

LOOKING ACROSS THE EMPATHIC DIVIDE:
RACIALIZED DECISION MAKING ON THE CAPITAL
JURY*

Mona Lynch** & Craig Haney***

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INTRODUCTION

Consider the following two excerpts taken from recorded deliberations in a capital jury decision-making experiment that we conducted some years ago.¹ Both “jurors” heard the exact same penalty phase case, including evidence that the defendant, “Mitchell Hall,” had been severely abused by his stepfather as a child and suffered a number of other problems as he grew up. Both jurors were White men who came to the study expressing the same level of general support for the death penalty. A key difference between them, however, was that Juror 305-5 viewed the version of the penalty trial in which Mitchell Hall was depicted as White, whereas Juror 403-4 viewed the version in which Hall was Black. Here is how they argued for their respective positions in the simulated juries during deliberations:

I could really identify with the defendant, because that is a story that I hear all too often and have experienced exactly the same thing in my own family that he expe-

* We continue to owe a deep debt of gratitude to the late David Baldus for his trailblazing efforts in closing the gap between the empirical realities of the American death penalty and the political and legal fictions that keep it alive. His work has long influenced and inspired our own, including the research that we discuss in this Article.

** University of California, Irvine.

*** University of California, Santa Cruz.

1. Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481 (2009) [hereinafter *Capital Jury Deliberation*]; Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide,”* 45 LAW & SOC. REV. 69 (2011) [hereinafter *Mapping the Racial Bias*].

rienced. I didn't go out and kill anybody and our case may not have been so bad as his family's, but everything that was . . . done in that family by that stepfather was done by my father in my family. So I put myself in that position, if I did snap, like he did. I guess, because I could relate to it so much, I could be more empathic. (Juror 305-5, arguing for a life sentence.)

I don't need to know that this guy was whipped. I feel bad for him. I don't need to know about his three kids. I feel bad for them. I grew up without a dad, so I feel bad for them. ALL I need to know is that this guy went and came back with his socks [and stuffed them down the victim's throat and killed him]. (Juror 403-4, arguing for a death sentence.)²

Although we concede that two short deliberation excerpts prove very little about the way that race influences death penalty decision making, we believe they are poignant illustrations of a psychological phenomenon that we will argue continues to plague capital juries: a tendency for White jurors—especially White male jurors—to interpret many common penalty phase facts and circumstances as potentially mitigating for a White defendant but to see those same things as irrelevant or even aggravating for a defendant who is Black. Indeed, the above contrasting quotations seem to epitomize what one of us earlier termed the “empathic divide”³ that separates capital jurors from defendants, and the way that the racial dynamics of a case can significantly reduce the chances that it will ever be traversed.

Thus, Juror 305-5 was able to see and appreciate the defense penalty phase evidence in human terms and to attach exactly the mitigating significance to it that the defendant's lawyers intended and hoped it would have. He not only drew parallels between his own life experiences and those of the White defendant, but also explicitly cited the “empathic” feelings these connections produced in him as the basis for his life verdict. On the other hand, Juror 404-3, who sat in judgment of a Black defendant who was depicted as having committed exactly the same criminal acts and experienced exactly the same troubled life history, was unable or unwilling to use his insights into the defendant's problematic background as a way of understanding his violent behavior, or to mitigate his level of culpability as a result. Although he said he felt “bad” for the Black defendant and his family, he immediately discounted the implications of those feelings and asserted that the circumstances of the murder itself were “all” that he needed to know in order to sentence Hall to death.

As Anthony Amsterdam recently observed, “A cardinal feature of the death penalty in the United States has always been its racially biased use.”⁴ In the early history of the death penalty, of course, its racially biased use

2. Transcript on file with authors.

3. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557 (2004).

4. Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 35 (2007).

was explicit, and capital punishment operated within a larger legal system in which de jure racial animus was codified by law. The fact that even now—decades after the passage of anti-discrimination laws and the implementation of legal doctrines intended to drastically reduce the role of extra-legal factors like race—this “racially biased use” is *still* one of the death penalty’s cardinal features requires explanation. In this Article we try to provide some of that explanation by briefly examining the problem of racial bias in capital cases generally and its operation within capital juries in particular, as well as addressing some of the ways that it might be effectively remedied.

In Part I we provide a brief summary of the empirical research that demonstrates the way that juror demographics and defendant race interact to produce race-based death sentencing. Part II explores some of the psychological dynamics that we believe are at the core of discriminatory death sentencing by capital jurors, particularly the tendency of White jurors to more often sentence Black defendants to death. In Part III, after briefly examining some of legal approaches that have been used to address this problem in the past, as well as the evidence of how and why they have fallen short of doing so, we propose a set of reforms that focus more precisely on the core psychological issues that we believe are at the heart of this problem.

I. PERSISTENT RACE-BASED DEATH SENTENCING IN THE “MODERN ERA” OF CAPITAL PUNISHMENT

A wealth of empirical evidence collected over the last several decades has documented the way that race continues to influence death sentencing. Indeed, it has persisted well into the “modern” post-*Furman* era of capital punishment, a time when the influence of extra-legal variables on juror decision making was supposed to have been brought under control.⁵ Much of this research owes its inspiration to the late David Baldus who, along with his colleagues, pioneered the use of sophisticated regression analytic techniques to examine the important role that race plays in actual capital cases. By controlling for and parceling out the influence of many competing, potentially explanatory variables, regression analysis has allowed researchers to make a strong case that all stages of the capital trial process—from charging decisions to jury penalty phase verdicts—are influenced by racial factors. The large-scale study that Baldus and his colleagues conducted on the influence of race on death sentencing in the state of Georgia was the basis

5. *Furman v. Georgia*, 408 U.S. 238 (1972).

of the constitutional challenge in *McCleskey v. Kemp*,⁶ and has since become the “gold standard” of such studies.⁷

Following Baldus’s lead, numerous scholars have used regression analysis to document the influence of race (particularly victim race) on death penalty decision making in a number of other states, including California,⁸ Florida,⁹ Illinois,¹⁰ Maryland,¹¹ Mississippi,¹² Missouri,¹³ Nebraska,¹⁴ New Jersey,¹⁵ North Carolina,¹⁶ and South Carolina.¹⁷ One of the most consistent findings in these studies has been that prosecutors are significantly less likely to initially seek and subsequently pursue the death penalty in cases where the victims are non-White. This suggests that, in some sense, prosecutors seem to comparatively “devalue” victims of Color.¹⁸ The same kind of racial bias—an apparent devaluing of non-White victims—persists into the actual sentencing stage of a capital trial as well, although with

6. 481 U.S. 279 (1987).

7. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL EMPIRICAL ANALYSIS* (1990); *see also* David C. Baldus, George Woodworth & Catherine M. Grosso, *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 151 (2007-2008).

8. Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1 (2005).

9. Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991).

10. Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

11. Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 MARGINS: U. MD. L. J. OF RACE, RELIGION, GENDER & CLASS 1 (2004).

12. Gross & Mauro, *supra* note 10.

13. Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death Eligible Cases*, 51 ARIZ. L. REV. 305 (2009).

14. David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486 (2002).

15. Baldus, Woodworth & Grosso, *supra* note 7, at 151-52.

16. Gross & Mauro, *supra* note 10.

17. Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006).

18. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* (1990) for an early comprehensive review of state level studies. This report indicated that 82% of all studies found a robust race-of-victim effect, which was especially influential at the earliest stages of case processing. *Id.* at 5.

somewhat less effect.¹⁹ Nonetheless, otherwise similarly situated defendants convicted of killing Whites are more likely to receive a death sentence than those convicted of killing Blacks.²⁰ Some of this research also indicates the cases that are *most* likely to be pursued capitally and to end with death sentences are ones in which Black defendants are accused and subsequently convicted of killing White victims.²¹

For example, Raymond Paternoster and his colleagues looked at the multiple decision-making stages in the handling of death-eligible homicides in the state of Maryland, in an attempt to determine the points in the legal process at which the racial characteristics of the cases influenced outcomes.²² Because very different local prosecutorial policies and practices can greatly influence these patterns, the researchers examined race effects at a county-by-county level.²³ Their findings suggested that prosecutorial discretion accounted for much of the race-of-victim effect, but that those biases were not corrected at later stages.²⁴ Most significantly, they found that Blacks charged with killing Whites were the most disadvantaged at each stage of the process, resulting in a cumulative biasing effect.²⁵

Several recent studies have documented racial bias against Black defendants, apart from the interactive effect that the race of defendant has with the race of victim. This work suggests that race-based discrimination against a capital defendant is especially likely to operate in the juries' penalty phase decision making.²⁶ In one such study, Baldus and his colleagues tried to eliminate the role of county-by-county variations in population demographics and differences in local prosecutorial practices by focusing on a single county-level jurisdiction.²⁷ Of course, because death-eligible cases

19. David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1714 (1998).

20. See section IV.B. of Jules Epstein, *Death-worthiness and Prosecutorial Discretion in Capital Case Charging*, 19 TEMP. POL. & CIV. RTS. L. REV. 389 (2010), for a recent review of the empirical evidence at all stages of case processing.

21. Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital Cases*, 46 CRIMINOLOGY 971 (2008); Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes*, 7 JUST. Q. 189 (1990); Baldus, Woodworth & Grosso, *supra* note 7; Gross & Mauro, *supra* note 10.

22. Paternoster et al., *supra* note 11, at 2-3.

23. *Id.* at 12.

24. *Id.* at 38.

25. See *id.* at 26, in which the authors suggest that "the proportion of cases involving a black offender and a white victim increases dramatically as a defendant move[s] further into the process."

