial for the beating of Black motorist Rodney King).

121 When Jennifer Eberhardt presented her work on ape imagery to the Cornell faculty, several members of the faculty insisted that they had never heard of an association between apes and African Americans, perhaps another example of the fading of explicit bias or—given the age of those who denied knowing of the association—perhaps more likely the faking of fading. *See* Sigall & Page, *supra* note 74, at 247 (discussing the difference between "faking" and "fading"). In any event, as Goff and his colleagues discovered, subjects need not have explicit knowledge of the linkage for it to affect their behavior. Goff, Eberhardt, Williams & Jackson, *supra* note 119, at 301.

122 Goff, Eberhardt, Williams & Jackson, s*upra* note 119, at 295.

123 *Id.*

124 *Id.*

125 *Id.* at 296.

126 *Id.*

127 *Id.*; *see also* Aneeta Rattan & Jennifer L. Eberhardt, *The Role of Social Meaning in Inattentional Blindness: When the Gorillas in Our Midst Do* Not *Go Unseen*, 46 J. EXPERIMENTAL SOC. PSYCH. 1085, 1086–87 (2010) (showing that subjects primed with Black names were more likely to see past task distractions and notice a gorilla in costume crossing the stage than were subjects primed with white names or not primed at all).

128 Goff, Eberhardt, Williams & Jackson, s*upra* note 119, at 297. This association was not driven by a general outgroup bias; an ape prime did not

Moreover, the Black-ape association has consequences; it can alter participants' judgments about violence against a Black target. When primed with apes, participants were more likely to believe that an extreme beating a Black suspect received was justified than when they were primed with big cats; however, participants' judgment of whether beating a white suspect was justified was not altered by ape priming.[129] Another study assessed the extent to which police officers associated Black people with apes and then compared those findings with each officer's use of force as documented in their personnel records; it concluded that the more an officer implicitly associated Black people with apes, the more often that officer had used force against Black children relative to children of other races.[130] Whether ape priming alters the willingness to see even greater violence—execution—imposed upon a Black defendant has not been tested in the laboratory, but analysis of news coverage of capital defendants in Philadelphia does reveal that Black defendants are more likely to be portrayed as apelike than are white defendants and that such portrayals are associated with a higher probability of death sentences, even when researchers controlled for the total number of articles, defendant socioeconomic status, victim socioeconomic status, aggravating circumstances, mitigating circumstances, and crime severity.[131]

2. *Processing Distortions: The Evidence from Cognitive Psychology*

Thus, the implicit bias literature, along with related social psychology findings, establishes that race influences many people's associations, often subconsciously, especially in settings where stereotypes are triggered. Cognitive psychology adds evidence of the prevalence of racial bias, but equally

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increase attention to Asian faces. *Id.* at 299. Moreover, it also was not driven by an association between apes and African and Black people in Africa; a prime of other African animals did not increase attention to Black faces. *Id.* at 300.

129 *Id.* at 302.

130 Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 535 (2014). At the "margins" of dehumanization, as the authors phrase it, is the refusal to see the vulnerability of Black children. *Id.* at 528. Black children as young as ten are seen as older and less innocent. *Id.* at 530–32. These perceptions are important in capital cases, both because youth itself may be mitigating for offenders in the late teens and early twenties, and because actions they have taken at younger ages may be seen as more aggravating if the greater tolerance of adolescent misbehavior is withdrawn.

131 Goff, Eberhardt, Williams & Jackson, s*upra* note 119, at 304.

importantly, it provides insight into how bias is translated into discrimination.

Cognitive psychologists have long studied reasoning and cognitive errors. Shortcuts in our thinking, though they sometimes lead to errors, are necessary. Relevant data may be unavailable, and even when available, often cannot be accessed in time to inform a decision; if everyone evaluated anew the risk of snakes or heights, many of us would be either paralyzed or dead. But cognitive shortcuts—what a layperson might call "intuition"—do lead to errors, and the risk is greatest when the decision maker does not recognize her reliance upon a shortcut.[132] Common shortcuts that lead to reasoning errors and generate racially biased determinations include the halo effect, attribution error, schema accessibility, belief persistence, and confirmation bias.

a. *The Halo Effect*

The first relevant cognitive processing distortion to note is the halo effect.[133] If I have positive affect toward you, I am less likely to notice bad things you do and more likely to see your good deeds. On the other hand, if I dislike you, or think you are conscienceless or lazy, the attention I pay to your good and bad deeds is reversed. Thus, for example, if you and I read the same article, but the author is my friend and your rival, I am more likely to focus on the strengths of the article while you are more likely to remember its weaknesses. Or to take a more pertinent example, when a juror has an implicit association of Black with bad, he is likely to interpret ambiguous information about the purposefulness of a Black defendant's conduct more harshly than if he would were the defendant white, and this is true even for prospective jurors who had *honestly* said in voir dire that race would not affect their judgment.

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132 Ian Scott, *Errors in Clinical Reasoning: Causes and Remedial Strategies*, 339 BRITISH MED. J. 22 (2009). Lawyers and judges commit common cognitive errors at nearly the same rate as laypeople. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816 (2001).

133 *See, e.g.*, THOMAS GILOVICH, DACHER KELTNER & RICHARD E. NISBETT, SOCIAL PSYCHOLOGY 106 (2006) (defining the halo effect); Sheldon J. Lachman & Alan R. Bass, *A Direct Study of Halo Effect*, 119 J. PSYCH. 535, 538 (1985) (discussing the results of a study indicating the existence of the halo effect).