26. Baldus, Woodworth & Grosso, *supra* note 7.

27. Baldus et al., *supra* note 19, at 1662; see Barnes, Sloss & Thaman, *supra* note 13, at 305-07, for a sustained discussion of the importance of intra-state geography on death sentencing patterns.

are relatively small in number, and death sentences are extremely rare within the scope of criminal cases, it is difficult to find jurisdictions large enough to mount county-level regression studies. Baldus and his colleagues were able to accomplish exactly this by using homicide case data from the city and county of Philadelphia, Pennsylvania.²⁸

Specifically, they looked at six decision points in the entire death penalty decision-making process and found that race-of-defendant effects were especially pronounced at the jury sentencing stage.²⁹ After controlling for a host of other variables, Black defendants were still significantly more likely to receive a death sentence at the hands of Philadelphia capital juries.³⁰ The race-of-victim effects were also manifested in the juries' decision making—Philadelphia juries were more likely to reach death verdicts in White victim cases—but they were somewhat weaker than the race-of-defendant effects.³¹

In order to better understand the components of this racialized decision-making process, Baldus and his colleagues also looked at whether Philadelphia capital juries handled mitigating evidence differently as a function of the race of the defendant.³² Mitigation—whether and how much of it capital juries find and how they use it in their deliberation—is critically important in every death penalty trial. It is literally the only thing that stands between a capital defendant and a death sentence in virtually every instance. However, mitigation is an especially important issue under Pennsylvania law because the state death penalty statute *requires* that a death verdict be rendered in every case where the jury finds that statutory aggravation is present but that mitigation is not.³³

In fact, Baldus and his colleagues found that capital juries were much more likely to give credence to mitigating evidence that was offered on behalf of non-Black defendants, whereas they gave little weight to such evidence when the defendant was Black.³⁴ The same kind of discounting of mitigation occurred in those cases where there were non-Black victims.³⁵

28. Baldus et. al., *supra* note 19.

29. *Id.* at 1715 (concluding, “The Philadelphia results are distinguishable from those estimated in earlier studies in the South in that the principal source of the race disparities in Philadelphia is jury, rather than prosecutorial, decision making.”).

30. *See, e.g., id.* at 1698 tbl. 8 (showing that when controlling for defendant culpability, the ratio of death sentences between Black defendants and non-Black defendants was 2.7, a difference that was significant at the .005 level).

31. *See id.* at 1697 tbl. 7 (showing that when controlling for defendant culpability, the ratio of death sentences between non-Black victim and Black victim cases was 1.5, a difference that was significant at the .02 level).

32. *Id.* at 1701.

33. *See id.* at 1647 (providing details about the unusual sentencing procedure in Pennsylvania).

34. *See id.* at 1702-09 tbl. 10 (weighing by race of defendant and race of victim).

35. *Id.*

Taken together, these analyses of actual case outcomes document the role of racial factors in various stages of the administration of the death penalty and also provided important insights about the kinds of cases that seem particularly prone to race effects. As powerful as this methodological approach has proven to be, however, it does not lend itself to a systematic examination of *why* the race-based disparities occur, especially at the level of individual decision makers. The social and psychological processes that presumably underlie discriminatory death sentencing must be explored in other ways.

Two approaches in particular have been used to study the way that racial factors have operated in at least one key stage of the death sentencing process—capital jury decision making.³⁶ One has entailed conducting in-depth interviews with former capital jurors about their trial experiences.³⁷ Thus, starting in the early 1990s, Capital Jury Project (CJP) researchers began conducting systematic post-verdict interviews with persons who had served as capital jurors, questioning them extensively about their jury decision-making process.³⁸ They have now completed interviews with nearly 1200 former capital jurors who sat on 353 different juries in 14 different states.³⁹ The CJP data have proven invaluable in illuminating a number of key issues, including how jurors report being individually and collectively influenced by various aspects of the cases on which they sat.⁴⁰ Several CJP studies have specifically examined the influence of the individual juror's

36. There are no empirical studies that examine prosecutorial decision making outside of the above-described regression analyses of case outcomes. This gap is problematic because prosecutorial discretion in charging and plea negotiating appears to play a significant role in creating and maintaining racial disparities in criminal and capital case outcomes. See Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007) for a discussion of this issue as it pertains both to noncapital and capital cases; see also Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817-18 (1998), where Pokorak studied the race of the prosecutors in each state who are responsible for death penalty cases and found that, as a group, they are "almost entirely white." *Id.* at 1817. Specifically, of the 38 active death penalty states at the time of the study, 18 had 100% White decision makers in these key prosecutorial positions. *Id.* Only Maryland had more than 8% who were of Color. *Id.*

37. *What is the Capital Jury Project?*, UNIV. ALB., ST. UNIV. N.Y., <http://www.albany.edu/scj/13189.php>.

38. *Id.*

39. *Id.*

40. William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 189-90 (2001); William J. Bowers, Marla Sandys & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1499-1500 (2004); BENJAMIN FLEURY-STEINER, JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY 30-37 (2004).

demographic characteristics, the group-level demographic make-up of the juries, and the race of the capital defendant and victim on the sentencing outcome in the case.⁴¹

Two distinct and important patterns have emerged in these studies. In what CJP researchers have termed the “white male dominance,” they found that the presence of five or more White male jurors on a jury was associated with a much higher rate of death sentencing in cases where there was an Black defendant and White victim.⁴² On the other hand, a so-called “Black male presence effect” occurred when one or more Black male jurors were present in the same kinds of cases to substantially reduce the chances of a death verdict.⁴³ Their interview data suggested that these overall patterns were a function of the fact that White and Black men typically came to very different conclusions about what they perceived to be the Black defendant’s remorsefulness, dangerousness, and his “cold-bloodedness.”⁴⁴ Moreover, they found that Black men reported being more empathic toward the defendants in these cases than any other category or group of juror.⁴⁵

Other CJP studies also have found that race of the juror can matter in capital case outcomes. For instance, Eisenberg, Garvey, and Wells found that Black jurors in South Carolina were much less likely than Whites to choose death in the first vote of penalty deliberations.⁴⁶ Although Black and White jurors did not differ by the time of final vote,⁴⁷ the first vote did matter in shaping the final sentencing outcome. Specifically, Eisenberg et al. found that the proportion of life to death votes at first ballot was the single largest predictor of final sentence.⁴⁸ Consequently, the racial composition of the juries had the potential to significantly influence the final verdict, above and beyond the other facts of the case.

Using the same interview dataset from South Carolina, Garvey examined the role that jurors’ emotions played in their assessments of capital cases and whether that role varied as a function of the racial characteristics

41. Bowers, Steiner & Sandys, *supra* note 40; FLEURY-STEINER, *supra* note 40.

42. Bowers, Sandys & Brewer, *supra* note 40, at 1501.

43. *Id.*

44. *Id.* at 1531-32.

45. *Id.* at 1501; *see also* Thomas W. Brewer, *Race and Jurors’ Receptivity to Mitigation in Capital Cases: The Effect of Jurors’, Defendants’, and Victims’ Race in Combination*, 28 LAW & HUM. BEHAV. 529 (2004) (analyzing CJP data that includes all combinations of victim and defendant races).

46. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 279 (2001).

47. This makes sense in that juries are under immense pressure to agree on a sentence so they generally do converge to a large degree by the time of the final verdict.

48. *See* Eisenberg, Garvey & Wells, *supra* note 46, at 303.

of the jurors, defendants, and victims.⁴⁹ He found that White jurors expressed much more anger toward defendants overall than Black jurors did, irrespective of the defendants' race.⁵⁰ Garvey also found that Black jurors were more able to find something likable about the defendant and to empathize with the defendant than their White counterparts.⁵¹ He concluded that Black jurors were much more likely to "keep the sin separate from the sinner" in both Black and White defendant cases.⁵²

The CJP data on these and a number of other aspects of capital jury decision making represent a monumental contribution to our understanding of death penalty decision making. Until their extensive, in-depth, systematic inquiries into the jury deliberation process, our insights into capital jury dynamics were largely speculative. Nonetheless, these compelling findings are limited in several respects. For one, they rely entirely on the post-verdict self-reports of jurors. These accounts may be colored by various factors—the passage of time, a desire to rationalize the outcome of the case, a lack of self-awareness, and so on. In addition, because the jurors have been drawn from a wide variety of capital cases, it is difficult to estimate or control for all of the other variables that may have come into play at the trial. For example, in the key CJP study on racially discriminatory death sentencing, the 89 jurors whose interviews were analyzed sat on one of 74 different cases that were tried in many different jurisdictions (which, in some instances, used somewhat different sentencing procedures) by different lawyers (of varying skill levels).⁵³ Obviously, they also were based on different guilt and penalty phase facts (ones in which the strength of the evidence, the heinousness of the capital crime, and the nature and amount aggravating and mitigating evidence that was presented may well have varied significantly). Of course, the CJP researchers were not able to precisely code or statistically control for all of the many and varied case-specific factors that might have played a role in the outcome of the cases.⁵⁴ For these reasons, although the CJP findings about the interaction of capital juror demographics with the racial characteristics of the case provide important insights into the phenomena, they cannot conclusively demonstrate a causal relationship between racial characteristics of the case, juror demographics, and sentencing outcomes.

49. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).

50. *Id.* at 45.

51. *Id.* at 47.

52. *Id.*

53. See Bowers, Sandys & Brewer, *supra* note 40, at 1501, 1505.

54. Indeed, precisely because they were mindful of these limitations, the CJP researchers adopted a "20% rule"—a heuristic that required there to be a 20% difference between juror groups before they considered it to be meaningful. *Id.* at 1505.