b. *Attribution Error*

Attribution error,[134] closely related to the halo effect, also distorts cognition. If I observe you doing something in a sloppy manner, do I conclude that you are indeed a careless person, or do I infer that you must be tired? Conversely, if I see you generously offering your time to a student, do I think you are a kind person, or do I think you must be trying to impress the dean? Generally, people attribute their own bad behavior to surrounding circumstances, and their own good behavior to their morality (or industriousness, or some other positive trait) But with others, we tend to be not as generous; we are both more likely to attribute their laudable behavior to the circumstances and more likely to attribute their less praiseworthy behavior to character. Race strongly exacerbates this tendency.[135] Because most juries are all or predominantly white,[136] attribution errors likely lead, on average, to harsher judgments of defendants of color. Moreover, attribution error is especially harmful in the capital sentencing context, where a juror must interpret the *meaning* of evidence of good and bad conduct. In deciding whether mitigation outweighs aggravation, when the defendant is of a different race than the juror, the juror is more likely to attribute all of the defendant's bad acts to his character (rather than to child sexual abuse, mental illness, intellectual limitations, or brain damage); he is also more likely to disparage evidence of remorse, good character, or good deeds as faked, or the product of self-interest.

c. *Accessible Schemas*

A third relevant concept from cognitive psychology is that of accessible schemas. Schemas are useful frameworks or concepts that help us organize and interpret information with which we are confronted. At many times, more than one schema could be applied to the information in our environment; which one we employ at a particular time depends on salience and priming, factors which make a

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134 Harold H. Kelley, *Attribution Theory in Social Psychology*, *in* NEBRASKA SYMPOSIUM ON MOTIVATION, 1967, at 192, 200 (1967).

135 SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 80–81 (Philip G. Zimbardo ed., 1991).

136 Lynch & Haney, *Empathic Divide*, *supra* note 77 (reviewing the literature and concluding that compared to juries seated in non-death cases, death-qualified jury pools are disproportionately white, male, older, and more religiously and politically conservative); *see supra* subsection II.B.2(b).

particular schema more or less accessible.[137] Unfortunately, in criminal trial settings, both salience and priming are likely to trigger racial schemas. Race is often salient in a criminal trial because the defendant is the only person of color in the courtroom, or one of very few, or the only person at either counsel table. Racial schemas are likely to be primed in a capital trial because the charge, the evidence, the arguments, and the instructions all are likely to trigger schema associating race and criminality. Other racial schemas may be triggered by interracial crimes, increasing the perception of the virtue (or loss) of the victim as compared to the depravity (or life) of the defendant.

d. *Confirmation Bias*

The fourth cognitive error impeding race-neutral evaluation of death worthiness is confirmation bias.[138] Suppose you formed a strong belief that Oath Keepers leader Stewart Rhodes will be sent to jail for his role in the events of January 6th because you think he is a traitor, and you hope to see him imprisoned. When you hear a newscast describing the prosecution's case, you will both remember it better than one describing the defense evidence and find it more persuasive—because it confirms your prior belief. Interestingly, this may also occur even if you believe Rhodes is a hero and you fear his martyrdom—so long as you have formed the belief that he will be convicted. With race, people who consciously hold negative stereotypes about racial minorities or unconsciously make associations between a racial outgroup and a negative trait will attend more closely to stereotype-consistent information, remember new information supportive of the stereotype better than they remember information impeaching the stereotype or its application to the defendant, remember the stereotype-consistent information in an exaggerated form and stereotype-inconsistent information in a diminished form if at all, and emphasize the importance of stereotype-consistent information.[139] Thus, confirmation bias may lead a juror who associates African Americans with animals, whether or not the juror *consciously* thinks "Black people are like animals," to remember and emphasize testimony that the defendant ignored the pleas of the victim when evaluating the defendant's

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137 GILOVICH, KELTNER & NISBETT, supra note 133, at 408; FISKE & TAYLOR, *supra* note 135, at 148–49.

138 ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 159 (1999).

139 *Id.*

character and deciding on his sentence, while forgetting or dismissing testimony that the defendant himself was locked in a closet for days as a child, and rejecting as unimportant testimony that he risked his own life to save a prison guard from another prisoner's assault.

e. *Belief Persistence*

Thus, halo effects, attribution bias, schema accessibility, and confirmation bias all operate without a juror's awareness, easing the path toward a death sentence when the defendant is a person of color. Moreover, another cognitive processing distortion, belief persistence, dooms attempts to discern whether race has influenced a decision. Justice White's concurring opinion in *Gregg* relies on appellate proportionality review to correct biased jury determinations, claiming that "if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside."[140] But belief persistence renders it unlikely that either proportionality review or requirements that jurors certify that their verdict was uninfluenced by race will actually detect and redress racial bias.

Belief persistence[141] makes an individual who has formed a belief reluctant to revise it, despite evidence that should cast doubt on that belief. If a juror thinks that Black people are lazy, and that's why so many fail to graduate from high school, evidence that a defendant's parents failed to wake him or provide transportation, or that the route to school was dangerous, is unlikely to shake the juror's belief that laziness was the reason he failed to graduate. Similarly, if a juror thinks Black people stick up for each other, he is unlikely to credit the arguments of a Black juror who argues against the death penalty for a Black defendant, even if those arguments have a strong basis in the evidence.

Likewise, belief persistence makes appellate courts conducting proportionality review unlikely to recognize racially disparate treatment (or any other form of arbitrariness, for that matter). Reviewing a death sentence that has already been imposed, judges are likely to emphasize facts about the crime that support the appropriateness of a death sentence and

140 Gregg v. Georgia, 428 U.S. 153, 224 (1976) (White, J., concurring).
141 FISKE & TAYLOR, *supra* note 135, at 150–51.

disregard or deprecate evidence that diminishes the defendant's culpability or his dangerousness, or in other ways undercuts a conclusion of proportionality.

3. *Racially Differentiated Brain Activation: The Evidence from Neuropsychology*

Even more hidden than implicit associations or cognitive errors is the role of the amygdala, a part of the brain "known to play a role in emotional learning and evaluation."[142] Neuroscientists, neuropsychologists, and neurobiologists have studied how the activation of various parts of the brain, particularly the amygdala, differs depending on the race of a stimulus, and their findings are at least as bleak as those from social and cognitive psychology.

a. *Negative Emotions*

Brain activation studies show that for most white people, if annoyance or anger is triggered, that annoyance is greater and lasts longer when the source of the annoyance is African-American than when he is white.[143] Moreover, whites with high levels of implicit bias are quicker to perceive anger in Black faces compared to white faces.[144] Subjects of all races and genders show a greater amygdala activation upon seeing Black male faces than other faces, which is likely a response to perceived threats traceable to stereotypes of Black male violence.[145] Relatedly, the activation of fear in white subjects lasts longer when the source is an African American than when the source is white,[146] and subjects with high implicit racial bias register higher levels of emotion when viewing unfamiliar African-American faces than when viewing unfamiliar white

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142 *See* Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729 (2000).

143 William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCH. SCI. 806, 809 (2004).

144 Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH. SCI. 640, 641–43 (2003).

145 Adam M. Chekroud, Jim A.C. Everett, Holly Bridge & Miles Hewstone, *A Review of Neuroimaging Studies of Race-Related Prejudice: Does Amygdala Response Reflect Threat?*, 8 FRONTIERS HUM. NEUROSCIENCE 1, 4 (2014), http://journal.frontiersin.org/article/10.3389/fnhum.2014.00179/full [https://perma.cc/H4YG-L58N]; *see also* Jennifer T. Kubota, Mahzarin R. Banaji & Elizabeth A. Phelps, *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940, 940–42 (2012) (reporting race-based differences in amygdala response).

146 Andreas Olsson, Jeffrey P. Ebert, Mahzarin R. Banaji & Elizabeth A. Phelps, *The Role of Social Groups in the Persistence of Learned Fear*, 309 SCIENCE 785, 785–86 (2005).

faces.[147] White subjects who are low in explicit measures of prejudice (that is, they deny negative feelings and stereotypes), but high in implicit measures, like the IAT, register high levels of revulsion at shaking hands with a person of color.[148] The consistency of findings documenting greater brain activation of negative emotions when the target is African-American strongly suggests that a juror's (or prosecutor's) response to aggravating evidence would be exaggerated when the defendant is Black.

b. *Positive Reactions*

Empathy, as measured by neural and autonomic responses to the pain experienced by others, depends on the race of the person in pain; extensive research demonstrates that people tend to respond more strongly to the pain of same-race individuals than to the pain of different-race individuals,[149] with degree of implicit bias predicting the size of the empathy differential.[150] What do these findings about positive reactions imply for capital sentencing proceedings? It

147 Phelps et al., *supra* note 142, at 732; *see also* John F. Dovidio, Kerry Kawakami, Craig Johnson, Brenda Johnson & Adaiah Howard, *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCH. 510, 511–18 (1997) (demonstrating that implicit negative racial attitudes among whites may be unconscious and automatic).

148 Jennifer Richeson et al., *An fMRI Examination of the Impact of Interracial Contact on Executive Function*, 6 NATURE NEUROSCIENCE 1323 (2003).

149 Multiple studies reveal different responses to watching hands or faces of the same race, a different race, or a fictitious race (violet) being pricked by a needle or poked with a Q–tip. *See, e.g.*, Alessio Avenanti, Angela Sirigu & Salvatore M. Aglioti, *Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018, 1018–19 (2010) (finding that when white and Black individuals living in Italy observed the pain of same-race and fictional-race individuals, their corticospinal systems were inhibited as if they were feeling the pain, but this did not occur when they observed different-race individuals in pain); Azevedo et al., *supra* note 88, at 3176–79 (examining white and Black participants and finding increased hemodynamic activity within the bilateral anterior insula (an area involved in processing of first- and third-person emotional experiences of pain) for same-race pain); Vani A. Mathur, Tokiko Harada & Joan Y. Chiao, *Racial Identification Modulates Default Network Activity for Same and Other Races*, 33 HUM. BRAIN MAPPING 1883, 1884, 1890 (2012) (finding increased activity within parts of the brain "associated with self-referential and social cognitive processing" when viewing pictures of same-race individuals in a natural disaster); Xiaojing Xu, Xiangyu Zuo, Xiaoying Wang & Shihui Han, *Do You Feel My Pain? Racial Group Membership Modulates Empathic Neural Responses*, 29 J. NEUROSCIENCE 8525, 8528 (2009) (conducting fMRIs of Chinese and white participants and finding reduced neural activity in the anterior cingulate cortex (associated with the emotional experience of pain) when watching different-race faces in pain).

150 See Avenanti, Sirigu & Aglioti, *supra* note 149, at 1019–20 (finding a linear relationship between implicit bias and increased empathic-related brain responses for own-race pain compared to other-race pain); Azevedo et al., *supra* note 88, at 3175–76 (finding the same relationship).

seems a safe prediction that a juror's empathy for a different-race defendant will be decreased, and that his or her empathy for a same-race victim's family will be increased, a finding that is consistent with the results of mock jury studies investigating empathy for criminal defendants.[151]

c. *Facial Recognition*

Face recognition is assigned to the fusiform region of the brain. Most white people, however, when observing faces, have greater activity in the fusiform region when trying to recognize a person of the same race than when trying to recognize a person of color,[152] a difference that increases with darker complexions.[153] And, the greater the subject's level of implicit bias, the greater the difference in activation.[154] Indeed, in significant numbers of white individuals, the fusiform region is not activated *at all* when they attempt to identify a person of another race; one might even say that the brain is not reacting to a different-race face as human.

III
DECREASING THE INFLUENCE OF BIAS ON CAPITAL SENTENCING

A. Revisiting *McCleskey*

Most of the motivation behind this Article was to show that, viewed from yet another lens, *McCleskey* was wrongly decided. That is, not only statistics, history, and doctrine, but also post-*McCleskey* scientific developments bear witness to the explanation of racial disparities: racial bias. What psychologists—social, cognitive, and neuro—now know about racial bias both corroborates the other forms of evidence and explains how bias is translated into discrimination in the capital sentencing arena, generally without conscious malicious intent.

Putting it all together, the evidence from psychology is overwhelming. Animosity and consciously held stereotypes have not disappeared. To the extent they have diminished,

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151 *See* Johnson et al., *supra* note 88, at 1215.