In order to completely control for the influence of potentially confounding variables that cannot otherwise be eliminated in studies using actual cases (either juror interviews or case outcome data), researchers have also used experimental methods to examine the mechanics of capital jury decision making in simulated trial settings. Although these experiments lack the authenticity of Baldus-type regression analyses of actual cases and do not yield the rich subjective accounts of the CJP juror interview data, experimental research designs do have some compensating advantages. Perhaps the most important one is that they allow researchers to control completely for the influence of any extraneous variables. By holding everything else constant, it is possible to focus only on the variables that are of interest and to precisely measure their effects. Experimental methods have thus been used to examine the influence of a wide range of variables on capital decision making, including the impact of aggravating factors (such as victim impact evidence⁵⁵ and expert testimony about future dangerousness⁵⁶), mitigating evidence,⁵⁷ and different types of jury instructions.⁵⁸

There is a relatively robust body of experimental research that examines the influence of race on criminal jury decision making in both capital and non-capital cases.⁵⁹ Our own studies have built on that earlier work to explore the inter-related roles that the racial characteristics of jurors, defendants, and victims play in the death sentencing process.⁶⁰ Thus, we have looked at various components of the process by which jurors choose between life and death, including the effects of instructional comprehension

55. James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1 (1995); Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129 (2011).

56. Daniel A. Krauss & Dae Ho Lee, *Deliberating on Dangerousness and Death: Jurors' Ability to Differentiate Between Expert Actuarial and Clinical Predictions of Dangerousness*, 26 INT'L J. L. & PSYCHIATRY 113 (2003).

57. Michelle E. Barnett, Stanley L. Brodsky & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751 (2004).

58. Amy E. Smith & Craig Haney, *Getting to the Point: Attempting to Improve Juror Comprehension of Capital Penalty Phase Instructions*, 35 LAW & HUM. BEHAV. 339 (2011); Richard L. Wiener et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 10 PSYCHOL. PUB. POL'Y & L. 516 (2004).

59. See, e.g., Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621 (2005); Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIM. PSYCHOL. 171 (2007); Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179 (1992).

60. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337 (2000) [hereinafter *Discrimination and Instructional Comprehension*]; *Capital Jury Deliberation*, *supra* note 1; *Mapping the Racial Bias*, *supra* note 1.

on their penalty phase decision making, race-based differentials in their evaluation of penalty-phase evidence, and the interactive effect of race of the juror and defendant on the outcomes of capital jury deliberations.

In our first experiment, over 400 jury-eligible, non-student, death-qualified participants individually viewed a simulated California capital penalty trial and recommended a sentencing verdict, either life without parole or death.⁶¹ The trial simulation videotapes were identical in all respects, except that the race of the defendant and of the victim were varied, yielding four different conditions (White defendant/White victim; White defendant/Black victim; Black defendant/White victim; or Black defendant/Black victim).⁶² Participants reached their sentencing verdicts individually and then completed a number of questionnaires about themselves, their decision-making processes, and their comprehension of the relevant jury instructions.⁶³

Participants who viewed the case with the Black defendant were significantly more likely to sentence him to death, especially in the Black defendant/White victim condition.⁶⁴ We were able to pinpoint some of the processes that appeared to underlie this race effect. For example, we found that those participants with the poorest comprehension of the penalty phase jury instructions were the most prone to racial bias.⁶⁵ Thus those deemed to have “high comprehension” sentenced the Black and White defendant to death in equal proportions,⁶⁶ but those who were “low comprehenders” sentenced the Black defendant to death significantly more often than the White defendant (60% versus 41%).⁶⁷ This disparity was even more pronounced among “low comprehension” participants in the cross-racial conditions: 36% selected a death sentence in the White defendant/Black victim condition, and 68% selected a death sentence in the Black defendant/White victim condition.⁶⁸

We also determined that the way that our participants weighed mitigating evidence varied as a function of the defendant’s race, such that participants were less willing to give the identical evidence mitigating weight when it was introduced on behalf of the Black defendant.⁶⁹ Indeed, we found that participants were significantly more likely to improperly use

61. *Discrimination and Instructional Comprehension*, *supra* note 60, at 344.

62. *Id.* at 343.

63. *Id.* at 344-45.

64. *Id.* at 349.

65. *Id.* at 344-45.

66. *Id.* at 349-50 (in both groups, 46% of participants sentenced the defendant to death).

67. *Id.*

68. *Id.* at 351 (these differences in death sentencing rates were statistically significant in both cases).

69. *Id.* at 352.

mitigating evidence in favor of a death sentence for the Black defendant in comparison to the White defendant.⁷⁰ We surmised that the racial disparities that we found in sentencing outcomes were likely the result of the jurors' inability or unwillingness to empathize with a defendant of a different race—that is, White jurors who simply could not or would not cross the “empathic divide” to fully appreciate the life struggles of a Black capital defendant and take those struggles into account in deciding on his sentence.⁷¹ This appeared to be exacerbated by the jurors' lack of comprehension of the penalty phase instructions that were supposed to guide the evidentiary weighing process.⁷²

In a follow-up study, we again used non-student, jury-eligible, death qualified participants and again randomly assigned them to one of the four race conditions.⁷³ They viewed the same penalty trial simulation tapes that were used in the first study, ones that differed only in terms of the race of the defendants and victims they depicted.⁷⁴ In addition, however, we gave jurors an opportunity to “deliberate” in small groups, and we videotaped and transcribed their deliberations.⁷⁵ Thus, over 500 participants were randomly assigned to one of 100 small group “juries” and, after watching one of the four versions of the penalty phase, deliberated to arrive at a sentencing verdict.⁷⁶ As in the first study, participants then individually completed a set of questionnaires about their decision-making process.⁷⁷

As in the original study, we found a race-of-defendant effect—that is, the jurors (and jury units) were more likely to sentence the defendant to death if he was Black than in the conditions where he was White.⁷⁸ However, in this second study, the race effect was manifested only after deliberation.⁷⁹ Specifically, we found that our participants moved toward death at a significantly higher degree in the Black defendant conditions than in the White defendant conditions.⁸⁰ As in the first study, we also found a significant relationship between comprehension of the jury instructions and racially biased sentencing, such that poor comprehenders were more likely to be influenced by race.⁸¹ This relationship was present at both the straw vote

70. *Id.*

71. *Id.* at 353.

72. *Id.* at 348.

73. *Capital Jury Deliberation*, *supra* note 1, at 483-84.

74. *Id.*

75. *Id.* at 483.

76. *Id.*

77. *Id.* at 484.

78. *Id.* at 485.

79. *Id.* at 486-87.

80. *Id.* at 485.

81. *Id.* at 490.

and final vote stages.⁸² Furthermore, we found that the evaluation of mitigating evidence was key to the measured race effects.⁸³

When we looked at the interaction of juror characteristics with the racial characteristics of the case, we found that the White male participants appeared to be the “driving force” behind the observed race effects.⁸⁴ These participants differed significantly from the women and non-White participants in several notable ways.⁸⁵ White men were significantly more likely to sentence the defendant to death than their counterparts, but *only* when the defendant was Black.⁸⁶ In fact, they alone accounted for the overall race effect.⁸⁷ In addition, this sentencing pattern appeared to be caused by the different ways in which White male jurors evaluated the mitigating evidence that was presented in the penalty trial, as well as the attributions that they made about the defendant’s character.⁸⁸ In contrast, there were no such race effects for women and non-White participants; they did not engage in racially discriminatory death sentencing, did not vary in their use of mitigation as a function of defendant race, and refused to make attributions about the defendant that differed as a function of his race.⁸⁹

Not surprisingly, perhaps, we also found that a concentration of White men on any given jury contributed to significantly higher rates of death sentencing in the Black defendant conditions.⁹⁰ Indeed, the White men were disproportionately influential in the group setting, persuading other jurors during the deliberations to join them in rendering death verdicts.⁹¹ Their concentrated presence made it more difficult for the women and non-White males on the jury to maintain their original, more pro-life positions.⁹² We saw this as providing further empirical support for the kind of “White male dominance” effect that the CJP researchers had reported earlier.⁹³ However, it was obtained here with an experimental design that controlled for all other potential confounding variables.⁹⁴

82. *Id.*

83. *Id.*

84. *Id.* at 487.

85. *Id.*

86. *Id.*

87. *Mapping the Racial Bias*, *supra* note 1, at 87.

88. *See generally id.*

89. *Capital Jury Deliberation*, *supra* note 1, at 487.

90. *Id.* at 491.

91. *Id.*

92. *Id.*

93. Bowers, Sandys & Brewer, *supra* note 40.

94. *Mapping the Racial Bias*, *supra* note 1, at 80. We were not able to systematically test for the “Black male presence” effect, because only seven Black men participated in the study. Nonetheless, all seven of these men favored life in their straw votes, and six of the seven maintained that stance through deliberations. They were assigned to six different jury units (three Black defendant; three White defendant) that ultimately ended in a mix of ver-

Our findings suggest that the problem of racial bias in the capital jury setting is not merely the product of individual actors who hold racial animus that they employ privately, in isolation from others. Rather, there appear to be important group level processes that are also at work, such that the very context of decision making—jury deliberations—may activate and exacerbate racial bias under certain conditions.

More broadly, what has become clear from our own empirical research and that of other scholars is that the racial characteristics of capital cases influence outcomes in predictable but not necessarily simple ways. The race-of-victim effect that has been well documented in the state-level regression analyses appears to arise in large part from pre-trial processes, in particular from prosecutorial decisions about which homicides will be pursued as death penalty cases. The race-of-defendant effect appears more likely to arise in the trial stage, is more a function of jury decision-making processes, and is especially likely in certain kinds of cases. Thus, capital cases that involve Black defendants, particularly when the victims are White, and where a concentration of White men serve on the juries, are especially prone to racially-biased outcomes.