152 Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCH. PUB. POL'Y & L. 3, 21 (2001).

153 Diane P. Ferguson, Gillian Rhodes, Kieran Lee & N. Sriram, *'They All Look Alike to Me': Prejudice and Cross-Race Face Recognition*, 92 BRITISH J. PSYCH. 567 (2001).

154 Phelps et al., *supra* note 142, at 732.

they have largely been replaced by unconscious bias. By one measure, 80% of white Americans associate African Americans with bad.[155] More particularly, they associate them with guns and violence, and in fact, even African Americans associate Black males with violence. The more stereotypically Black a defendant appears, the more likely he is to trigger these associations. The brains of many white people are wired in a way that makes them more afraid of Black people, more quickly and more deeply angered by wrongs committed by a Black person, more willing to inflict pain on a Black person, and more willing to see a Black person as less than human. Taken together, these beliefs, unconscious associations, and cognitive mechanisms make white men—*even in mock jury contexts, where race is far less salient than in a capital trial*—less receptive to mitigating evidence; more likely to place heavy weight on aggravating evidence; more likely to find the defendant coldhearted, violent by nature, and remorseless; and more likely to sentence the defendant to death when the defendant is Black. And for most Americans, their racially biased decision making is not subject to their conscious control but is facilitated by ubiquitous cognitive errors including the halo effect, attribution bias, accessible schemas, confirmation bias, and belief persistence.

Now, it might be that if Supreme Court Justices read psychological literature better than they read history or archival studies, they would revisit *McCleskey*. They should. They really should. However, not counting on that, at least in the near future,[156] it seems wise to turn to the following question: What efforts—short of overturning *McCleskey*—might be made to limit the influence of unconscious bias on capital sentencing, and how effective would such ameliorative measures be? Put differently, if we wanted to create a colorblind death penalty, how would we do it?

B. Avoiding Triggering or Aggravating Pre-Existing Bias

Outside of the capital trial context, some basic prescriptions for avoiding the exacerbation of pre-existing bias would be obvious: Don't prime stereotypes; don't make race salient (or better yet, conceal it entirely); don't emphasize us-

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155 Greenwald, McGhee & Schwartz, *supra* note 100, at 1474; *see also supra* subsection II.B.1(b).

156 Perhaps the day will come. Justice Powell came to regret his vote in *McCleskey* after he had left the Court. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 439 (1994).

them dynamics; don't prime racially differentiated emotions, particularly fear, anger, or empathy; and provide specific criteria for decision criteria before introducing facts. These prescriptions, however, are virtually impossible once a capital sentencing proceeding has begun.[157]

Most importantly, a murder trial with a Black defendant inevitably will prime Black/violence stereotypes and schemas. Presenting mitigating evidence—which is essential in motivating the jury to choose a life sentence over a death sentence—is very likely to trigger other negative stereotypes and schemas, whether that mitigation is related to child abuse or neglect, poverty, deprivation, drug abuse, or low intelligence. Inevitably, the prospect of inflicting pain on a defendant and his family will be less inhibiting when the defendant is Black than when he is white, and the empathy generated for a white victim's family is likely to be greater than for a Black victim's family.

1. *Enforcement of Prohibitions Against Inflammatory Arguments*

There are, however, small steps that could be taken to diminish the number of times and ways that capital trials exacerbate preexisting racial bias. The easiest, truly costless steps would be to enforce existing protections more effectively. Inflammatory arguments that "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process" violate the Fourteenth Amendment.[158] No court of which I am aware now *defends* the use of animal imagery in testimony or arguments as probative.[159] Most courts recognize that arguments comparing a defendant to an animal is inflammatory,[160] and some recognize that testimony characterizing a defendant's actions in subhuman language is

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157 In large jurisdictions, it might be possible to shield prosecutors from the race of the defendant and victim when he or she is making the decision to seek death, although it is not ordinarily attempted. In the federal system, some administrations have attempted to shield the central decision maker from that information, which would be desirable, albeit difficult.

158 Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

159 *See id.* at 180 (criticizing calling the defendant an animal, but not reversing the conviction). However, some courts refuse to find barely disguised subhuman references to be innocent. *See, e.g.*, Bennett v. Stirling, 842 F.3d 319, 324 (4th Cir. 2016) (rejecting the trial court's finding that the use of "King Kong" referred to the defendant's size rather than his race).

160 For an older review of the cases, see Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993).

improper, but *reversals* are rare.[161] Animal imagery in a capital prosecution standing alone is enough to infect a trial with unfairness as to deny due process, and the way to stop it is to reverse death sentences.

Some may argue that on the question of guilt, overwhelming evidence provides assurance that the outcome of the trial would not have been different absent animal images. However, comparing a capital defendant to an animal triggers associations that cannot be dispelled, and are central to deciding whether a *person* should live or die, *so at least with respect to capital sentencing*, animal imagery is never harmless, regardless of the strength of the evidence. More broadly, as I have argued elsewhere, racial epithets should prompt automatic reversals, and racial imagery of every sort should be strictly policed; for without consequences, it persists, and its persistence undoubtedly triggers racial schema much better left dormant.[162]

2. *Enforcement of Equal Protection Rights in Jury Selection*

A second step, also costless if embraced by trial courts, would be vigilant enforcement of *Batson v. Kentucky*,[163] which established the equal protection rights of jurors and defendants against racially motivated exercise of the peremptory challenge. Less discrimination by prosecutors in jury selection would lead to fewer racially biased decision makers. Some racial stereotypes and associations are also held by some African Americans—but some are not, and in particular, African Americans are racially neutral in their assessments of mitigation and aggravation, in their anger at wrongdoers, and in their willingness to inflict pain. A legion of commentators has complained of the ineffectiveness of *Batson*.[164] Although the last five years have seen a pair of

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161 One recent exception is *Bennett*, but it is noteworthy for both the extremity of the racial imagery (calling the defendant "King Kong") and the repetition of other racially inflammatory testimony and argument.