The intriguing finding that the race of victim appears to be an important factor—consciously or not—for prosecutors with the power to seek a death sentence, but that juries appear to be more influenced by defendant characteristics can be explained by the context in which both groups—prosecutors and jurors—operate. The prosecutor's staff (attorneys, investigators, victim-witness staff) is much more likely to interact with and focus on the victim's family, particularly in the early stages of case processing, so differential empathic bonds may be formed as a function of race (among other influences). On the other hand, the capital trial is more defendant focused, at least in the sense that jurors' decision-making process forces them to concentrate on the defendant's actions as well as the life history that preceded them. That is, capital jurors are specifically tasked with, first, determining whether the defendant did indeed commit a capital offense, and second, whether or not he deserves to be sentenced to death. The jurors' conceptualizations of the defendant—their understanding of who he is and where he came from—as well as their ability to empathize with him and appreciate his life experiences, become centrally important in a capital trial. Indeed, in many death penalty cases, testimony about the defendant's traumatic and risk factor filled early life is emotional and engaging, and can produce sympathetic responses in jurors that rival those precipitated by victims (as compelling as victim impact testimony can be).

dicts that were slightly more life-leaning than the jury units as a whole (one unanimous for death, one majority for death, one evenly split, one majority for life, and two unanimous for life).

As a consequence of these stage- and actor-specific phenomena, ameliorating racial bias in capital trials requires sensitivity to the conditions under which it is likely to emerge.⁹⁵ Key to such efforts is the recognition that bias is more than an atomized, dispositional trait, but it is also a *process* that is triggered by situational factors in concert with individual-level demographic, attitudinal, and trait factors.

II. RACE-BASED PUNITIVENESS: SOME PSYCHOLOGICAL REALITIES

Beyond the stage- and actor-specific phenomena discussed above, the pernicious role of race is exacerbated by the larger context in which it operates. That is, racial bias continues to plague virtually every step in the death penalty decision-making process in large part because racial animosity flourishes inside systems and structures of domination,⁹⁶ especially ones that have been constructed explicitly to deliver pain or punishment on the basis of perceived wrongdoing. The processes of derogation and demonization that characterize racial oppression have much in common with the most punitive criminal justice practices and procedures. When they operate in tandem, as they do in the case of defendants of Color, they facilitate and amplify each other.⁹⁷ Among other things, persons who already have been demonized, are perceived as somehow less than fully human, or are regarded as fundamentally “other” and are easier to punish because the psychological barriers against hurting them have been lowered in advance.⁹⁸

The increased levels of punishment that our legal system has routinely meted out since the mid-1970s—in a kind of “War on Prisoners”⁹⁹—were in many ways dependent on the intense derogation of criminal offenders that accompanied it in media and political discourse over the same period. This discourse ensured that the criminal class was increasingly despised, in part by greatly exaggerating the perceived “otherness” of its members. Once the inhibitions against imposing harsh punishment were lowered in these ways, an era of “penal harm” that pursued the primary goal of “making offenders

95. *Mapping the Racial Bias*, *supra* note 1.

96. On institutionalized racism generally, see Ian Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

97. See generally CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* (2005) (Chapter Nine, especially).

98. Albert Bandura, *Mechanisms of Moral Disengagement*, in *ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND* 161 (Walter Reich, ed., 1998); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1461 (1997) (quoting Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 692 (1989)).

99. Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 101 (2008) [hereinafter *Counting Casualties*].

suffer” was ushered in. Not surprisingly, support for the death penalty reached all-time highs during this same historical period.¹⁰⁰

Race-based punitiveness was central to these developments. The harsh prison sentences and the death penalty itself were disproportionately directed at minority group members, particularly Black men.¹⁰¹ In fact, the kind of otherness that attaches to criminal offenders is in some ways analogous to the perception of difference that racial prejudice engenders. Of course, the harsh and painful treatment that the targets of racial prejudice experience in our society comes about as a result of who they are, rather than anything that they have done. But it is easier to believe that people from already disfavored—here, racially stigmatized—groups have done bad things if belief in their inherent “badness” is part of their stigma. Indeed, there is reason to believe that the ease with which Whites cognitively associate members of a racially stigmatized group with criminality has perceptual and memoric components. For example, in one study participants who read crime stories that pictured White and Black perpetrators were more likely to incorrectly connect Blacks to the violent crimes.¹⁰²

Moreover, research on criminal justice attitudes conducted during the heart of the punitive era indicates that such attitudes are very much a proxy for racial attitudes. Political scientists Mark Peffley and Jon Hurwitz conducted a number of these studies,¹⁰³ and they found “a substantial and recurrent overlap between negative African-American stereotypes and more punitive views of crime policy among [their] white respondents over a variety of survey experiments.”¹⁰⁴ Their work also specifically linked racial biases among White Americans and support for capital punishment.¹⁰⁵ Indeed, in a recent survey experiment that Hurwitz and Peffley conducted they reported

100. HANEY, *supra* note 97, at 68-70.

101. *Counting Casualties*, *supra* note 99, at 125-26.

102. Mary Beth Oliver & Dana Fonash, *Race and Crime in the News: Whites' Identification and Misidentification of Violent and Nonviolent Criminal Suspects*, 4 MEDIA PSYCHOL. 137, 150 (2002); *see generally* KATHRYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* (1998) (discussing this and a number of related issues).

103. *See, e.g.*, Mark Peffley & Jon Hurwitz, *The Racial Components of “Race-neutral” Crime Policy Attitudes*, 23 POL. PSYCHOL. 59 (2002).

104. Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 393 (1997). A “survey experiment” is a research design that uses probability sampling to select a sample of a given population who are then surveyed about their thoughts, perceptions or attitudes on a subject. The experimental component comes when the researchers systematically vary some aspect of the survey, such as the ordering of questions, the nature of the questions, or an aspect of individual questions. Hurwitz and Peffley have conducted a series of survey experiments that assess criminal justice attitudes in which they vary the racial characteristics of hypothetical criminal justice scenarios to see if there are differences across subgroups of respondents.

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

that Whites, “upon hearing of the discriminatory properties of the death penalty, actually become *more*, rather than less, supportive [of the death penalty], to the point where more than three out of four individuals favour capital punishment in this treatment group.”¹⁰⁶

In fact, in a recent review of empirical studies conducted from the 1980s through the 2000s, Unnever, Cullen, and Jonson concluded that “racial animus is one of the most consistent and robust predictors of support for the death penalty. Whites who harbor racial animus toward African Americans, particularly those who endorse the new form of racism—that is, who are symbolic racists—are significantly more likely to support capital punishment.”¹⁰⁷

Race-based belief in a group’s “badness”—sentiments at the psychological core of most racist belief systems—also makes it easier to ignore the possible flaws in the legal processes by which its members are blamed and punished for their transgressions. Similarly—because out-groups are more feared and despised to begin with—it may be easier for decision makers to exaggerate the seriousness of the things that these already disfavored persons have been found guilty of doing. That is, in-group members are already prepared to believe that whatever crimes out-group members have committed are per se more heinous (whereas, if they were committed by members of one’s own group, they would be less so). Finally, because it is more difficult to identify or empathize with persons perceived as “other,” dominant group members can more easily distance themselves from the pains of whatever punishment the others receive, even in cases where such punishment is unjustly administered or excessive in amount. All of these psychological mechanisms help to explain how racism in the society at large is intensified in a system designed to deliver punishment and inflict pain. They thus operate within the criminal justice system in general and in our system of death sentencing in particular.

In addition, there is reason to believe that the *increased* racialization of punishment occurs whenever decision makers take a narrow and decontextualized view of crime. Ignoring or discounting the life circumstances and contextual causes of the crimes for which punishment is being meted out invariably leads to the over punishing of minority defendants—placing disproportionate numbers of them in prison or subjecting them more frequently to the punishment of death. More specifically, the tendency to rely on a decontextualized understanding of criminal behavior subjects Black and other minority defendants to the worst of two legal worlds. Jurors who rely on this narrow framework will fail to fully consider the race-based inequities that defendants of Color suffer in the society at large or appreciate

106. *Id.* at 470.

107. James D. Unnever, Francis T. Cullen & Cheryl Lero Jonson, *Race, Racism, and Support for Capital Punishment*, 37 CRIME & JUST. 45, 69 (2008).

the way those inequities can shape and determine the troubled life courses that frequently come about as a result. This means, in turn, that those inequities cannot play their proper, overt role in determining the appropriate magnitude or comparative fairness of the punishment that minority defendants should receive. Yet, the individualistic sentencing processes through which they must pass still permit the influence of racial bias (as evidenced by race-based differentials that plague virtually every criminal justice decision point).

Thus, a capital jury's failure to appreciate the social, historical, and immediate circumstantial determinants of the defendant's behavior—to cross the "empathic divide"—further institutionalizes what social psychologists have termed the "fundamental attribution error"—systematically discounting the important social, historical, and situational determinants of behavior (in this case, criminal behavior) and correspondingly exaggerating the causal role of dispositional or individual characteristics.¹⁰⁸

There are a number of ways in which fundamental attribution error can be increased or intensified. For example, social psychologists know that this error is exacerbated by the tendency to focus on a selective and biased sample of information about the targets of negative attributions.¹⁰⁹ By looking primarily at negative aspects of the behavior of persons we already regard negatively, our bad (and faulty) attributions about them appear to be confirmed and may increasingly harden. Rarely do people voluntarily expose themselves to inconsistent or contradictory data. As observers, we also tend to interact with the targets of our invidious attributions under the same limited set of circumstances. This means that the apparent consistency in *their* behavior—which we erroneously attribute to their stable traits—actually is produced by the common situations in which *we* observe them.

All of these processes are exaggerated in the criminal justice system, where legal decision makers as well as members of the public tend to focus narrowly on a defendant's criminal behavior, with little or no knowledge about the criminogenic circumstances under which it occurred, or the range of non-criminal behavior in which the person has engaged across a wide range of other, different circumstances. The stereotypic, one-dimensional way in which the media depicts criminal offenders reinforces this tendency to understand criminality exclusively in terms of the internal pathological characteristics of criminals.¹¹⁰

The operation of fundamental attribution error adds significantly to the problem of racialized criminal justice decision making by ensuring that the

108. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 88-89 (1991).