162 *See* Sheri Lynn Johnson, John H. Blume & Patrick M. Wilson, *Racial Epithets in the Criminal Process*, 2011 MICH. ST. L. REV. 755; *see also* Johnson, *supra* note 160 (identifying categories of racial imagery and arguing for automatic reversal when employed by the prosecution).

163 476 U.S. 79 (1986).

164 I am among the most persistent critics. *See, e.g.*, Sheri Lynn Johnson, Batson *from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71, 90 (2014) (providing a perspective of *Batson v. Kentucky* from the "bottom of the well"); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory*

Batson wins in the Supreme Court,[165] many clearly recalcitrant decisions, particularly from the Fifth Circuit, have been permitted to stand.[166] Stronger judicial enforcement of *Batson* would increase the number of African Americans on juries, leading to a decrease in the influence of racial bias. Beyond enforcement of federal equal protection guarantees, state courts could aggressively police the use of race-neutral reasons that are consistently used to decrease the number of people of color on juries, as the Washington Supreme Court has.[167] State statutes, like the one California enacted,[168] could do the same.

3. *Ending Death Qualification?*

Relatedly, there is "death qualification," where some might see trade-offs, though I do not. Although a state may not

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Challenges, 35 WM. & MARY L. REV. 21, 22 (1993) (focusing on the perspective that race-based jury selection denies the defendant her equal protection of the laws); Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 477 (1998) (focusing on ethical prosecutors and trial judges); Sheri Lynn Johnson, *Race and Recalcitrance: The* Miller-El *Remands*, 5 OHIO ST. J. CRIM. L. 131, 131 (2007) (demonstrating that *Hightower v. Terry* and *Snyder v. Louisiana* reflect race-based resistance to the Supreme Court); *see also* Ann M. Eisenberg, Amelia Courtney Hritz, Caisa Elizabeth Royer & John H. Blume, *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373, 388 (2017) (finding "capital jury selection procedures [in South Carolina] serve to systematically siphon off women and African-Americans through the death qualification process and peremptory strikes").

165 Foster v. Chatman, 578 U.S. 488, 491 (2016); Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).

166 *See, e.g.*, Sheppard v. Davis, 967 F.3d 458, 462 (5th Cir. 2020) (affirming denial of federal habeas relief and finding that defendant failed to establish that prosecution's proffered legitimate reasons for peremptory strike against Black prospective juror were pretext for racial discrimination); Broadnax v. Lumpkin, 987 F.3d 400, 404 (5th Cir. 2021) (same); Chamberlin v. Fisher, 885 F.3d 832, 835 (5th Cir. 2018) (same).

167 Wash. R. Gen. Application 37, Jury Selection, https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf [https://perma.cc/SP28-HYP9] (stating that if a Washington trial court "determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied").

168 The California statute determines that the following reasons for striking a prospective juror are presumptively invalid: expressing distrust of the criminal justice system; having a negative experience with the justice system; having a close relationship with someone charged with or convicted of a crime; speaking English as a second language; providing unintelligent or confused answers; or acting inattentively, are presumptively invalid. CAL. CODE CIV. PROC. § 231.7. The presumption of invalidity may be rebutted only by clear and convincing evidence, and, in the case of confused or inattentive prospects, where the judge observed the conduct. *Id.*

exclude from jury service on a capital case all jurors who are generally opposed to capital punishment, it may, through voir dire, "death qualify" jurors, which means determine which jurors are impaired in their ability to vote for a death sentence and then exclude such jurors for cause.[169] Before *Furman* and *Gregg*, the Supreme Court upheld the practice of death qualification over objections that death-qualified jurors are, as compared to a cross-section of the community, more likely to be biased in favor of the prosecution and conviction-prone, reasoning that "[t]he data adduced . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt."[170] Twenty years later, when the evidence of such a bias could not be dismissed as insubstantial, the Supreme Court "assume[d] for purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries [but held] nonetheless, that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases."[171] But death qualification—in addition to increasing the likelihood of guilty verdicts and death sentences—also increases the likelihood that race will influence capital proceedings. In part, this is because racial minorities and women of every race are less likely to favor capital punishment than are white men[172]—and white men, as discussed above, are more likely to exhibit racial bias in their assessments of both mitigation and aggravation. Equally importantly, however, death qualification is likely to increase racial bias in capital proceedings because racial

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169 Witherspoon v. Illinois, 391 U.S. 510, 513–14 (1968).

170 *Id.* at 517.

171 Lockhart v. McCree, 476 U.S. 162, 173 (1986).

172 *See, e.g.*, James D. Unnever & Francis T. Cullen, *Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race*, 44 J. RSCH. CRIME & DELINQ. 124, 140 (2007) (discussing results of study where African Americans were significantly more likely to oppose the death penalty than whites); Craig Haney, Aida Hurtado & Luis Vega, *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 L. & HUM. BEHAV. 619, 629 (1994) ("[A] number of studies have documented the consistently lower levels of death penalty support among racial minorities, particularly African Americans and the corresponding effects of death qualification on minority group representation on capital juries." (citations omitted)); Joseph W. Filkins, Christine M. Smith & R. Scott Tindale, *An Evaluation of the Biasing Effects of Death Qualification: A Meta-Analytic/Computer Simulation Approach*, *in* THEORY AND RESEARCH ON SMALL GROUPS 153, 163 (R. Scott Tindale et al. eds., 1998) (finding that "minority jurors are more likely to be excluded than white jurors," and that "women are more likely to be excluded from jury service than are men").

animus is one of the most consistent and robust predictors of support for the death penalty.[173] Thus, death qualification disproportionately selects racially biased jurors. True, it is likely to decrease the number of death sentences, not a loss in my view, though one that many death penalty advocates would bemoan.