109. *Id.*

110. Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689 (2009).

repetitive nature of much structurally-based crime is explained primarily in terms of the intractable criminal predispositions of the perpetrators (rather than the persistence of the race-based structural inequalities to which they were exposed). When minority group members engage in repeat acts of criminality—because of the tendency for stable structures (including race-based structural inequalities) to produce repetitive patterns of behavior—fundamental attribution error leads us to blame deep-seated, intractable criminal traits instead of persistent criminogenic conditions. In this way, the invidious joining of race and crime—in existing social historical conditions, prevailing legal policy, and in the popular consciousness—is solidified. In fact, these supposed, unmodifiable criminal dispositions—ones whose existence is demonstrated by the “habitual” nature of the behavior to which they are thought to give rise—now serve throughout the criminal justice system as the basis for special enhancements in the amount of punishment that is imposed.¹¹¹ Because capital jurors in virtually every death penalty jurisdiction are instructed to regard prior criminal behavior as “aggravating” (i.e., as a reason to impose death over life), this underlying dynamic provides a seemingly race-neutral mechanism resulting in the imposition of more death verdicts in the cases of defendants of Color.

Disentangling the various roles that racial bias plays in the entire death sentencing process is complicated by the sheer number of subjective judgments that a great many actors in the system are called upon to make, long before the question of whether or not a defendant should live or die is placed before them. Indeed, many decisions that may have been made very early in a capital defendant’s life can influence the nature of his prior contact with the criminal justice system in ways that indirectly affect the pro-

111. The racially disproportionate impact of three strikes laws is an extreme illustration of the fundamental attribution error at work in contemporary criminal justice policy. The differentials are large: in some states—like California and Washington—Blacks represent around 5% of the population but constitute between 37-45% of the three strikes commitments to prison. Scott Sunde, *Blacks Bear Brunt of ‘3 Strikes’ Law: Lesser Crimes Count Toward Life Sentence, and a Higher Imprisonment Rate Compounds Problem*, SEATTLE POST-INTELLIGENCER, Feb. 20, 2001, at A1; see SCOTT EHLERS, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INST., STILL STRIKING OUT: TEN YEARS OF CALIFORNIA’S THREE STRIKES, 10 (2004), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/04-03_rep_castillstrikingout_ac.pdf. Statistics for the state of Washington compiled by the state’s Sentencing Guidelines Commission indicated that Blacks made up 4% of the state’s population but fully 37% of those sentenced under the three strikes law. Sunde, *supra*. A California study showed that Blacks, who represent 6% of the California population, and accounted for 29% of the state prison population but were 45% of third strike convicts in 2003. See EHLERS, SCHIRALDI & ZIEDENBERG, *supra*; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CHARACTERISTICS OF INMATE POPULATION (Dec. 31, 2003), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENSUSd0312.pdf (reporting percentage of population in prison by race).

cessing of his capital case. Race can and often does play a role in all of them, including:

■ whether and how closely the police monitor someone's behavior, place him under suspicion, and take him into custody (on the basis of such inherently subjective and discretionary judgments as a potential suspect's perceived dangerousness, the characteristics that police have come to associate with what have been called "symbolic assailants,"¹¹² and the kind of behavior and evidence that officers decide constitutes "probable cause");¹¹³

■ the likelihood that prosecutors will pursue criminal charges against a defendant (on the basis of their views of the relative heinousness of the particular criminal acts that have been alleged in a case, and their estimate of the likelihood that a defendant will be convicted);¹¹⁴

■ the frequency with which juries reach guilty verdicts and the level or seriousness of the crime for which the defendant is convicted (shaped in part by jurors' prior beliefs about a defendant's probable legal guilt and level of moral blameworthiness);¹¹⁵

■ the nature and severity of the punishment that is imposed (pre-ised partly on a sentencer's estimate of the gravity of the crime the defendant has been convicted of committing, the convicted person's "character," and his redemptive potential);¹¹⁶

■ and, finally, where and for how long a prisoner remains incarcerated (as a function of a classification officer's initial assessment of a convict's rehabilitation potential and likely future institutional adjustment, a correctional official's assessment of his in-prison behavior, and a parole board member's prediction about his chances for post-prison reintegration).¹¹⁷

112. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 45-48 (2d ed. 1975).

113. The relationship between subjective law enforcement decision making, race of arrest targets, and institutional dynamics is also explored in David Eitle & Susanne Monahan, *Revisiting the Racial Threat Thesis: The Role of Police Organizational Characteristics in Predicting Race-Specific Drug Arrest Rates*, 26 *JUST. Q.* 528 (2009).

114. See generally Davis, *supra* note 36; Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 *L. & SOC. REV.* 531 (1997).

115. These processes are implicit and operate routinely as a function of still widely-held, underlying racially-tinged views. They are also subject to manipulation and intentional activation. See, e.g., Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 *TUL. L. REV.* 1739 (1993).

116. See generally Jeffery T. Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 *JUST. Q.* 1 (2012) (comprehensively reviewing the nature of sentencing decision making and the various factors that shape the judgments of decision makers).

117. For examples of racialized decision making that adversely affects the "prison careers" and correctional outcomes of prisoners of Color, see Philip Goodman, *"It's Just Black, White, or Hispanic": An Observational Study of Racializing Moves in California's*

All of these discretionary decisions are subject to the “subtle” influence of race. To be sure, decision makers in these scenarios are using race consciously by taking it overtly into account in making their judgments. However, they are not necessarily doing so in classically “racist” ways. That is, rather than making adverse decisions “just because” of the suspect’s/defendant’s/prisoner’s race, their decisions are shaped by the way his race has colored their perceptions, expectations, and predictions. Although this kind of racism may be subtle in operation, it is hardly subtle in consequence. Indeed, racism’s cumulative effects—which can affect a capital defendant’s overall record of arrest and conviction, the length of time he spends in jail and prison, the security level of the correctional facilities in which he is housed and the kinds of inmates with whom he is surrounded, the likelihood that he will be housed in disciplinary segregation units, the challenges he faces winning release from prison, and the probability of being returned to custody¹¹⁸—all contribute to his criminal justice profile and adversely affect a capital jury’s assessment of the kind of person he is at the time of sentencing. Even if these seemingly objective events and outcomes are used in subsequent decision making in ways that appear entirely legitimate and race-neutral (for example, by treating persons with worse criminal or institutional histories more harshly), they are nonetheless tainted by the racialized processes that preceded them.

Ian Haney López’s conceptualization of institutional racism offers a useful model of the linkages between these structural and institutional practices and individuals’ cognitions.¹¹⁹ He suggests that institutional forms of racism, like the kind we describe above, happen when institutions (like law enforcement organizations, courts, and correctional agencies) enforce racial status hierarchies (either harming a disadvantaged group or benefitting an advantaged group) while relying upon “racial institutions.”¹²⁰ He describes

Segregated Prison Reception Centers, 42 LAW & SOC’Y REV. 735 (2008); Sarah Spiegel, Comment, *Prison “Race Riots”: An Easy Case for Segregation?*, 95 CALIF. L. REV. 2261 (2007); and Scott N. Tachiki, Comment, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CALIF. L. REV. 1115 (1995).

118. See, e.g., Charles F. Bond, Jr., Clarisse G. DiCandia & John R. MacKinnon, *Responses to Violence in a Psychiatric Setting: The Role of Patient’s Race*, 14 PERSONALITY & SOC. PSYCHOL. BULL. 448 (1988); Margaret Farnworth & Patrick M. Horan, *Separate Justice: An Analysis of Race Differences in Court Processes*, 9 SOC. SCI. RES. 381 (1980); Alan J. Lizotte, *Extra-Legal Factors in Chicago’s Criminal Courts: Testing the Conflict Model of Criminal Justice*, 25 SOC. PROBS. 564 (1978); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC’Y. REV. 587 (1985); see also *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) (providing an overview of the insensitivity to this issue that plagues the American legal system).

119. López, *supra* note 96.

120. *Id.* at 1806-11.

racial institutions as “any understanding of race that has come to be so widely shared within a community that it operates as an unexamined cognitive resource for understanding one’s self, others, and the-way-the-world-is.”¹²¹

In this framework, action is not intentionally racist in the traditional sense, but it does require, first, the involvement of shared and widely accepted cognitions, attitudes, and/or world-views about race, and, second, a behavioral component that enforces or reinforces a racial status hierarchy.¹²² Thus, racism in institutional settings cannot be expected to manifest itself as a singular, individual, conscious act (or expression) that is identifiable to others as aberrationally problematic. Rather, institutions and the actors within them will operate in ways that appear to most as nonracial, even when they significantly negatively impact those from racially subjugated groups.¹²³ Applying this framework to the capital case context, the racial inequalities that have been documented in death penalty adjudication are likely the product of multiple stages and instances of such institutional racism, yet these processes are somewhat invisible due to the widely held views about race and criminality within and outside of criminal justice institutions.¹²⁴

In fact, the kind of institutional racism that Haney López has so effectively described is part of a broader legacy of what one of us has termed “biographical racism”—namely the “accumulation of race-based obstacles, indignities, and criminogenic influences that characterizes the life histories” of many defendants of Color.¹²⁵ This kind of racism is not just structural or institutional—although it surely encompasses both of these dimensions—but also “biographical,” adding up over an individual’s lifetime, aggregating experiences that are “built into the very social contexts and life circumstances that have surrounded many African-American capital defendants at key developmental stages of their lives.”¹²⁶ Capital defendants of Color are simultaneously the victims of these racially correlated forces and factors, of a criminal justice system whose decision making is implicitly racialized (even as it claims “color blindness”), and of a death sentencing process that too often fails to adequately appreciate and take into account the consequences of these dynamics in the constitutionally-mandated “moral inquiry into the culpability” that is supposed to guide penalty-phase verdicts.