4. *Vigilance*

Finally, while it may be difficult to come up with encompassing rules for avoiding triggering racial bias precisely because a capital trial inevitably does so in multiple ways on multiple occasions, judges nonetheless can be alert for events that unnecessarily trigger racial associations and attempt to either avoid them entirely or keep them out of the view of the jury. *Deck v. Missouri* recognized that where a court, without adequate justification, orders the defendant to wear shackles visible to the jury during the penalty phase of a capital trial, the defendant need not demonstrate actual prejudice to establish a due process violation;[174] the defendant's appearance in shackles almost always implies to a jury that court authorities consider him a danger to the community. Although *Deck*'s reasoning did not depend on racial associations, judges can borrow its approach: Only when there is adequate justification should events or arrangements that (like shackling) trigger racial associations be permitted. For example, permitting the state to line the back of the courtroom with police officers in uniform—something that *Holbrook v. Flynn*[175] allows—is almost certain to trigger associations of dangerousness and is within the discretion of a trial judge to forbid. Similarly, rather than asking the entire venire, "Have you been convicted of a felony?" and making those who answer march to the bench for a determination of their eligibility to serve, a judge could take care of the matter on questionnaires or during individual voir dire. Doing so avoids unnecessarily priming race and criminality (which, due to confirmation bias, will occur even though Black and white venire members are both identified as having criminal records).

Legislatures too could consider the structure of their death penalties to determine how that structure might aggravate bias. Most prominently, directing jurors' attention to the

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173 James D. Unnever, Francis T. Cullen & Cheryl Lero Jonson, *Race, Racism, and Support for Capital Punishment*, 37 CRIME & JUST. 45, 84 (2008).

174 544 U.S. 622, 624 (2005).

175 475 U.S. 560, 572 (1986).

question of "future dangerousness," as Texas does, seems almost certain to trigger racial schema.

C. Countering Bias

More ambitious than avoiding the exacerbation of bias would be attempts to affirmatively tackle preexisting bias. Once psychologists recognized the prevalence of unconscious bias, they began to study ways to counteract it. A variety of measures have been proposed, and some may be quite useful for judges, court personnel, prosecutors, and defense counsel who are willing to examine their own unconscious attitudes and work at altering them.[176] Unfortunately, most of what they have learned has limited potential to diminish the influence of bias on jurors.

1. *Reducing Unconscious Bias*

One might think that informing individuals of their own biases and then instructing them to repress biased thoughts would be useful, but the literature suggests that this often produces rebound effects; deliberate suppression of automatic stereotypes does not reduce them and may make them greater by making them hyper-accessible.[177] Rather, "[i]nhibiting stereotype-congruent or prejudice-like responses and intentionally replacing them with nonprejudiced responses [is like] breaking . . . a bad habit," and requires "intention, attention, and time" so that new responses are learned well enough to compete with the formerly automatically activated responses.[178] Choosing to openly acknowledge one's biases, and then directly challenging or refuting them, can help an individual overcome them, but a capital trial neither leaves

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176 For a compendium of such advice, see NATIONAL CENTER FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS 19–20 (2012), https://cdn.ymaws.com/www.napaba.org/resource/resmgr/2015_NAPABA_Con/CLE_/400s/404_NAPABA2015CLE.pdf [https://perma.cc/KTL7-QEFC]; *see also* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169–86 (2012) (identifying intervention strategies to address implicit biases in the justice system).

177 *See* Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. PERSONALITY & SOC. PSYCH. 708, 710 (2000); Adam D. Galinsky & Gordon B. Moskowitz, *Further Ironies of Suppression: Stereotype* and *Counterstereotype Accessibility*, 43 J. EXPERIMENTAL SOC. PSYCH. 833, 839 (2007); C. Neil Macrae, Galen V. Bodenhausen, Alan B. Milne & Jolanda Jetten, *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCH. 808, 813–14 (1994).

178 Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5, 15–16 (1989).

sufficient time for that process nor can force a juror to engage in it. Another long-term strategy has shown great promise: positive intergroup contact,[179] particularly when the contact is equal status. However, it too is clearly unavailable with respect to juries, though it can be recommended to other criminal justice system participants.

Some shorter-term strategies are available—shorter-term both in the sense that they take less long to accomplish and in the sense that their results are shorter lived—but the most successful are not appropriate for use in capital trials. Interventions that explicitly counter stereotypes and train individuals to develop new associations have found some success, but there is no precedent for requiring such training for jurors, and the effects of such trainings would not be expected to last the length of a trial, so they would have to be repeated.[180] Exposure to counter-stereotypic, positively perceived exemplars (such as Michael Jordan, Colin Powell, and Martin Luther King Jr.) significantly decreased IAT automatic white preferences,[181] and such exposure seems relatively easy to create in a courthouse. However, one limitation of the exposure research is that it deems the persistence of the effect for 24 hours to be evidence that it had "staying power;" another problem is that the subjects were primed both with images of admired African Americans and with disliked whites, such as Jeffrey Dahmer, Timothy McVeigh, and Al Capone.[182] The authors suggest "creating environments that highlight admired and disliked members of various groups . . . may, over time, render these exemplars chronically accessible so that they can consistently and automatically override preexisting biases."[183] Though less demanding than long-term strategies, these short-term strategies, upon examination, also seem impractical in the context of capital trials.

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179 *See, e.g.*, E. Ashby Plant, B. Michelle Peruche & David A. Butz, *Eliminating Automatic Racial Bias: Making Race Non-Diagnostic for Responses to Criminal Suspects*, 41 J. EXPERIMENTAL SOC. PSYCH. 141, 153 (2005) (reporting diminution in bias among police officers).

180 *See* KIRWAN INSTITUTE, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013 54–55, http://www.kirwaninstitute.osu.edu/reports/2013/03_2013_SOTS-Implicit_Bias.pdf [https://perma.cc/FK5A-UBZP] (reviewing the literature).

181 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. PSYCH. 800, 803 (2001).

182 *Id.* at 802.

183 *Id.* at 807.