121. *Id.* at 1809.

122. Mona Lynch, *Crack Pipes and Policing: A Case Study of Institutional Racism and Remedial Action in Cleveland*, 33 *LAW & POL’Y* 179, 182.

123. *Id.* at 183.

124. Haney, *supra* note 3, at 1561-62.

125. Haney, *supra* note 3, at 1557.

126. *Id.* at 1562.

III. CLOSING THE GAP: RACIALLY FAIR OR UNFIXABLE?

Racial disparities in the administration of capital punishment have been the subject of numerous constitutional challenges. In addition, the racial composition of capital and criminal juries has been addressed in a long line of key rulings, most notably in *Batson v. Kentucky*, that sets out standards for inclusiveness and articulates remedial tests in cases where potential jurors appear to be improperly excluded.¹²⁷ Many legal scholars have provided excellent analyses of the shortcomings of these cases,¹²⁸ and there is no need to repeat their trenchant criticisms here. Instead, we briefly discuss the doctrines to which they have given rise in order to highlight the need for alternative approaches to reducing the influence of racial factors on death penalty decision making.

Despite stark evidence of continued racial bias in the administration of the death penalty, courts have done little to effectively address the systemic nature of the problem. Even the landmark *Furman v. Georgia* case¹²⁹—by far the United States Supreme Court’s most elaborate and lengthy discussion of the nation’s system of death sentencing—only indirectly addressed the issue of its racially biased imposition. In his concurrence, Justice Douglas linked the death penalty’s “cruel and unusual” administration of the death penalty to its discriminatory impact: “[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination[,] and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”¹³⁰ Yet, aside from Justice Marshall, no others subscribed to this view.¹³¹

The Court’s most direct, albeit utterly unsatisfying, examination of race-based death sentencing came in *McCleskey v. Kemp*,¹³² which formally marked the Court’s retreat from any meaningful confrontation with these issues (a position that had only been implicit since the time of *Furman*). Rather than address the clear implications of the troubling findings of the

127. 476 U.S. 79 (1986).

128. For just a few examples, see Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149 (2010); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511 (1994); Sheri Lynn Johnson, *Race and Recalcitrance: The Miller-El Remands* 5 OH. ST. J. CRIM. L. 131 (2007-2008).

129. 408 U.S. 238 (1972).

130. *Id.* at 256-57 (Douglas, J., concurring).

131. Indeed, Justice Stewart wrote: “[R]acial discrimination has not been proved, and I put it to one side.” *Id.* at 310 (footnote omitted).

132. 481 U.S. 279 (1987).

Baldus study,¹³³ which indicated serious and systemic racial discrimination in the administration of Georgia's post-*Furman* sentencing outcomes, the Court articulated a legal standard that rendered such data largely irrelevant. Indeed, it is a standard that virtually guaranteed that no subsequent systemic challenge to a modern jurisdiction's death sentencing practices could prevail. Thus, the Court articulated a test that brought the required scope of inquiry down to the single case, and set a bar for proving discrimination so high that only the most egregiously racist conduct could pass over it. Specifically, *McCleskey* required a petitioner alleging an equal protection violation in a capital case to provide evidence of "purposeful discrimination" by a decision maker in the case, and demonstrate that this had a "discriminatory effect" in the case itself.¹³⁴ Its evidentiary requirements reflect a conceptualization of contemporary racism that is belied by virtually all of contemporary research on the nature of racism—showing that it is both implicit (i.e., non-consciously purposeful) and systemic or structural (i.e., well beyond the level of individual actors). The *McCleskey* standard is uniquely framed to ignore both of these crucial, settled social science insights.

Thus, existing legal remedies for racial bias and the social psychological realities of racism now diverge considerably. Although courts have long recognized that minority criminal defendants facing predominantly or exclusively White juries face an increased risk of bias, the legal remedies at the jury selection stage continue to rely on problematic assumptions.¹³⁵ First, although *Batson v. Kentucky*¹³⁶ made it somewhat less burdensome for defendants to challenge the jury selection process when they suspect that prosecutors are using peremptory challenges to impermissibly excuse jurors on the basis of race, the mechanism for doing so was limited in nature.¹³⁷ Basically, defendants must demonstrate membership in a "cognizable racial group,"¹³⁸ and that the prosecutor used peremptory challenges to exclude potential jurors on account of their race. If the trial judge finds this evidence to constitute an adequate showing, "the burden shifts to the State to come

133. BALDUS, WOODWORTH & PULASKI, *supra* note 7.

134. *McCleskey*, 481 U.S. at 292.

135. Jury pool formation is also subject to legal scrutiny if the pool significantly diverges in demographic composition from the broader community, thereby violating the "fair cross section of the community" requirement. For a recent discussion, see Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 *DRAKE L. REV.* 761 (2011).

136. 476 U.S. 79 (1986).

137. The Court revisited its ruling in *Swain v. Alabama*, 380 U.S. 202 (1965), that it was necessary to show a long-standing, systematic pattern of the prosecutor's exclusion of non-White jurors. *Batson*, 476 U.S. at 92-93. It determined that the *Swain* standard amounted to a "crippling burden of proof" that left prosecutors' use of peremptory challenges "largely immune from constitutional scrutiny." *Id.*

138. *Id.* at 96 (citation omitted).

forward with a neutral explanation for challenging black jurors.”¹³⁹ The trial judge then decides whether that explanation is sufficient or not.

The other legal safeguard against racially biased jurors is voir dire—capital defendants have the right to directly question potential jurors about any racial animosity that they may hold. In *Turner v. Murray*, which was decided just one year before *McCleskey*, the Court held that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.”¹⁴⁰

From a social psychological perspective, these legal remedies for racial bias are woefully inadequate. First, to the extent that individual decision makers—prosecutors, jurors, or judges—are even aware of their own implicit biases (and there is little reason to believe that many of them are), they are unlikely to voice them in a manner that could be construed as evidence of prejudice. Yet *McCleskey*, *Batson*, and *Turner* all rely in various ways on explicit individualized expressions of racism as a precondition for relief.

For instance, the majority opinion in *Turner* seemed to be sensitive to potential racial biases in the capital cases, especially ones involving Black defendants accused of killing White victims. Yet the Court took the seemingly naïve position that racially biased jurors could and would openly share these prejudices when asked about them during voir dire. There is no reason to believe that this will happen often enough to be an effective remedy, especially not to the kind of more subtle operation of implicit forms of racism that we described above.¹⁴¹ *Batson*’s test is even more problematic in that it requires a trial judge—who likely has an ongoing working relationship with the prosecutor—to directly question the prosecutor’s motives in excluding jurors of Color and decide whether he or she is lying by (inevitably) asserting a racially neutral explanation. So not only is the expectation under *Batson* that prosecutors “caught” using race as a basis for juror exclusion might actually admit to such biased behavior, but also that if they do not, judges will be willing and able to challenge their mendacity with sufficient frequency and accuracy to keep the entire process honest and fair.¹⁴²

139. *Id.* at 97.

140. 476 U.S. 28, 36-37 (1986).

141. Making race salient for the potential jurors exposed to such questioning could indirectly help mitigate racially biased judgments. Experimental research by Samuel Sommers and Phoebe Ellsworth suggests that the presence of “salient racial issues” at trial can lessen White prejudice against African-American defendants. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL., PUB. POL’Y. & L. 201, 213 (2001).

142. Federal district court Judge Mark Bennett discusses this problem in detail within a larger analysis of the problematic assumptions about racism inherent in *Batson*. See Bennett, *supra* note 128.

Furthermore, as we noted earlier, racism, especially in institutionalized settings such as criminal courts, is not simply and singularly the product of individual attitudes, cognitions, or motivations.¹⁴³ Individual differences in both implicit bias and more motivational prejudice can only be a starting point for understanding from whom, when, and why racism is manifested in capital case contexts, and what it looks like when it does occur. As we noted above, there are many powerful structural, institutional, biographical, and social psychological components to racism in a capital case context that interact with, exacerbate, and build on individual-level prejudice.

Rather than remedying these potential biases, some capital trial procedures worsen them. For instance, the well-documented problem of underrepresentation of minorities in many jurisdictions' jury pools¹⁴⁴ is exacerbated in capital cases by the added impact of disproportionate exclusion of minorities via death qualification. Because both minorities and women in most jurisdictions continue to oppose the death penalty at higher rates than White men,¹⁴⁵ they are disproportionately excludable, and fewer of them are eligible to sit as jurors on capital cases.¹⁴⁶ Obviously, then, White men are disproportionately likely to be death qualified,¹⁴⁷ which increases the overall likelihood of "white male dominance"¹⁴⁸ effects. This group-level phenomenon occurs above and beyond the added individual-level risk of implicit or explicit bias that results from demographic skewing that death qualification produces.¹⁴⁹ The dual structural and institutional forces that create disproportionately White jury pools, particularly in jurisdictions where Whites are the majority, also reduce the chances that a *Batson* challenge can be successfully mounted. With few minorities in the pool to begin with, and greater numbers of them voicing reservations about the death penalty (even reservations that stop short of the standard of exclusion under death qualification), prosecutors have a built-in and seemingly neutral explanation for pat-

143. See *Mapping the Racial Bias*, *supra* note 1, for a fuller discussion of this.

144. HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE* (1993); Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 *SOC. ISSUES & POL'Y. REV.* 65 (2008).

145. 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. RES. CRIME & DELINQ.* 124 (2007).

146. See, e.g., Craig Haney, Aida Hurtado & Luis Vega, "Modern" *Death Qualification: New Data on Its Biasing Effects*, 18 *LAW & HUM. BEHAV.* 619 (1994).