Professor Jerry Kang and his coauthors have proposed that a more modest form of exposure to counter-stereotypic individuals might be employed in courtroom settings: the use of posters, pamphlets, photographs, and similar materials that could provoke counter-typical associations in the minds of jurors and judges.[184] It would be possible to place photos of African Americans who are esteemed in courtrooms across America, and the Center for State Courts recommends replacing stereotypic images "with non-stereotypic or counter-stereotypic information [to] decrease the amount of daily exposure court employees and other legal professionals have with the types of social stereotypes that underlie implicit bias."[185] However, there are two reasons to question the efficacy of exposing jurors to such non-stereotypic images. First, studies (one very large, comprised of nearly half a million individuals) examined whether Barack Obama, as a high-status Black exemplar, shifted implicit or explicit racial attitudes by his candidacy and presidency; the researchers found little evidence that implicit racial attitudes changed systematically due to Obama's presence as a counter-stereotypic exemplar.[186] Second, efforts to replicate the earlier work on reduction of implicit bias through exposure to counter-stereotypical individuals have produced only very small decreases in bias levels.[187]

It might be hoped that informing jurors (and prosecutors and judges) of their biases would either decrease those biases or inhibit their expression. Some commentators have suggested requiring jurors to take a race IAT and providing them with the results,[188] and one judge routinely informs juries of the research on implicit bias and warns them to guard against it.[189] Although it is possible that an IAT might prompt

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184 Kang et al., *supra* note 176, at 1171.

185 NATIONAL CENTER FOR STATE COURTS, *supra* note 176, at Appendix G.

186 Kathleen Schmidt & Brian A. Nosek, *Implicit (and Explicit) Race Attitudes Barely Changed During Barack Obama's Presidential Campaign and Early Presidency*, 46 J. EXPERIMENTAL SOC. PSYCH. 308, 310 (2010); Jill E. Lybarger & Margo J. Monteith, *The Effect of Obama Saliency on Individual-Level Racial Bias: Silver Bullet or Smokescreen?*, 47 J. EXPERIMENTAL SOC. PSYCH. 647, 649–50 (2011).

187 Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCH. 137, 139 (2010).

188 *See, e.g.*, Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) (discussing various proposals and their relative merits).

189 Judge Mark Bennett, a U.S. district court judge, gives the following instruction:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions,

self-reflection, it is also possible that it might create rebound effects,[190] and indeed, it seems likely that its effects will not be uniform; a compromise might be to encourage jurors to take an IAT but not require it. An instruction seems even less likely to be interpreted as accusatory and therefore less likely to create rebound effects, but its efficacy is unknown. Even the best-intentioned juror might not know what to do with such an instruction; she may not know how to determine if she is a person influenced by such bias, and if so, what sort of discount or adjustment she is supposed to apply to correct for that bias.

2. *Reducing the Influence of Unconscious Bias*

a. *Race-switching*

Instructing a juror about unconscious bias straddles two goals: decreasing bias and decreasing the influence of bias. If we give up on decreasing bias itself and focus on minimizing the influence of bias, there are other kinds of instructions to consider. One possible such instruction is general, but still concrete: Tell the jurors to determine how they would evaluate the evidence if the race of the defendant (and sometimes, that of the victim as well) were different. It is important to note that such an instruction does not track the practice in federal capital cases, where jurors are required to certify *after reaching a verdict* that consideration of the race, color, religious beliefs,

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

Id. at 859.

190 *See, e.g.*, Phillip Atiba Goff, Claude M. Steele & Paul G. Davies, *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCH. 91, 95 (2008) (finding that white male students reminded of the stereotype that whites are racist and told that they would be discussing racial profiling with two partners placed their chairs further away from their partners' seats when they thought their partners would be Black than when they thought their partners would be white); *see also* Tiffany L. Green & Nao Hagiwara, Opinion, *The Problem with Implicit Bias Training*, SCI. AM. (Aug. 28, 2020), https://www.scientificamerican.com/article/the-problem-with-implicit-bias-training [https://perma.cc/533T-TALZ] (noting the growth of implicit bias training, the lack of data establishing its effectiveness, and the risk that training will exacerbate bias).

national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.[191]

When jurors finally reach that question on the verdict form after agreeing upon their verdict, confirmation bias and belief persistence virtually assure that they will sign it, and I am aware of no case in which a juror has failed to sign this certification. However, were jurors asked to imagine their reactions to the evidence if races of the parties were switched *before* reaching a verdict, perhaps even at the beginning of jury deliberations, and if they took that instruction seriously, bias might thereby be reduced.

Alternatively, as Professor Cynthia Lee has proposed,[192] jurors might be asked questions in voir dire that point to race switching—"The defendant in the case is African-American and the victims are White. How might this affect your perceptions of the trial?" or "In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?"[193] Professor Lee points to several mock jury studies where such questions decreased the number of guilty verdicts for Black defendants.[194] However, as she acknowledges, there is a risk that poorly executed questioning might exacerbate bias; other studies she cites find that exaggerating racial disproportion in imprisonment or stop-and-frisk decisions leads to *greater* support for punitive responses.[195] Moreover, even accurate information about racial disparities in capital punishment has been shown to increase support for the death penalty.[196] What effect carefully worded questions would have upon capital sentencing, as opposed to guilt determinations, is not clear.

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191 18 U.S.C. § 3593(f) (2018).

192 Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 867–69 (2015).

193 *Id.* at 862.

194 *Id.*

195 *Id.* at 863–66.

196 Jon Hurwitz & Mark Peffley, *And Justice for Some: Race, Crime, and Punishment in the US Criminal Justice System*, 43 CANADIAN J. POL. SCI. 457, 469–70 (2010).

b. *Case-specific Instructions or Testimony*

Other case-specific instructions might be helpful. As a handful of courts have already concluded,[197] instructions on the greater likelihood of error in cross-racial identification, augmented with the brain activation studies that explain it, could be important in cases where identity is an issue. The information that such an instruction could provide might also be presented by experts, perhaps even more effectively because case-specific details could be addressed.[198] Although most capital cases do not depend on cross-racial identifications, in those that do, instructions or expert testimony could be significant.