147. Joseph W. Filkins, Christine M. Smith & R. Scott Tindale, *An Evaluation of the Biasing Effects of Death Qualification: A Meta-Analytic/Computer Simulation Approach*, 4 *THEORY & RES. SMALL GROUPS* 153, 163 (2002).

148. Bowers, Steiner & Sandys, *supra* note 40, at 191-92.

149. See Hurwitz & Peffley, *supra* note 104.

terms of racial exclusion that produce capital juries that are comprised primarily or even exclusively of Whites.¹⁵⁰

The daunting range of forces at work in American society in general and in the criminal justice system in particular—from the massive systemic, structural, and institutional arrangements that create and maintain racial inequality down to the interpersonal level of White male dominance effects through which racialized decision making operates and is amplified inside individual capital juries—all combine to dwarf the sometimes pallid and too often ineffectual legal remedies that are currently used to limit and contain the pernicious effects of racism.¹⁵¹ For reasons we have previously discussed, our nation's system of death sentencing is uniquely vulnerable to these effects. If we are to continue to have the death penalty—an unexpectedly open question at this stage in the history of capital punishment in the United States¹⁵²—then what steps must be taken to ensure that it is administered in ways that are more racially fair?

We think that the first crucial issue to address is the demographic diversity of capital juries, and the need to implement whatever steps that can ensure that all capital juries are representative of the community from which they are drawn. Obviously, this is of particular importance in counties where non-Whites are a distinct minority, and in cases where the defendant is non-White. Psychologists Samuel Sommers and Michael Norton have argued that “affirmative jury selection” is one viable method for reducing the problem of jury bias generally.¹⁵³ This would entail oversampling minority populations in the issuance of jury summons, then changing the orientation when empanelling the jury to focus on inclusiveness and diversity, rather than the status quo orientation that requires the defendant to raise concerns when the jury selection processes appear biased.

These kinds of affirmative changes in the jury selection process in capital trials would acknowledge jury representativeness as a primary legal value, and institutionalize it in legal doctrine and practice. They also would

150. This jury pool effect may partially account for the wide and troubling intra-state geographic differences in rates of death penalty prosecutions and sentences. In particular prosecutors in urban areas with higher minority populations are demonstrably and significantly less likely to seek death in eligible cases, and capital juries in high minority urban counties are significantly less likely to sentence to death, than in suburban and rural counties. See, e.g., Barnes, Sloss & Thaman, *supra* note 13; Paternoster et al., *supra* note 11.

151. HANEY, *supra* note 97.

152. Abolition may well be the most just, cost-effective, and humane remedy to the many problems with which our system of death sentencing is plagued, including its discriminatory application. The death of capital punishment may occur sooner rather than later, given the growing number of abolitionist states and the increasing reservations about the death penalty within venerated legal organizations such as the American Bar Association and the American Legal Institute.

153. Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527 (2008).

help take the onus off defendants and their attorneys to police the behavior of the state, and off trial judges who are currently asked to make difficult subjective decisions about their courtroom colleagues. In addition, because affirmative jury selection would increase the demographic diversity of juries in general, concentrations of White male jurors sitting in the absence of any Black male presence would be less likely to occur.¹⁵⁴

Some commentators have suggested that one solution to the problem of minority juror exclusion would be to eliminate the use of peremptory challenges.¹⁵⁵ As a practical matter, the revered and historical status of the peremptory challenge makes it unlikely that it would ever be eliminated outright. A better solution—especially in capital cases—would be a return to the historical norm of allowing the defense to exercise more peremptory challenges than the prosecution.¹⁵⁶ We see this as a straightforward extension of the due process rights that are so important to preserve in the case of capital cases. The defense and the state do not have exactly parallel and equally balanced interests in this regard. That is, the state has no countervailing inherent right to convict and obtain death sentences against which the defendant's due process rights must be "balanced."

On a related front, as we noted above, the legally mandated practice of death qualification operates to undermine the representativeness of the capital jury. Indeed, "[d]eath qualified juries are less likely to share the racial and status characteristics or the common life experiences with capital defendants that would otherwise enable them to bridge the vast differences in behavior the trial is designed to highlight."¹⁵⁷ Especially in light of the consistent erosion of attitudinal support for capital punishment in the United States over the last decade and a half—which has "resulted in larger numbers of potential jurors being excluded as public opinion against the death penalty has grown"¹⁵⁸—we believe that the time may have come to renew

154. There is a wealth of research from a number of contexts that indicates group decision making is more thoughtful, deliberated, and of a higher quality when the group is comprised of those with diverse life experiences, which is in part the product of diverse demographic characteristics.

155. See, e.g., Bennett, *supra* note 128; *Baston v. Kentucky*, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring).

156. See Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 13 n.18 (2001) for a full list of current peremptory allocations by state. A total of forty-six of the 50 U.S. states provide the defense and prosecution an equal number of such challenges. See Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369 (1992). Until the early 19th century, peremptory challenges were the exclusive right of the defense in most jurisdictions; thereafter and into the 20th century, the defense was afforded a larger proportion than the state. See *id.*

157. Haney, *supra* note 98, at 1463.

158. Gerald Ueleman, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495, 512 (2009).

constitutional challenges to this questionable practice, in part on the basis of its continued role in undermining the representativeness of the capital jury and widening the empathic divide.¹⁵⁹

In addition, we would advocate much more intensive training and education of legal professionals about the nature of contemporary racism and how it is manifested. Such training would sensitize legal decision makers to the racial dynamics that commonly plague capital trials and the range of problematic consequences that can occur as a result. Such training also might help to change the normative understanding of the major trial participants about the frequency and effect of racism inside the legal system more generally. As a consequence, the current, unrealistic legal standards for demonstrating bias and discrimination in the criminal justice system might be increasingly challenged and prove more difficult to sustain.

As some of the research we have discussed in the preceding pages makes clear, the biased capital jury decision making is context-sensitive. The fact that this kind of bias can be exacerbated under certain conditions also implies that there are steps that can be taken to reduce it. For instance, we know that jurors' comprehension of sentencing instructions can reduce their tendency to be improperly influenced by the defendant's race. Moreover, the primary reasons for poor instructional comprehension are well understood and easily addressed. Specifically, jurors typically do not comprehend jury instructions either because they do not have the ability to understand the language that is used in the instructions and/or properly apply it, or because they are insufficiently attentive to the instructions and fail to accord them the appropriate significance when they are rendering their sentencing verdict.

Both of these problems can be solved in straightforward albeit slightly different ways. There is a great deal of social science research that both identifies the linguistic problems in capital jury instructions and demonstrates various ways in which those instructions can be improved to optimize comprehension.¹⁶⁰ Unfortunately, these proposed solutions have gotten

159. In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Supreme Court expressed skepticism about the methodology used in the dozen or so empirical studies that formed most of the factual record in the case. However, Justice Rehnquist went on to conclude, in an unusual twist of logic, that since a jury of only death-qualified members *could be* assembled by chance, accident, or through the "luck of the draw," the same kind of jury should not be found unconstitutional "merely" because it was produced "from a state-ordained process" that absolutely guaranteed such a composition in every capital case. *Id.* at 178. In the subsequent 25 years, not only have a number of additional studies been conducted that continued to consistently document the biasing effects of death qualification but, as we say, death penalty opposition has increased and a correspondingly larger group of potential jurors has been placed at risk by this practice. The time may well have come to revisit this curious "luck of the draw" logic with a factual record that takes these new developments into account.

160. There is an even larger body of such research on non-capital pattern instructions that also has significance for capital cases, especially in the guilt phase. *See, e.g.*, Robert P.

a very mixed reception from the courts.¹⁶¹ Because, as our research shows, improved instructional comprehension has the potential to reduce the influence of race in capital cases, better instructions that incorporate changes in language that demonstrably improve laypersons' understanding without altering the underlying meaning are badly needed. They should be requested in individual cases and, more importantly, advocated in statewide judicial committees with the authority to issue generic directives and rewrite standard "benchmark" instructions.¹⁶² Research also suggests that when jurors are given legal instructions both before and after hearing evidence, and when they are allowed to have a copy of the instructions for reference during their deliberations, comprehension is improved.¹⁶³ These practices, too, should be made standard procedure in all capital cases.

Although the issue has been given little attention, the actual delivery of jury instructions also could be dramatically improved. Judges typically read jury instructions aloud—rote and verbatim—without providing an explanation about how and why those instructions are central to the decision-making process. Jurors are typically prohibited from asking questions during this recitation, which comes at the very end of proceedings, when they are most likely to be mentally and emotionally drained. We see no reason why judges could not provide jurors with a broader explanatory context for the instructions, especially one that includes the underlying rationale for and significance of the capital sentencing framework they are required to use (how and why it is critically important to guide their discretion in the life and death decision making in which they are engaged). The process by which judges instruct jurors could also explicitly permit the jurors to pose questions about aspects of the instructions that are unclear, both as a way of

Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Shari Seidman Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOLOGIST 423 (1993); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1. For a recent comprehensive review of the underlying problems affecting laypersons' comprehension and application of jury instructions, see Joel D. Lieberman, *The Psychology of the Jury Instruction Process*, in 1 PSYCHOLOGY IN THE COURTROOM (Joel D. Lieberman & Daniel A. Krauss eds., 2009).

161. See, e.g., Peter Tiersma, *Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081 (2001).

162. There is a clear cultural issue here—those with legal training have a difficult time recognizing what language might be unfamiliar, incomprehensible "legalese." Yet most, if not all, of those with the power to revise instructions at the state level, and all of those with the power to tailor instructions in individual cases (judges) are legally trained and have been acculturated to the very legal language with which others may struggle.

163. See Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. APPLIED PSYCHOL. 220 (1991); J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y. REV. 155, 157 (1991).

ensuring their comprehension in advance of deliberation and to more actively involve them in the process itself.

Moreover, it is not difficult to envision the use of a “modern racism” judicial instruction that might be delivered in cases in which there are capital defendants of Color. Given what is known about the persistence of racialized decision making in death penalty cases (i.e., ignoring race when it should matter, being influenced by it when it should not), explicitly voicing concerns about the potential for pernicious race-based processes to distort judgments—processes that we know are most problematic when they operate at an implicit level—might serve as an effective antidote.¹⁶⁴ An instruction that acknowledged the kind of burdens and obstacles that many Black defendants face throughout their lives—the biographical racism to which we earlier referred—and sensitized jurors against allowing unconscious prejudices to play any role in their decision making may serve as a useful prophylactic against forces and factors that we know are likely to operate in this context.

As we noted earlier, racial bias is often manifested through a lack of empathy for the defendant and disregard for mitigating evidence—especially mitigation that stems from the defendant’s life experiences that jurors may perceive are not directly connected to the crime itself. This problem can and should be addressed in several ways. For one, defense attorneys must effectively link individual pieces of mitigating evidence to a larger narrative about the defendant’s life course and why these things represent reasons that the defendant should receive a life sentence.¹⁶⁵ The nature and effective implementation of these concepts and approaches is not part of law school curricula nor does it occur in the course of non-capital legal training or trial experience. As the American Bar Association has stressed in its policies on effective death penalty representation, substantial training of the entire capital defense team is critical given the legal complexity and uniqueness of death penalty cases.¹⁶⁶

In addition, the unique and difficult to understand nature of mitigation places special burdens on trial judges to instruct juries especially clearly

164. In legal scholarship, see, for example, the foundation work of critical race theorist Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) and his follow-up, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931 (2008); see also Sherri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

165. For a discussion of this process, see Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835 (2008).

166. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS ET AL., ABA, REPORT TO THE HOUSE OF DELEGATES 4-5 (2003), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/adoption_guidelines.authcheckdam.pdf.

about what mitigating evidence is, its relevance to the decision-making process, their obligations to consider it, and what forms it can take. This, too, can be accomplished through tailored or “pinpoint” instructions.¹⁶⁷ To the extent that this message gets through to the jury during the proceedings, it can give individual jurors the language needed during deliberations to argue against those in the jury room who refuse to at least consider the value of mitigating evidence.¹⁶⁸

For capital defendants of Color to be treated fairly in the capital sentencing process, a way has to be found to reliably bridge the “empathic divide” that separates them from jurors. As we have repeatedly suggested, although it exists in every capital case, that divide is greater and more difficult to traverse in cases where White jurors sit in judgment of Black defendants. If anything, the immense burden that must be shouldered by defense team members in preparing a capital penalty trial—conducting painstakingly in-depth and elaborate pretrial investigation into the client’s background and social history; the organization of diverse life facts into a meaningful narratives with coherent mitigating themes; and planning an effective, honest, humanizing presentation to jurors that places the defendant’s behavior in a larger context that will allow them to better understand him—is even greater in such cases. In all capital penalty trials, “the goal is . . . to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them.”¹⁶⁹

Of course, the mitigating narratives that contextualize the lives of capital defendants for jurors have to be assembled, organized, and presented by defense teams, some of whose members may have very little background or experience with these issues. Here, too, in the case of defendants of Color, an empathic divide may separate team members from their clients. Those who lack the necessary training, resources, motivation, or insight to appreciate and effectively present the important race-related facts and circumstances are less able to make the defendant’s life understandable to the jury. Thus, it is important to increase the diversity of defense teams and ensure that they are provided with culturally and racially sensitive training.

167. See, e.g., Smith & Haney, *supra* note 58, at 344, 347.

168. The recorded deliberations from our study indicated that jurors who could articulate a “narrative for life” tied to the mitigating evidence presented were able to do just that with their fellow jurors. The narrative for death—which generally rejected the mitigating evidence as relevant to the decision, and instead was hyper-focused on the capital crime itself—was generally the more hegemonic viewpoint in deliberations that jurors arguing for life had to overcome. Mona Lynch & Craig Haney, “Just Feel It”: Mock Capital Jurors’ Emotional Expressions in Life and Death Deliberations (unpublished manuscript) (on file with authors).

169. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 561 (1995).

In the final analysis, because racism is infused so deeply and systemically into the fabric of capital punishment in the United States, there is always the possibility that even these wide-ranging reforms will fall short, and racially discriminatory death sentencing will persist. In order to avoid the disingenuous “let them eat due process” approach endorsed in *McCleskey*,¹⁷⁰ in which a parade of seemingly well-intended procedural protections was used to sidestep the empirically documented fact that they had clearly not prevented widespread discrimination, an overarching framework must be imposed to assess racially disparate outcomes and implement a decisive remedy when they have been demonstrated. The passage of the Racial Justice Act in North Carolina, which was signed into law in 2009, is a model of such an approach.¹⁷¹ It allows for a statistical showing that the race of defendant and/or victim impacted prosecutorial charging decisions or jury sentencing decisions, and it allows for challenges of jury selection procedures on the basis of disparate impact statistics.¹⁷²

Moreover, the statute is sensitive to the multi-level nature of the system of death sentencing, and the various jurisdictions in which patterns of disparity may emerge. Thus, it allows for statistical evidence to be presented at the county, the prosecutorial district, judicial division, or state level.¹⁷³ Indeed:

[T]he examination of the impact of race called for by the RJA is an examination of this multi-level system of death penalty administration at the time relevant to each case. If the system, when examined at the state-wide level, reveals the systemic improper influence of race at a relevant time, then the death verdicts that are a product of that system at that time period cannot stand. If, however, no state-wide systemic problem is found, then the capital defendant may press his case based on an examination of the data by judicial division, judicial district, or county.¹⁷⁴

With sufficient statistical and/or other direct evidence in support of any of these claims, the burden shifts to the state to rebut the data. However, absent a convincing rebuttal, the death sentence *must* be vacated and a life sentence imposed in the case.

While this law is under near constant threat of repeal by the legislature,¹⁷⁵ it represents one of the most effective ways to ultimately safeguard

170. See Craig Haney, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15 LAW & HUM. BEHAV. 183 (1991).

171. N.C. GEN. STAT. §§ 15A-2010-2012 (2011).

172. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031 (2010).

173. N.C. GEN. STAT. § 15A-2012(a).

174. Kotch & Mosteller, *supra* note 172, at 2118-19.

175. Nathan Koppel, *N.C.'s Racial Justice Act Survives (At Least for Now)*, *Law Blog*, WALL ST. J. (June 17, 2011, 12:22 PM), http://blogs.wsj.com/law/2011/06/17/n-c-s-racial-justice-act-survives-at-least-for-now/?mod=google_news_blog.

against racially discriminatory capital prosecutions and sentencing. It should be adopted on a national level.

CONCLUSION

Social scientists understand contemporary racism in terms that are very different from—and render it far more problematic than—its simplistic formulation in law. The legal system's inability or unwillingness to more directly and effectively confront the problem of racialized decision making continues to plague all aspects of our nation's system of death sentencing. We concede that those remedies that are most likely to effectively address the pernicious effects of racism are the ones that are the most radical and least likely to be implemented. Indeed, we acknowledge that even the more pallid remedies that have been proposed—such as improved sentencing instructions—have only been sporadically implemented and enforced. Racial justice has proven to be an elusive goal in the overall administration of capital punishment in the United States. Absent much more forceful advocacy and a much greater commitment on the part of courts and legislatures, it is unlikely ever to be achieved.

On the other hand, there have been a few positive developments in recent years. Over the last decade, several states have taken seriously the sometimes inter-connected problems of wrongful convictions and race-based decision making in capital cases. Outright abolition, based in large part on these grounds, has recently occurred in New Jersey, New York, New Mexico, and Illinois. Other states, including Maryland, have imposed moratoria for periods of time to study its racially biased application.¹⁷⁶ And the aforementioned Racial Justice Act passed in North Carolina is another significant advance.¹⁷⁷

Short of outright abolition, of course, the challenge of overcoming racism in the administration of capital punishment will require a creative, decisive, and overarching set of remedies to be persistently pursued and consci-

176. Lori Montgomery, *Maryland Suspends Death Penalty; Glendening Awaits Report on Racial Bias in Murder Prosecutions*, WASH. POST, May 10, 2002. Maryland has a different moratorium in place at present in part due to issues with the lethal injection protocol. John Wagner, *National NAACP Leader to Join Md. Death Penalty Opponents*, WASH. POST, Jan. 9, 2012, available at http://www.washingtonpost.com/blogs/maryland-politics/post/national-naacp-leader-to-join-md-death-penalty-opponents/2012/01/09/gIQAdGYxmP_blog.html. This moratorium has been in effect for over 5 years, and there is considerable political interest in abolition. *Id.* In the most recent moratorium to be declared, Oregon Governor John Kitzhaber described the death penalty system as “inequitable,” among other problems, in justifying his action. Helen Jung, *Gov. John Kitzhaber: Oregon Death Penalty Fails ‘Basic Standards of Justice,’* THE OREGONIAN, Nov. 22, 2011, available at http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_oregon_deat.html.

177. N.C. GEN. STAT. §§ 15A-2010-2012.

entiously implemented. These remedies must be premised on what we now know about the nature and operation of modern racism, including the frank recognition that, contrary to prevailing legal wisdom, it is not solely a problem of conscious, motivated individual actors who engage in “purposeful discrimination.”¹⁷⁸ Because it often operates implicitly, as a function of structural, institutional, and even biographical forces, it must be combated with remedies that extend far beyond the openly prejudiced, single individuals who are most often targeted.

178. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).