In contrast, future dangerousness is at issue in virtually all death penalty cases, whether or not the governing statute focuses jurors' attention upon it, as it does in Texas. As *Turner v. Murray* acknowledged, jurors who believes that African Americans are violence-prone may be influenced in their determination of aggravating factors, may place less weight on mitigating evidence, or because of their "[f]ear of blacks, which could easily be stirred up by the violent facts of petitioner's crime," may lean toward a death sentence.[199] The Capital Jury Project, a "multistate research effort designed to better understand the dynamics of juror decision making in capital cases," attests to the unparalleled importance of future dangerousness to jurors;[200] a defendant's perceived future

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197 *See, e.g.*, United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972) (prospectively adopting the instruction "You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness"); State v. Henderson, 27 A.3d 872, 925–26 (N.J. 2011) (holding that research on own-race bias requires giving a charge describing the phenomenon in all cases where cross-racial identification is at issue). *But see* State v. Miles, 585 N.W.2d 368, 371–72 (Minn. 1998) (declining to follow the New Jersey rule).

198 *See, e.g.*, State v. Copeland, 226 S.W.3d 287, 302–04 (Tenn. 2007) (reversing conviction for failure to admit expert testimony on cross-racial identification). *See generally* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984) (advocating both instructions and expert testimony).

199 476 U.S. 28, 35 (1986) (plurality opinion).

200 *See generally* John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue"*, 86 CORNELL L. REV. 397, 398–99, 402 (2001) ("We find that future dangerousness is on the minds of most capital jurors, and is thus 'at issue' in virtually all capital trials . . . ."). Future dangerousness overshadows evidence presented in mitigation, such as the defendant's intelligence, remorse, alcoholism, or mental illness. *See* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 5–6 (1993).

dangerousness trumps mitigation of any sort. That race influences interpretation of violence and perceptions of dangerousness is supported by stereotype research, by Capital Jury Project interviews,[201] by David Baldus's Philadelphia study, by IATs, by the shooter studies, and by the brain activation studies. Thus, one could wish for an instruction (or expert testimony) concerning the way in which race and violence associations distort decision making that would diminish those associations, or inhibit their activation, or decrease their influence. To date, there are no models of such instruction of which I am aware, and any such instruction would have to carefully navigate between making jurors aware of unconscious associations and making them more salient.

It is possible that instructions or testimony on other aspects of racial bias, such as credibility determinations, associations with drugs, or gang membership, might be developed, but I am aware of no related research.

c. *Time and Task Modifications*

Biased decisions are more likely when decision making must be quick, more likely when the task is complex, and more likely when there are no specific rules established in advance. Slowing down decision making decreases the influence of racial bias, and compared to many decisions, the choice of a life-or-death sentence is not a hurried one;[202] that helps, and perhaps the decision would be even less hurried were juries not sequestered. However, the task is extraordinarily complex, and mostly, it lacks rules; complexity and the lack of standards are inevitable concomitants of individualized decision making. Nonetheless, jurors who understand instructions exhibit less racial bias,[203] so making instructions easier to comprehend would help.

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201 *See* Blume, Garvey & Johnson, *supra* note 200, at 398–99.

202 Whether group deliberation decreases racially biased decision making may depend on the racial composition of the deliberating group. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 606 (2006).

203 Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUM. BEHAV. 337, 347 (2000).

3. *Recognizing and Redressing Individual Instances of Bias*

It is beyond the scope of this Article to consider the implications of the unconscious bias literature for the wide variety of specific bias claims that might arise, such as selective prosecution claims,[204] disqualifications for cause claims,[205] juror misconduct claims,[206] proportionality claims,[207] and ineffective assistance of counsel claims.[208] The impossibility of entirely avoiding exacerbating racial bias in the course of a capital trial, the impracticality of using debiasing techniques with jurors, and the lack of effective means for inhibiting the expression of bias in the decisions of juries, all argue for generosity in recognizing and redressing these and other individual instances of bias. However, remedying observable instances of racially biased decision making, while desirable, is almost exclusively useful with respect to conscious bias, and will not reach beyond it.

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204 At least by its terms, *McCleskey* does not preclude such claims, though lower courts have interpreted it to do so. *See supra* discussion at subpart I.E.

205 *Thomas v. Lumpkin*, 995 F.3d 432 (5th Cir. 2021), raises the question of whether antipathy toward interracial marriage should disqualify jurors from sitting in a capital case where the Black defendant was married to a white woman. Three seated jurors expressed opposition to people of different races marrying and having children—writing on their voir dire questionnaires that such relationships are "against God's will," that we should "stay with our Blood Line," and that the children of interracial relationships are denied "a specific race to belong to"—and never disclaimed those views or stated that they could set them aside. As this Article goes to press, Thomas's petition for certiorari is pending before the Supreme Court, having already been set for conference 20 times.

206 "[W]here a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017). The question, of course is how the judge will decide whether that statement denied the jury trial guarantee, a matter on which *Peña-Rodriguez* offers no guidance; the mechanisms of unconscious bias described in this Article weigh heavily against any conclusion that, in the face of explicit statements of bias, the jury trial guarantee nonetheless could have been honored.

207 *See* Moore v. Stirling, 871 S.E.2d 423, 442 (S.C. 2022) (Hearn, J., concurring in part and dissenting in part) (criticizing majority for refusing to consider influence of race in proportionality analysis).

208 *See* Sheri Lynn Johnson, *Racial Antagonism, Sexual Betrayal, Graft, and More: Rethinking and Remedying the Universe of Defense Counsel Failings*, 97 WASH. U. L. REV. 57, 100 (2019).

CONCLUSION

> *"[W]e decline to assume that what is unexplained is invidious."*

McCleskey was wrong. Racial disparities in the imposition of capital punishment were not "unexplained" when *McCleskey* was decided, though they are better understood today. Racial bias is the explanation for those disparities, an explanation that is hideously "invidious."

But it was not only *McCleskey* that was wrong. Social, cognitive, and neuropsychology not only confirm the source of racial disparities, but together provide an explanation for *how* bias is translated into discrimination. Findings from those disciplines make it plain that *Gregg*'s faith in guided discretion was misplaced. *Furman* was right; at least in America, capital punishment is "pregnant with discrimination."[209]

209 Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring).