

Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States

Justin D. Levinson, Robert J. Smith & Danielle M. Young

Stark racial disparities define America's relationship with the death penalty. Though commentators have scrutinized a range of possible causes for this uneven racial distribution of death sentences, no convincing evidence suggests that any one of these factors consistently account for the unjustified racial disparities at play in the administration of capital punishment. We propose that a unifying current running through each of these partial plausible explanations is the notion that the human mind may unwittingly contribute bias into the seemingly neutral concepts and processes of death penalty administration.

To test the effects of implicit bias on the death penalty, we conducted a study on 445 jury eligible citizens in six leading death penalty states. We found that jury eligible citizens harbored the two different kinds of implicit racial bias we tested: implicit racial stereotypes about Blacks and Whites generally, as well as implicit associations between race and the value of life. We also found that death qualified jurors, those that expressed a willingness to consider imposing both a life sentence and a death sentence, harbored stronger implicit and self-reported (explicit) racial biases than excluded jurors. The results of the study underscore the potentially powerful role of implicit bias and suggest that racial disparities in the modern death penalty could be linked to the very concepts entrusted to maintain the continued constitutionality of capital punishment: its retributive core, its empowerment of juries to express the cultural consensus of local communities, and the modern regulatory measures that promised to eliminate arbitrary death sentencing.

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INTRODUCTION

Stark racial disparities define America's relationship with the death penalty.¹ Scholars began documenting these disparities over a hundred years ago,² and modern empirical evidence demonstrates their continued existence.³ The most

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¹ See generally FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) [hereinafter FROM LYNCH MOBS]; STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997). See also Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1559 (2004) (stating that "between 1930 and 1982, African Americans constituted between 10% and 12% of the United States population but 53% of those executed") (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment 1982*, Aug. 1984, at 9).

² Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 18 (2002) (noting that "the racially disproportionate application of the death penalty can be seen as being in historical continuity with the long and sordid history of lynching in this country").

³ See, e.g., DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990) [hereinafter BALDUS ET AL., EQUAL JUSTICE]; SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989). See also David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004) [hereinafter Baldus & Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment*]; David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003) [hereinafter Baldus & Woodworth, *Race Discrimination in the Administration of the Death Penalty*]; Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 AM. J. CRIM. JUST. 1 (1995); U.S. Gen. Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (GAO/GGD-90-57, 1990).

consistent and robust finding in this literature is that even after controlling for dozens and sometimes hundreds of case-related variables, Americans who murder Whites are more likely to receive a death sentence than those who murder Blacks.⁴ Though the effects are smaller (and more controversial), a significant body of research also finds that, in some jurisdictions, Black defendants are sentenced to death more frequently than White defendants, especially when the universe of studied cases is narrowed to include only those cases that result in a capital trial.⁵

Commentators have scrutinized a range of possible causes for this uneven racial distribution of death sentences. These possible explanations fit into three broad categories: 1) spatial and cultural (for example, prosecutors might be more inclined to pursue capital charges when a non-White community outsider crosses geographic and social boundaries to commit a crime against a White community insider;⁶ 2) procedural (for example, prosecutors might disproportionately pursue

⁴ See John Blume, Theodore Eisenberg and Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 167 (2004) (examining the composition of the death rows in eight states and finding that “[t]he different death sentence rates for black defendant-black victim cases and black defendant-white victim cases confirm the well-known race-of-victim effect”); Anthony Amsterdam, *Symposium on Pursuing Racial Fairness in Criminal Justice: Twenty Years After McCleskey v. Kemp: Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLIM. HUMAN RIGHTS L. REV. 34 (2007) (“Most of the studies find that the race of the victim is the principal determiner of sentence: killers of white victims are far more likely to be sentenced to death than killers of African-American victims. Some studies find bias against African-American defendants as well, but this is ordinarily weaker and is usually masked by the race-of-victim bias because (1) the overwhelming number of killings committed by African-American perpetrators involve African-American victims; (2) very few cases are found in which white perpetrators are convicted of killing African-American victims; and (3) almost no one convicted of killing an African-American victim gets the death sentence.”).

⁵ See Mona Lynch and Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 577 (2011) (noting “[s]everal 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” and indicating that race of defendant bias is “especially likely to operate in the juries’ penalty phase decision making”).

⁶ There are several possible explanations important to mention, but not necessary to expound upon in text. First, prosecutors might face more death penalty related pressure from families of White victims than Black victims. See, e.g., David Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1449-1450 (2004) [hereinafter Baldus & Woodworth, *Legitimacy of Capital Punishment*] (“Support for capital punishment is substantially lower in Black communities than it is in white communities. Thus, to the extent that prosecutors take into account the views of the victim’s family, the request for a capital prosecution is likely to be higher when the victim is white. Moreover, because most prosecutors are white, the families of white victims are more likely to meet with the prosecutor and press their views on the death penalty.”). Second, Black jurors might be less willing to impose the death penalty, but more likely to reside in areas where Black homicide victims are located. See Blume *et al*, *supra* at n. 4 (explaining “prosecutors are more likely to seek death sentences when they believe they can obtain them. In urban communities with a strong minority presence, prosecutors may face juries that are more reluctant to impose the death penalty, or those communities may select prosecutors who are reluctant to seek the death penalty);

the death penalty for crimes against White victims; jurors have a difficult time empathizing with the mitigating evidence presented by Black defendants and, conversely, victim impact testimony might disproportionately magnify the loss of White victims compared to non-White victims⁷); and 3) structural (for example, the penological justifications for capital punishment—i.e. retribution—might be inextricably tied to race; death-qualifying jurors might inadvertently racialize capital trials despite its purpose of promoting impartiality).

No convincing evidence suggests that any one of these factors consistently accounts for all—or most—of the unjustified racial disparities at play in the administration of capital punishment. Indeed, these factors appear to matter in varying degrees across jurisdictions (and, for that matter, over time within the same jurisdiction). We propose that a unifying current running through each of these partial plausible explanations is the notion that the human mind can automatically introduce massive bias into the seemingly neutral concepts and processes of death penalty administration.

id. at 203 (“African Americans are, in general, more reluctant to impose the death penalty, tend to murder other African Americans, and tend to commit within-race murders in communities with substantial African-American populations.”); *id.* at 203 (“Prosecutors may be reluctant to seek the death penalty because they expect the jury to be reluctant to impose it. Since this effect should occur more in communities with larger African-American populations, where most African-American murders occur, African-American presence on death row should be understated.”). *See also* G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425 (2010) (documenting the tendency for federal prosecutors to seek—and obtain—death sentences that occurred in counties with high African American populations and low death sentencing rates, and noting that the change of venire to the federal district court significantly “whitens” the jury pool). Finally, crimes committed against White victims might tend to be disproportionately aggravated—and thus death eligible. *See* Blume, *et al.*, *supra* at n. 4 (noting that “murders involving multiple victims” and “murders of strangers” are often considered to be “more deathworthy,” and arguing that Black defendant / white victim cases are stranger murder scenarios more often than any other race of the defendant / race of the victim combination). *But see id.* at 202 n.71 (cautioning against attributing too much explanatory power to differences in number of victims or stranger status because “murder characteristics [] were not helpful in explaining interstate differences in death row sizes”). Though this phenomenon appears to explain *some* of the disparities in the death sentencing of white and Black defendants in white victim cases, it does nothing to “explain the extraordinarily low death sentence rate in Black defendant-Black victim cases.” *Id.* 202.

⁷ Robert J. Smith & G. Ben Cohen, *Choosing Life or Death (Implicitly)*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 229 (Justin D. Levinson & Robert J. Smith, eds. 2012). Others suggest that the dynamic might run in the opposite direction: prosecutors devalue the worth of Black victims. *See* Blume *et al.*, *supra* at note 4 (noting that “[s]ince most Black offenders murder Black victims, race-based prosecutorial reluctance to seek the death penalty in this category of cases, or of juries to impose the death penalty, drives the racial imbalance” and providing as possible explanations that “Black life is valued less highly than white life” or “the white-dominated social structure is less threatened by Black-victim homicide”).

Few scholars have relied on modern social science methods or evidence to deconstruct the ways the human mind may unwittingly contribute to racial disparities in the death penalty.⁸ This Article begins to fill that gap by considering racial disparities in capital punishment through the lens of implicit racial bias. Implicit bias refers to the automatic attitudes and stereotypes that appear in individuals.⁹ These biases have been shown to affect a broad range of behaviors and decisions, and the breadth of knowledge continues to expand.¹⁰ Implicit biases, for example, have been shown to predict the way economic allocations are made,¹¹ medical treatments are rendered,¹² job interviews are offered,¹³ and more. Yet knowledge of implicit cognitive processes has yet to be adequately considered an underlying source of inequity in capital punishment.¹⁴ To address

⁸ Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004); Justin D. Levinson, *Race, Death and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009); Smith & Cohen, *supra* note 7.

⁹ For a summary of implicit bias social science research, see Justin D. Levinson, Danielle K. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 9 [hereinafter Levinson et al., *A Social Science Overview*] (citing John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 9 (1989); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004); Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509 (1991); Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009)). For a more theoretical perspective underlying work on implicit bias, see Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, in THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 123 (Henry L. Roediger III et al. eds., 2001); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

¹⁰ See Levinson et al., *A Social Science Overview*, *supra* note 9. See, e.g., Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002); Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007); Greenwald, et al., *supra* note 9. ,

¹¹ Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359 (2007).

¹² Alexander R. Green et al., *Implicit Bias among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007).

¹³ Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence* 17 LABOUR ECON. 523 (2010); Jens Agerstrom & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790 (2011).

¹⁴ See Smith & Cohen, *supra* note 7. Several scholars have suggested that implicit bias plays a role in death penalty disparities, but have yet to empirically or deeply explore these hypotheses. See, e.g., Lucy Adams, Comment, *Death by Discretion: Who Decides Who Lives and Dies in the United States of America?* 32 AM. J. CRIM. L. 381, 389–90 (2005) (stating that “a white prosecutor may — consciously or subconsciously — perceive a crime to be more ‘outrageously or wantonly vile, horrible, or inhuman’ if it is alleged to have been committed against a white victim” (quoting

this knowledge gap, we conducted an empirical study of jury eligible citizens from six of the most active death penalty states.¹⁵ The results of the study underscore the potentially powerful role of implicit bias and suggest that racial disparities in the modern death penalty could be linked to the very concepts entrusted to maintain the continued constitutionality of capital punishment: its retributive core, its empowerment of juries to express the cultural consensus of local communities, and the post-*Gregg* regulatory measures that promised to eliminate arbitrary death sentencing.

Empirical research on race and the death penalty outside the context of implicit bias has been a model of productivity in early empirical legal scholarship. In a particularly busy period beginning in the early 1970s, researchers investigated topics spanning from the role of death qualification on the composition of the jury,¹⁶ to the now famous race of victim effects that (over thirty years after they were first discovered) continue to define the make-up of death rows everywhere.¹⁷ Much of this work has relied on modern and sophisticated empirical methods. Yet empirical work on implicit bias has barely scratched the surface of issues

GA. CODE ANN. § 17-10-30(b)(7) (1994)); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2094–2106 (2004) (considering the extreme deference given to prosecutors); Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1599–1600 (2004) (addressing “unconscious race empathy” that white prosecutors may have with white defendants or white victims); Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1819 (1998) (alluding to unconscious biases produced due to similarities between prosecutors and victims); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 140–41 (2003) (proposing that it “is likely that that unconscious racism influences a prosecutor even more than it affects others”).

¹⁵ Alabama, Arizona, California, Florida, Oklahoma, and Texas.

¹⁶ See, e.g., J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 12 U. Colo. L. Rev. 1 (1970); J. Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convcit? Some Evidence from California*, 3 Woodrow Wilson L.J. 11 (1980); Claudia L. Cowen et al., *Effects of Death Qualification*, 8 LAW & HUM. BEHAV. 53 (1984); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46–48 (1984); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984); George L. Jurow, *New Data on the Effect of a “Death Qualified Jury” on the Guilt Determination Process*, 84 Harv. L. Rev. 567 (1971); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 109 (1984).

¹⁷ David C. Baldus & James W.L. Cole, *Quantitative Proof of Intentional Discrimination*, 1 EVALUATION QUARTERLY 53 (1977); David C. Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. LAW & CRIMINOLOGY 661 (1983); BALDUS ET AL., EQUAL JUSTICE, *supra* note 3.

related to race and the death penalty.¹⁸ In an effort to begin an empirical consideration of implicit bias in the death penalty, we designed a study that examined the role of implicit bias in a broad range of jury eligible citizens in six leading death penalty states. Our study pursued a range of hypotheses relevant to racial bias and the death penalty, including: (1) do jury eligible citizens in death penalty states harbor implicit racial stereotypes, such as stereotypes that Blacks are aggressive, lazy, and worthless, and Whites are virtuous, hard-working, and valuable; (2) do death qualified jurors hold stronger implicit and explicit racial biases than non-death qualified jurors; and (3) do implicit and explicit biases predict death penalty decision-making depending upon the race of the defendant and the victim.

We hypothesized that capital jurors possess implicit racial biases both as to traditional racial stereotypes as well as moral stereotypes related to the value of human life (specifically, that White people are more valuable than Black people). We also predicted that death qualification, a legal process designed to provide fairness in the administration of the death penalty, actually functions to remove the least racially biased jurors from juries. And finally, we hypothesized that jurors' implicit biases would help predict their ultimate life and death decisions.

Results of the study confirmed several of our hypotheses. To begin with, we found, as expected, that jury eligible citizens harbored the two different kinds of implicit racial bias we tested: implicit racial stereotypes about Blacks and Whites generally, as well as implicit associations between race and the value of life (using a measure we designed called the "Value of Life IAT"¹⁹). In addition, we

¹⁸ See Eisenberg & Johnson, *supra* note 8. In Eisenberg and Johnson's study, the researchers tested whether a sample of capital defense attorneys held implicit racial bias, as employed by (a paper and pencil version of) the IAT. They found that the attorneys, a group that one would expect to resist such biases, harbored similar biases to the rest of the population. *Id.* at 1556.

¹⁹ IAT stands for Implicit Association Test. The IAT:

pairs an attitude object (such as a racial group) with an evaluative dimension (good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes. Participants sit at a computer and are asked to pair an attitude object (for example, Black or white, man or woman; fat or thin) with either an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts) by pressing a response key as quickly as they can. For example, in one task, participants are told to quickly pair together pictures of African-American faces with positive words from the evaluative dimension. In a second task, participants are obliged to pair African-American faces with negative words. The difference in the speed at which the participants can perform the two tasks is interpreted as the strength of the attitude (or in the case of attributes, the strength of the stereotype). For example, if participants perform the first task faster than the second task, they are showing implicitly positive attitudes toward Blacks. Similarly, if they are faster to perform tasks that oblige

found, as predicted, that death qualified jurors harbored stronger racial biases than excluded jurors;²⁰ these differences in racial bias levels were revealed on both implicit and self-reported (explicit) measures. Turning to the mock trial scenario we conducted, although our overall results did not replicate the known racial effects on ultimate life and death decisions, results of the study showed that implicit racial bias predicted race of defendant effects.²¹ That is, the more the mock jurors showed implicit bias that related to race and the value of human life, the more likely they were to convict a Black defendant relative to a White defendant. In addition we found that self-reported (explicit) racial bias predicted death decisions based on the race of the victim.

This Article considers what an implicit bias examination can contribute to the discussion of racial disparities and capital punishment and presents the empirical study we conducted to test our hypotheses. The Article is organized as follows: Section II frames the issue by presenting the historical and constitutional problem. It considers the history of race in the death penalty, and specifically focuses on the modern prevalence of race of victim effects and the constitutional challenges surrounding racial inequalities in capital punishment. Section III introduces implicit bias to the capital context. It briefly summarizes empirical implicit bias scholarship in the criminal justice realm, proposes an implicit bias model of jury decision-making that could be relevant both to non-capital and capital cases, and presents a theory that attempts to deconstruct the role of implicit bias in capital cases. Section IV details the empirical study. It begins by describing the methods and materials of the experiment, which was conducted in six leading death penalty states, and concludes by presenting the results. Among other things, the results of the study found that death qualified jurors are more racially biased (both implicitly and explicitly) than non-death qualified jurors and also that both implicit and explicit biases can play a role in the ultimate decision of whether a defendant lives or dies. Section V considers the implications of the study from multiple perspectives and contextualizes the results both in legal scholarship and in terms of constitutional jurisprudence. We conclude with a brief examination of future pathways for identifying and assessing the locations where racial disparities continue to plague the administration of the death penalty.

categorizing women with home than tasks that oblige categorizing women with career, they are showing implicit sex stereotyping.

Levinson et al., *A Social Science Overview*, *supra* note 9 at 16-17.

²⁰ These jurors would be excluded because they would not be willing to convict when death was a possible penalty or to impose the death penalty after a conviction.

²¹ See *supra* notes 199-200 and accompanying text.

II. RACE AND DEATH: STILL INTERTWINED AND STILL LEGAL

The close connection between race and the death penalty has deep historical and cultural roots that have been considered by both the Supreme Court and by legal scholars for generations. This section begins with a brief sketch of the historical relationship between race and the death penalty in the period before *Furman v. Georgia*,²² the 1972 decision that ended the pre-modern death penalty in America. It then details the doctrinal structure used to regulate capital punishment since *Furman*. Next, it considers where unjustified racial disparities enter into the administration of capital punishment and examines both how scholars have understood why such disparities persist as well as offers new perspectives that may further illuminate America's continuing cultural and legal struggles with race and death.

A. *Race and the Unregulated Death Penalty: From Lynching Mobs to Furman v. Georgia*

Race and capital punishment share a long, intertwined history in the United States. Pre-Civil War states formally set the punishment for some crimes at death when committed by a Black man and a lesser sentence when committed by a White man.²³ These states also labeled some crimes as death-eligible (or not) based on whether the victim was White or Black.²⁴ Formal discrimination faded eventually, but the fear of freed Black men escalated across the South (and, as Black Americans moved North and West, outside of the South, too). This fear dovetailed with the argument that the death penalty was a necessary tool for maintaining social order, especially against the threat of Blacks. For example, in 1927, the Governor of Arkansas, addressing “one of the South’s most serious problems,” i.e., “the negro question,”²⁵ argued that because Blacks were “still quite primitive, and in general culture and advancement in a childish state of progress, [i]f the death penalty were to be removed from our statute books, the

²² 408 U.S. 238 (1972).

²³ See Amsterdam, *supra* note 4 (“Prior to the Civil War, all Southern States provided by law that slaves - and sometimes free Negroes as well - should be sentenced to death for crimes punishable by lesser penalties when whites committed them. After the War ended slavery, formal legal discrimination against free Negroes and Mulattoes was perpetuated by the Black Codes; African-Americans continued to be punished by death for crimes with lesser punishments for whites.”).

²⁴ *Id.*

²⁵ See BANNER, *supra* note 1 at 228.

tendency to commit deeds of violence would be heightened [because] the greater number of the race do not maintain the same ideals as the Whites.”²⁶

Other commentators proposed expansion—or at least opposed abolition—of capital punishment on the grounds the death penalty served as a structurally manageable alternative to lynching.²⁷ The general argument was that “southerners’ strong desire to exact retribution for crime would result in even more lynching,”²⁸ unless the death penalty remained intact.²⁹ The following excerpt from an editorial in a Shreveport, Louisiana newspaper in 1914 illustrates the thrust of the idea:

There are “suggestions from some of the newspapers of the State that Louisiana follow the lead of a few other States and abolish the death penalty,” but “[w]ould not one result be to increase the number of lynchings? Would the murderer be permitted to reach State prison in safety from the vengeance of an outraged citizenship . . . ?”³⁰

Beginning in the 1920s, the Supreme Court poked around the edges of state capital statutes by intervening in truly abhorrent death penalty cases where Black

²⁶ *Id.*

²⁷ *Id.* at 228 (“Southern whites turned toward alternative forms of racial subjugation, and one of those was the death penalty. That capital punishment was necessary to restrain a primitive, animalistic Black population became an article of faith among white southerners that persisted well into the twentieth century.”).

²⁸ *Id.* at 229.

²⁹ *Id.*; see also *Furman*, 408 U.S. at 303 (Brennan, J., concurring) (rejecting the claim that capital punishment is constitutional because it “satisfies the popular demand for grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hand”) G. Ben Cohen, *The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65, 87 (2012) (“[T]he broad correlation between counties with high death sentencing rates today and counties that had multiple lynchings in the early 1900s justifies specific inquiry.”); *id.* (citing Carol S. Steiker and Jordan M. Steiker, *Centennial Symposium: A Century Of Criminal Justice: I. Crimes And Punishment: Capital Punishment: A Century Of Discontinuous Debate Summer*, 100 J. CRIM. L. & CRIMINOLOGY 643, 646-662 (2010) (labeling “the death penalty as a necessary antidote to lynching”)); *id.* (noting that “[s]upporters of capital punishment urged that the maintenance of the death penalty was a necessary antidote to lynching; indeed, it may well be that some who might otherwise have opposed the death penalty came reluctantly to support it as a lesser evil, given that the anti-lynching voices tended to come from the more politically progressive members of communities in which lynching was most prevalent”).

³⁰ Cohen, *supra* note 29, at 94 (citing *Editorial, The Shreveport Times, April 13, 1914*). Other commentators suggest *expanding* the death penalty based on the need to control freed Blacks. See BANNER, *supra* note 1 (“Virginia chemist and farmer Edmund Ruffin complained that the free slaves were committing so many crimes that “burglary, robbery and arson ought to be again punished by death.”).

defendants received visible shoddy justice—³¹ cases that legal historian Michael Klarman has labeled variously as “Jim Crow at its worst,”³² “legal lynching,”³³ and “sentences designed to appease an angry mob.”³⁴ By the 1960s, the problem of racially disparate death penalty schemes had bubbled to the surface. The South was the center of gravity for these observed disparities, and nowhere was the impact greater than in the application of the death penalty to the crime of rape: all but two of the eighteen jurisdictions that still punished rape capitally in 1953 were Southern jurisdictions and greater than 90% of Americans executed for rape in the eight preceding decades had been Black Americans.³⁵ Indeed, the improper influence of race on the administration of the death penalty contributed to the United States Supreme Court halting death sentencing nationally in 1972. In *Furman v. Georgia*, the Supreme Court struck down Georgia and Texas death penalty statutes and placed a de facto prohibition on all then existing capital sentencing schemes.³⁶ The concurring opinions of Justice Douglas and Justice Marshall highlighted the racially unequal application of the death penalty among the races.³⁷ Justice Douglas cited to the final report of Lyndon Johnson’s President’s Commission on Law Enforcement and the Administration of Criminal Justice, which concluded that “[t]he death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.”³⁸ Justice Douglas also cited to a comprehensive study of the Texas death penalty

³¹ BANNER, *supra* note 1 at 215 (“the Court had intervened in a series of Southern cases in which violence and intimidation had produced death sentences that it regarded as a travesty of justice”); *id.* (listing, *inter alia*, *Moore v. Demspey*—overturning convictions against six Black men where their confessions were produced by torture—, *Powell v Alabama* and *Norris v. Alabama*—reversing the convictions of the Scottsboro boys, who were Black men convicted of raping two white woman and tried in a trial that reflected mob-rule rather than the rule of law—, and *Patton v. Mississippi*—reversing conviction where all white jury imposed a death sentence against a Black defendant in a jury with a 1/3 Black American population).

³² Michael Karlman, *Scottsboro*, 93 MARQ. L. REV. 379, 422 and 426 (2009).

³³ *Id.* at 393 (quoting DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 160 (rev. ed. 1979)).

³⁴ *Id.* at 382 (“Some jurisdictions actually enacted laws deigned to prevent lynchings by providing for special terms of court to convene within days of alleged rapes and other incendiary crimes. In many instances, law enforcement officers explicitly promised would-be lynch mobs that black defendants would be quickly tried and executed if the mob desisted, and prosecutors appealed to juries to convict in order to reward mobs for good behavior and thus encourage similar restraint in the future.”).

³⁵ See Donald H. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43, 53 (“The execution statistics show that the total number of executions for rape in the states imposing the death penalty during all or some of the period, was 444; of these, 399 were Negroes . . .”).

³⁶ *Furman v. Georgia*, *supra* note 22 at 239-40.

³⁷ *Id.* at 251, 364 (“The Negro convicted of rape is far more likely to get the death penalty than a term sentence . . .” and “It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.”).

³⁸ *Id.* at 251.

from 1924-1968, which found “several instances where a White and a Negro were co-defendants, the White was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty” and that “[t]he Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas Whites and Latins are far more likely to get a term sentence than the death penalty.”³⁹

In his concurring opinion, Justice Marshall added that it becomes “immediately apparent [from historical execution statistics] that Negroes were executed far more often than whites in proportion to their percentage of the population.”⁴⁰ Marshall continued: “Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.”⁴¹ After considering the arguments put forward by Douglas and Marshall, Justice Stewart wrote, “[m]y concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”⁴² Nonetheless, Stewart concluded that “racial discrimination has not been proved,” and thus he “put it to one side.”⁴³ The *Furman* court simply held in a one paragraph per curiam opinion that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments,” which left the death penalty temporarily suspended, but with an implicit invitation for reform.⁴⁴

B. Race and the Regulated Death Penalty: From Furman v. Georgia to the Present.

In the years immediately following *Furman*, state legislatures wasted no time in recalibrating and reenacting death penalty schemes that would withstand constitutional scrutiny.⁴⁵ Just four years after *Furman*, the Court gave its blessing to capital punishment in the 1976 case of *Gregg v. Georgia*,⁴⁶ noting that statutes like the newly minted Georgia statute contain procedural safeguards that help

³⁹ *Id.* at 250-251.

⁴⁰ *Id.* at 364 (Marshall, J., concurring).

⁴¹ *Id.*

⁴² *Furman v. Georgia supra* note 22 at 310 (Stewart, J., concurring).

⁴³ *Id.*

⁴⁴ *Id.* at 240.

⁴⁵ See *Gregg v. Georgia*, 428 U.S. 153, 179-180 (1976) (“The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.”).

⁴⁶ 428 U.S. 153 (1976).

guard against arbitrary or discriminatory imposition of the death penalty.⁴⁷ The Court noted that some of the procedural safeguards that Georgia adopted were aimed at stamping out racial arbitrariness: they included a “questionnaire [for trial judges to complete with] six questions designed to disclose whether race played a role in the case” and a “provision for appellate review,” which included a requirement that the Georgia Supreme Court explicitly decide “[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.”⁴⁸ The *Gregg* Court, then, did not eschew the importance of a race-neutral death penalty, but rather it placed its faith in the ability of the revised sentencing statutes to eliminate the importance of race in deciding who lives and who dies.

The Court’s conclusion in *Gregg* that sufficient procedural regulation could stamp out racial and other arbitrariness from capital sentencing has been a source of great skepticism.⁴⁹ The biggest post-*Gregg* race-based systemic challenge to the modern death penalty came in the 1987 case of *McCleskey v. Kemp*.⁵⁰ Warren McCleskey, a Black man, had been convicted and sentenced to death in Georgia for the murder of a White police officer.⁵¹ McCleskey urged the Supreme Court to reverse his death sentence due to the influence of racial arbitrariness in the administration of the Georgia death-sentencing scheme.⁵² To support this proposition, McCleskey introduced the results of two large-scale statistical studies of more than 2,000 Georgia capital cases.⁵³ These studies, known collectively as “the Baldus study,” demonstrated that a capital defendant who

⁴⁷ *Id.* at 180 (explaining how “recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily [] by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence”).

⁴⁸ *Id.* at 211-212. Though many states passed statutes that contained safeguards similar to those enacted in Georgia, states did—and do—tend to give them perfunctory treatment. *See e.g. See Leigh B. Bienen, The Proportionality Review of Capital Cases by State High Courts After Gregg: Only “The Appearance of Justice,”* 87 J. CRIM. L. & CRIMINOLOGY 130, 140 (1996) (noting that more than 30 states passed similar safeguards, but that most of these states either perform perfunctory review or else have repealed proportionality / arbitrariness review altogether).

⁴⁹ *See, e.g.,* Carol Steiker and Jordan Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,* 109 HARV. L. REV. 355 (1995) (describing the Court’s then twenty year old *Gregg* experiment and concluding that procedural regulation failed to satisfy its Eighth Amendment objectives).

⁵⁰ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁵¹ *Id.* at 283 (noting the race of both McCleskey and the police officer).

⁵² *Id.* at 291 (“[McCleskey] argues that race has infected the administration of Georgia’s statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers. As a black defendant who killed a white victim, McCleskey claims that the Baldus study demonstrates that he was discriminated against because of his race and because of the race of his victim.”).

⁵³ *Id.* at 286-287.

killed a White victim was more than four times as likely to be sentenced to death than a capital defendant who murdered a Black victim.⁵⁴ The study also considered the likelihood of a death sentence given the various race of the defendant / race of the victim combinations. It found that the death penalty was imposed in “22% of the cases involving Black defendants and White victims; 8% of the cases involving White defendants and White victims; 1% of the cases involving Black defendants and Black victims; and 3% of the cases involving White defendants and Black victims.”⁵⁵ The Baldus study demonstrated (as Justice Brennan explained) that “[o]f the more than 200 variables potentially relevant to a sentencing decision, race of the victim [was] a powerful explanation for variation in death sentence rates—as powerful as nonracial aggravating factors such as a prior murder conviction or acting as the principal planner of the homicide.”⁵⁶

McCleskey used the findings of the Baldus study to support his racial arbitrariness claim on two main grounds. First, McCleskey argued that the results of the statistical studies sufficed to raise an inference of purposeful discrimination, which, unless rebutted by Georgia, is enough to violate the Equal Protection clause.⁵⁷ Second, he argued that the study demonstrated a constitutionally intolerable risk under the Eighth Amendment that racial bias infected the Georgia death-sentencing scheme and thus McCleskey could not be guaranteed that he received a death sentence based on rationally and consistently applied non-racial factors.⁵⁸

The Court rejected McCleskey’s challenge on a variety of grounds. First, it rejected the Equal Protection challenge, finding “the Baldus study [to be] clearly insufficient to support an inference that any of the decisionmakers in McCleskey’s case acted with discriminatory purpose.”⁵⁹ The Court explained “the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics [in other settings such as petit jury composition or employment discrimination cases where such inferences are permitted].”⁶⁰ It reasoned that the death penalty was a genre particularly unsuited for this type of statistical inference because in the capital context each capital jury “is unique in

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *McCleskey v. Kemp*, 481 U.S. at 326 (Brennan, J., dissenting).

⁵⁷ *Id.* at 291

⁵⁸ *Id.* at 299.

⁵⁹ *Id.* at 297.

⁶⁰ *Id.* at 294-295.

its composition,” is “selected from a properly constituted venire” and renders a final decision that “rest[s] on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.”⁶¹ After noting its own “unceasing efforts to eradicate racial prejudice from our criminal justice system,”⁶² the Court characterized the Baldus study as “at most . . . indicat[ing] a discrepancy that appears to correlate with race,”⁶³ “declin[e]d to assume that what is unexplained is invidious,”⁶⁴ and “h[e]ld that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”⁶⁵ Finally, the Court worried that if it “accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”⁶⁶ This fear, Justice Brennan quipped in his dissent, is best labeled “a fear of too much justice.”⁶⁷

The discouragement from the *McCleskey* Court has not stopped researchers from documenting continued racial arbitrariness in the administration of capital sentencing schemes.⁶⁸ Indeed, a host of empirical studies measuring race of the defendant effects, race of the victim effects, or both, have been published since *McCleskey*.⁶⁹ Most of the post-*McCleskey* studies that report unjustified racial

⁶¹ *Id.*

⁶² *McCleskey v. Kemp*, 481 U.S. at 309.

⁶³ *Id.* at 313.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 315.

⁶⁷ *Id.* at 339 (Brennan, J., dissenting).

⁶⁸ *See, e.g., infra* at notes 82-87; Lynch and Haney, *supra* note 5 at 576 (noting that “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 [besides Georgia], including California, Florida, Illinois, Maryland, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, and South Carolina”).

⁶⁹ *Id.*; *see, e.g.,* Samuel R. Gross and Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 106 (1984) (finding “remarkably stable and consistent” race of the victim effects “in the imposition of the death penalty under post-Furman statutes in the eight states [that the authors] examined” and explaining that the “legitimate sentencing variables that we considered could not explain these disparities, whether we controlled for these variables one at a time, organized them into a scale of aggravation, or used multiple regression analysis”). *But see* David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1676-1760 (1998) (finding that Black defendants who committed mid-range capital crimes were four times more likely to receive a sentence of death than white defendants that committed similarly aggravated crimes, even after adjusting for case-related factors); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 386 (2006) (finding that the degree with which the offenders in the Philadelphia dataset possess

disparities in the imposition of the death penalty have found that the influence of racial bias centers on the race of the victim rather than on the race of the defendant.⁷⁰ In other words, the death penalty is imposed disproportionately often for the homicide of White victims. This effect is particularly stark—as it was in the Baldus studies presented in *McCleskey*⁷¹—when the victim is White *and* the defendant is Black.⁷²

The evidence comes from death penalty jurisdictions across the country. For example, a study of death-eligible homicide cases from 1990-2005 in southwest Arkansas found “large and highly statistically significant” death-sentencing disparities in Black-defendant / White-victim cases.⁷³ Indeed, in the two Arkansas judicial circuits included in the study, the only death-eligible cases (n=63) to result in a death sentence involved Black defendants and White victims.⁷⁴ A 2010 review of 1,100 death-eligible homicides that occurred in East Baton Rouge, Louisiana over a twenty-eight year period similarly found that though Blacks constitute four-fifths of homicide victims in East Baton Rouge, over half of the cases in which a death sentence was obtained involved a White victim.⁷⁵ A 2010 study that examined more than 15,000 homicide cases across a quarter-century span found that killing a White person in North Carolina is associated with a threefold increase in the likelihood of receiving a death sentence over killing a

stereotypically Afrocentric facial features predicts death-sentencing). The reason why race of the victim effects are not found in this study is because the then-district attorney of Philadelphia, Lynn Abrahams, prosecuted nearly every case capitally if it was death-eligible. This also provides some support for the idea that charging practices—more than jury determinations—drive race of the victim effects. Regarding the lack of consistent findings of race of defendants, Justin Levinson has argued that this inconsistency may actually cover up true race of defendant disparities. In a theory called “Racial Bias Masking Hypothesis,” Levinson argued that the construction of the case facts used by empirical researchers themselves may have been automatically skewed (by implicit bias) in such a way as to wash away race of defendant effects. See Levinson, *Race, Death, and the Complicitous Mind*, *supra* note 8. Relying on research beginning with classic social psychology experiments on how stories are told and retold, Levinson claimed that when researchers attempted to compare like crimes by white and Black defendants, they may have actually been comparing defendants who had, in actuality, committed different severities of crimes (Whites more severe than Blacks). See *Id.* at 603 (citing GORDON W. ALPORT & LEO J. POSTMAN, *THE PSYCHOLOGY OF RUMOR* (1947)).

⁷⁰ See, e.g., Gross & Mauro, *Patterns of Death*, *supra* note 69.

⁷¹ *McCleskey*, 481 U.S. at 286-287.

⁷² See, e.g., *infra* at notes 82-87.

⁷³ David C. Baldus, Julie Brain, Neil A. Weiner, George Woodworth, *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southwest Arkansas (1990-2005) with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, 76 TENN. L. REV. 555, 573 (2009).

⁷⁴ *Id.* at 586.

⁷⁵ Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647 (2011).

Black person.⁷⁶ These race of the victim disparities persist at the federal level, too: a 2000 study conducted by the United States Department of Justice found that local United States Attorneys sought authorization from the Attorney General to pursue a federal capital prosecution twice as often when the victim was non-Black than when the victim was Black.⁷⁷ Similarly, a 2011 study found statistically significant race of the victim effects in the context of the military death penalty.⁷⁸ These differences could not “be explained by legitimate case characteristics or the effects of chance in a race-neutral system.”⁷⁹ These studies demonstrate that the race of the victim effects first demonstrated in *McCleskey* have been consistently replicated across many jurisdictions by a number of researchers over thirty years.

Researchers also find race of the defendant effects, though these effects are more modest today than they were forty years ago.⁸⁰ The decreased disparities probably stem from restricting the death penalty to homicide offenses. More specifically, first a decrease in capital rape prosecutions, and then the Court’s decision in *Coker v. Georgia*⁸¹ to ban the death penalty for the rape of an adult woman, led to a decrease in race of defendant disparities because capital rape convictions constituted the largest source of such disparities.⁸² The decreased defendant-based disparities—and indeed the lack of statistically significant findings in most studies that focus on all death-eligible homicides in a jurisdiction—also are explained, at least in part, by the fact that race of the defendant discrimination appears mostly to play out during the penalty phase of a capital trial and not at the stage where prosecutors decide whether to pursue a case capitally.⁸³ The charging stage is a far more important sorting tool in the modern era than are capital trials because the vast majority of homicide cases (even those that are death-eligible) do not proceed

⁷⁶ Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina 1980–2007*, 89 N.C. L. REV. (2011).

⁷⁷ U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000) (Sept. 12, 2000), available at <http://www.justice.gov/dag/pubdoc/dpsurvey.html>.

⁷⁸ David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1266 (2012).

⁷⁹ *Id.*

⁸⁰ *See id.* at 1273 n.144 (finding race of the defendant effects in Philadelphia capital cases from 1983-1993); Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUSTON L. REV. 131 (2012) (finding race of the defendant effects in Harris County, Texas).

⁸¹ 433 U.S. 584 (1977).

⁸² BANNER, *supra* at 1.

⁸³ Lynch & Haney, *supra* at note 5 (“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.”).

to a capital trial.⁸⁴ Professors Lynch and Haney hypothesize that one normally does not find significant race of defendant effects until the jury-decision making stage because (at least from the point of view of a prosecutor) the pre-trial stage is more likely to focus on the victim of the crime whereas the penalty phase of a capital trial is centered on the defendant.⁸⁵ Regardless of whether race of victim and race of defendant effects persist in equal proportions, the broader point is that the Court's Eighth Amendment regulatory framework appears to have failed in practice to eliminate unjustified racial disparities from the administration of capital punishment.

C. Explanations for Continued Racial Disparities

In light of the massive disparities in the administration of the death penalty, present and past, there has been no shortage of scholarly attempts to deconstruct the reasons behind this continuing and disturbing trend. This section addresses why racial disparities persist, both by considering legal commentators' work, as well as by proposing new implicit bias-based explanations. We sketch three categories of explanations that scholars have advanced to explain racial disparities in capital sentencing. The first category is a spatial and cultural explanation: jurisdictions that sentence people to death regularly tend to possess a core lower-status minority group population ("outsiders") and a thick ring of higher-status White citizens ("spatial"), and also tend to be more "parochial," which results in the community punishing most harshly crimes committed by lower-status outsiders against higher status insiders ("cultural").⁸⁶ The second category, which is procedural, has three component parts. First, it questions whether the death-qualification, a central tenet in death penalty jurisprudence that was enacted for the purpose of eradicating impartiality, has the unintended consequences of increasing unjustified racial disparities. It also includes two descriptions of the stages where racial factors can enter into capital punishment process. The most important stage involves prosecutorial charging decisions. The other important

⁸⁴ *Felony Defendants*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=231> (last visited Feb. 14, 2013).

⁸⁵ Lynch & Haney, *supra* note 5 at 586 ("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."); *id.* ("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).")

⁸⁶ James Liebman and Peter Clark, *David H. Bodiker Lecture of Criminal Justice: Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 288 (2012) ("Parochialism helps explain . . . why insular communities demand extra punishment, especially death, for cross-culture crim.").

stage is when jurors consider whether to impose a death sentence. This latter stage has racial implications for multiple reasons: when jurors consider aggravating factors, such as whether the defendant committed a murder that was “heinous, atrocious and cruel,” the amorphous nature of the inquiry as compared to an ordinary question of fact (e.g. did the defendant fire this weapon) increases the opportunity for racial bias to operate;⁸⁷ jurors consider mitigating evidence in different ways depending on the race of the defendant;⁸⁸ and jurors weigh victim impact testimony differently based on the race of the victim.⁸⁹ The third category is a structural one, focusing on a core justification for capital punishment—retribution—and asking whether it is hopelessly intertwined with race.

1. Spatial and Cultural Explanations

Jurors empanelled in state capital trials are culled from the county in which the homicide occurred.⁹⁰ This section explores how the spatial and cultural realities of this process influences the types of crime for which the death penalty is sought and obtained. The counties that regularly return death sentences tend to possess a peculiar geography: a heavily minority populated urban core surrounded by a thick ring of heavily White populated suburbs.⁹¹ The federal jurisdictions that return the most death sentences follow a similar pattern: the counties where the homicide occurred are often counties where a majority of the population are minority group members, but jurors are culled from all of the counties in the federal district, and the counties surrounding the county of offense tend to be very heavily White.⁹²

Political scientists Joe Soss and his colleagues argue that the spatial distribution of Black and White Americans in a jurisdiction matters tremendously because “individuals with similar characteristics can be expected to respond differently to this issue depending on their surrounding social environments.”⁹³ Support for the

⁸⁷ Robert J. Smith & G. Ben Cohen, *Choosing Life or Death (Implicitly)*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 7, at 236.

⁸⁸ *Id.* at 236, 236-40.

⁸⁹ *Id.* at 236, 240-43.

⁹⁰ G. Ben Cohen & Robert J. Smith, *supra* note 6 at 432 (explaining that the jury lottery system is based on county).

⁹¹ Robert J. Smith & G. Ben Cohen, *supra* note 7. at 272 (offering, for example, “Baltimore County, Maryland—the predominantly white, suburban donut that encircles the majority African-American Baltimore City”).

⁹² G. Ben Cohen & Robert J. Smith, *supra* note 6 at 437 (“[W]hat is striking about these jurisdictions is that the county of the offense generally has a high percentage of blacks, but is located within federal districts which are heavily white.”).

⁹³ Joe Soss, Laura Langbein & Alan R. Metelko, *Why Do White Americans Support the Death Penalty?*, 65 *J. OF POLITICS* 397, 414 (2003).

death penalty fluctuates among White Americans depending on whether they possess high or low anti-Black prejudice and on their residential proximity to Black Americans.⁹⁴ Explicit racial bias is a strong predictor of death penalty support for White Americans generally, but the predictive quality varies depending on the racial demographics of a particular location.⁹⁵ White Americans with high explicit anti-Black prejudice show increased support for capital punishment when moving from an all-White county to a county with at least a 20% Black population.⁹⁶ Indeed the predicative value of explicit racial prejudice and death penalty support “more than double[s]” for White Americans that live in “more integrated”—as opposed to all White—counties.⁹⁷ This appears to be (at least in part) a function of increased self-reporting of explicit racial bias: among Americans residing in counties with a 20%, or greater, Black population, explicit anti-Black prejudice is “staggering[ly]” higher than in all White counties.⁹⁸

Liebman and Clark posit that the handful of jurisdictions that continue to use the death penalty with regularity are bound together by their parochial tendencies as well as their spatial characteristics.⁹⁹ By parochial, Liebman and Clark mean to convey a sense of “localism for its own sake,” or “the attribution of innate importance and validity to the values and experiences one shares with the members of—and thus to the security, stability and continuity of—one’s closely proximate community.”¹⁰⁰ Parochialism also embodies “fears that prized local values and experiences are embattled, slipping into the minority and at risk from modernity, cosmopolitanism, immigration-driven demographic change, and a coterie of ‘progressive’ and secular influences, including permissiveness and crime.” Thus, communities with parochial characteristics possess “a sense of anxiety or threat” about “outside influences that threaten to dilute or entirely dissolve the community’s cohesion.”¹⁰¹

High death penalty usage appears to be influenced by both the spatial distribution of racial diversity and cultural parochialism. As Liebman and Clark conclude,

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*; *id.* at 416 (“White Americans’ preferences for the death penalty cannot be adequately understood apart from their racial component. Racial prejudice is, in the aggregate, a significant part of what white death penalty support means. Just as racial bias remains a feature of how capital punishment seems to be practiced in the U.S., so too does it continue to distort the ways white Americans think about and respond to the ultimate penalty.”).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ James Liebman and Peter Clark, *David H. Bodiker Lecture of Criminal Justice: Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255 (2012).

¹⁰⁰ *Id.* at 268.

¹⁰¹ *Id.* 269-270.

[h]eavy use of the death penalty [] seems to occur when the worst effects of crime have spilled over from poor and minority neighborhoods and are particularly salient to parts of the community that we can predict will have greater influence over local law enforcement, prosecution, and judicial officials.¹⁰²

Professors Shatz and Dalton recently conducted studied 473 first-degree murder convictions that occurred in Alameda County,¹⁰³ California over 23 years. There are two distinct neighborhoods in Alameda County—North County, with a 30% Black population and South County, with a less than 30% Black population. Blacks were 4.5 more likely to be a homicide victim than Whites in North County,¹⁰⁴ whereas Whites were 3 times more likely to be a homicide victim in South County.¹⁰⁵ Nonetheless, Shatz and Dalton found that “the Alameda County District Attorney was substantially more likely to seek death, and capital juries, drawn from a county-wide jury pool, were substantially more likely to impose death, for murders that occurred in South County.”¹⁰⁶

Indeed, Liebman and Clark conclude that it is the “cross- boundary, cross-class, and cross-race spill-over effect of crime—or the elevated fear of it—that disposes communities towards the harshly retributive response of capital punishment.”¹⁰⁷ Professor Garland is more blunt: legislators and juries express the moral consensus of a community, and when those local decision-makers “identify with offenders, or with the groups to which they belong, the death penalty becomes less likely.”¹⁰⁸ Conversely, “[w]herever punishers and punished are deeply divided by race or class, death sentences become easier to impose.”¹⁰⁹ Divisions between racial groups living in the locality “foster suspicion and hostility” and the more powerful group often uses “moral phrasing” to establish “outsiders as immoral, idle, dirty, or dangerous.”¹¹⁰ The dynamics could feed race of the victim effects by overvaluing the lives of white victims relative to black victims—even when black homicide victims are more numerous—and simultaneously

¹⁰² *Id.*

¹⁰³ Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty With Statistics: Furman, McCleskey and a Single County Case Study*, Univ. of San Francisco Law Research Paper No. 2012-23. Available at SSRN: <http://dx.doi.org/10.2139/ssrn.2146253>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 168 (2010).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 169.

intensifying the perceived need for retribution because the offender crossed geographic and social boundaries.

Professor Boddie suggests that implicit racial bias might be at play here.¹¹¹ Labeling the interaction of implicit bias and physical space as a form of “racial territoriality,”¹¹² she hypothesizes that “buttressed by social and cultural norms of racial separation and fear”¹¹³ implicit biases can be “triggered by spatial conditions, including not only whether people of color are present but also their status within the space and how they are treated and/or represented.”¹¹⁴ In this way, neighborhoods like North County and South County in Alameda County, California become spaces that “represent more than a physical set of boundaries or associations.”¹¹⁵ Instead, these “racialized” spaces “correlate with and reinforce cultural norms about spatial belonging and power.”¹¹⁶

2. Race and Procedural Discretion: The Role of Prosecutors and Capital Jurors

i. Prosecutorial Charging Decisions

Discrimination can enter into capital punishment determinations at the point where prosecutors decide to pursue cases capitally.¹¹⁷ The typical claim is that prosecutors choose to pursue the death penalty more often in cases where the victim is White.¹¹⁸ There is strong support for this proposition.¹¹⁹ For example, the East Baton Rouge study discussed above indicated that prosecutors in that Parish pursued capital cases 364% more often when the victim was White than when the victim was Black.¹²⁰ Baldus similarly found that charging practices

¹¹¹ Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. Rev. 401, 438-442 (2010).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See, e.g., *McCleskey*, 481 U.S. at 287 (“Baldus found that prosecutors sought the death penalty in 70% of the cases involving Black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving Black defendants and Black victims; and 19% of the cases involving white defendants and Black victims.”).

¹¹⁸ See Gross & Mauro, *Patterns of Death supra*, note 69 at 106-107 (“Since death penalty prosecutions require large allocations of scarce prosecutorial resources, prosecutors must choose a small number of cases to receive this expensive treatment. In making these choices they may favor homicides that are visible and disturbing to the majority of the community, and these will tend to be white-victim homicides.”).

¹¹⁹ See Blume et al, *supra* note 4; Lynch and Haney, *supra* note 5 at 577 (discussing a recent study of death-eligible Maryland homicide cases that found that “prosecutorial discretion accounted for much of the race-of-victim effect, but that those biases were not corrected at later stages”).

¹²⁰ *Id.*

significantly contribute to the race of victim in Southwest Arkansas.¹²¹ But why do prosecutors make these choices? One theoretically possible explanation for capital charging discrepancies is that crimes with White victims, and particularly crimes with Black defendants and White victims, are more aggravated on average than Black victim crimes.¹²² Another possibility is that the wishes of the victim's surviving family members are important to the prosecution, and that the average family member of a Black victim is less willing to demand—or even applaud—capital charges because the average Black American is less likely to support the death penalty.¹²³ Yet another possibility—consistent with our implicit bias-based claims—is that prosecutors devalue (perhaps automatically and unintentionally) the lives of Black victims relative to White victims.¹²⁴ The prosecutorial discretion explanation ties in to the spatial and cultural explanation offered above: When White victims (“the insiders”) are killed by Black citizens (“the outsiders”) in a jurisdiction where Blacks exist in sufficient numbers to provoke fear and anxiety, but are not sufficiently integrated into the economy and culture of the locality, then offenses committed by Blacks against Whites can be perceived to be more aggravated, White community members can be expected both to be more punitive and more likely to wield political power, and the humanity of the White victims can be overvalued and the humanity of the Black offender (and Black victims) undervalued.

¹²¹ Baldus, et al, note 8, *supra* at 585 (“These large Black-defendant/white-victim race effects were overwhelmingly the product of prosecutorial charging and jury sentencing decisions.”).

¹²² There is mixed data on this question. Compare Glenn L. Pierce & Michael Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 OR. L. REV. 39, 67 (2002) (noting if “homicides with white victims are more aggravated or otherwise more death-eligible than homicides with Black victims, [race of the victim disparities] can be explained by legally relevant variables,” but finding that race of victim effects in a ten year dataset of Illinois death-eligible homicides persist even after controlling for legally relevant factors (including relative aggravation of the homicides)); with Blume et al, *supra* note 4 (noting that Black offender / white victim cases involve “stranger crimes” or multiple victim crimes more than do any other combination of offender / victim racial groupings, but noting that these categorizations are themselves subject to racially tinged decision-making and, in any event, that homicide characteristics do not eliminate race of victim effects).

¹²³ See, e.g., Baldus & Woodworth, *Legitimacy of Capital Punishment*, *supra* note 6 at 1449-50 (“Support for capital punishment is substantially lower in Black communities than it is in white communities. Thus, to the extent that prosecutors take into account the views of the victim's family, the request for a capital prosecution is likely to be higher when the victim is white. Moreover, because most prosecutors are white, the families of white victims are more likely to meet with the prosecutor and press their views on the death penalty.”).

¹²⁴ See, e.g., *id.* at 1450 (“[W]e consider it highly plausible that the statistically significant race-of-victim effects documented in the literature reflect a devaluing (conscious or unconscious) of Black murder victims.”); Smith and Cohen, *supra*, note 7 at 240 (arguing that “white [decision-makers] are more likely to magnify the humanity of white victims and marginalize the humanity of Black perpetrators, [which] negatively affects defendants who murder white victims, because the favorable implicit biases that flow toward white victims enhance the perceived harm of the crime when the victim is white.”).

ii. Capital Jurors

Jury decision-making during the penalty phase of a capital trial is another point in the administration of the death penalty where racial disparities can seep into the system.¹²⁵ This can happen through at least two different avenues: 1) through the use of victim impact evidence and 2) through the inability of jurors to empathize with the mitigating evidence presented by Black defendants. We address each in turn. Scholars have suggested that race of the victim bias might enter into the trial during the introduction of victim impact evidence, which is a type of evidence that is introduced in the sentencing phase of a capital trial by a surviving family member.¹²⁶ Victim impact evidence frequently includes videos, pictures and music that attempt to capture for the jury a glimpse of the life that has been lost.¹²⁷ Robert J. Smith and G. Ben Cohen have observed, “White jurors are more

¹²⁵ Mona Lynch and Haney, *supra* note 5 at 586 (“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.”); *id.* at 577 (“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”) (citing 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).

¹²⁶ Smith and Cohen, *supra* note 7 at 240 (arguing that process whereby “all things being equal, white jurors are more likely to magnify the humanity of white victims and marginalize the humanity of Black perpetrators . . . occurs most clearly through the introduction of victim impact evidence in capital cases”); *Booth v. Maryland*, 482 U.S. 496 (1987) (White, J., dissenting) (characterizing the Court’s concern that capital juries will understand victim impact statements to imply that “defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy” to include a concern that “sentencing juries might be moved by victim impact statements to rely on impermissible factors such as the race of the victim”).

¹²⁷ *See, e.g., Kelly v. California*, 555 U.S. 1020, 1021 (2008) (Stevens, J., statement respecting the denial of certiorari) (describing the victim impact evidence presented in one of the consolidated cases before the Court in *Kelly*: “The prosecution played a 20-minute video consisting of a montage of still photographs and video footage documenting [the victim’s] life from her infancy until shortly before she was killed. The video was narrated by the victim’s mother with soft music playing in the background, and it showed scenes of her swimming, horseback riding, and attending school and social functions with her family and friends. The video ended with a view of her grave marker and footage of people riding horseback in Alberta, Canada—the ‘kind of heaven’ in which her mother said she belonged.”).

likely to magnify the humanity of White victims and marginalize the humanity of both Black victims and Black perpetrators. . . . This dynamic [] negatively affects defendants who murder White victims, because the favorable implicit biases that flow toward White victims enhance the perceived harm of the crime when the victim is White.”¹²⁸

Juror difficulty in giving adequate mitigating value to evidence introduced by Black defendants is a strong candidate for the factor most likely to induce racial unevenness in the penalty phase of capital trials. In *Woodson v. North Carolina*,¹²⁹ the United States Supreme Court held that state capital sentencing schemes cannot preclude jurors from considering “relevant aspects of the [defendant’s] character and record” or any “compassionate or mitigating factors stemming from the diverse frailties of humankind”¹³⁰ that tend to suggest that death is not an appropriate penalty. Mitigation evidence comes in all shapes and forms, but brain injuries, significant intellectual deficits, several mental illness and “rotten social background” tend to dominate. The introduction of testimony that family members and friends love the defendant is also critical mitigation evidence in many capital cases. Each of the mitigating factors requires that the capital jury empathize with the defendant, not so that the jury can justify the terrible conduct in which the defendant has engaged, but so the jury might find some redeeming qualities that suggest that the defendant should remain alive.

Scholars suggest that consideration of mitigating evidence produces race of defendant effects (or at least aggravates race of victim effects in Black defendant / White victim cases) because most capital jurors are White and male. Reporting the results of a simulated California capital trial using 400 jury eligible participants, Mona Lynch and Craig Haney concluded:

¹²⁸ Gross & Mauro, *supra* note 69. The following reflection from Sam Gross and Robert Mauro offered in 1984 remains at least partially relevant today: “[I]n a society that remains segregated socially if not legally, and in which the great majority of jurors are white, jurors are not likely to identify with Black victims or see them as family or friends. This reaction is not an expression of racial hostility, it is simply a reflection of an emotional fact of interracial relations in our society.” As Gross and Mauro first suggested, and as Smith and Cohen explain, there may well be an unintentional yet powerful relationship that has developed, according to which white victims lives have become overvalued relative to Black victims’ lives. We hypothesize that such effects are not only due to an identification or empathy disconnect between white jurors or prosecutors and Black victims, but also may be explained by specific societal stereotypes that cast Blacks as of lesser worth or value than whites.

¹²⁹ 428 U.S. 280, 303-04 (1976).

¹³⁰ *Id.* at 303-04.

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 ... [and] [w]hite 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.¹³¹

Interviews with over a thousand jurors that served on real-life capital juries confirm this dynamic: "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," and "Black men reported being more empathic toward the defendants in these cases than any other category or group of juror."¹³²

3. Structural Explanations

i. Race and Retribution

The fact that racial bias persists in capital punishment systems, combined with an understanding of the close relationship between punitiveness, race and support for the death penalty,¹³³ has led commentators to question whether race might be inextricable from retribution.¹³⁴ The close relationship between race and retribution is important because capital defendants periodically challenge use of the death penalty as it relates to a particular crime (e.g. child rape) or a particular class of offenders (e.g. juveniles). In analyzing those claims, known as Eighth Amendment categorical challenges, the Supreme Court considers whether imposition of the death penalty satisfies "the [] distinct social purposes"¹³⁵ embodied in the core punishment rationales. The Court finds "capital punishment [to be] excessive when . . . it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."¹³⁶

¹³¹ Lynch and Haney, *supra* note 5 at 584.

¹³² *Id.*

¹³³ See, e.g., *infra* notes 145-49 and accompanying text.

¹³⁴ G. Ben Cohen, McCleskey's Omission: *The Racial Geography of Retribution*, OHIO ST. J. CRIM. L. (forthcoming 2012)

¹³⁵ Kennedy v. Louisiana, 554 U.S. 407, 441 (2008).

¹³⁶ *Id.*

While the Court has expressed ambivalence towards the deterrence rationale,¹³⁷ it has closely monitored the retributive value of the death penalty.¹³⁸ In recent years, and especially in *Kennedy v. Louisiana*¹³⁹ (the most recent capital case decided under this analysis), the Court at once justified the death penalty primarily on retributive grounds and acknowledged the vulnerability of doing so: retribution is the punishment rationale that “most often can contradict the law’s own ends,” and “[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”¹⁴⁰ Thus the relationship between race and retribution is important because retribution has been cast as an indispensable component to the constitutionality of the death penalty¹⁴¹ while racial arbitrariness is an impermissible consideration for imposing capital punishment;¹⁴² and yet, it might be that one cannot be contemplated without also considering the corresponding impact of the other.

Moreover, history teaches us that when retribution and race are intertwined, concerns about a law’s “sudden descent into brutality”¹⁴³ or its “transgressing [of] the constitutional commitment to decency and restraint”¹⁴⁴ are at their apex. Retribution and race have an uneasy relationship when it comes to capital punishment. In *Gregg*, Justice Stewart, evoking the specter of lynchings, affirmed the link between race and retribution, asserting that the constitution permits retributive goals for capital punishment because “[w]hen organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve, then there are sown the seeds of anarchy—of self-help, vigilante justice,

¹³⁷ *Id.* (citing *Gregg*, 428 U.S. at 185-186) (joint opinion of Powell, J, Stewart, J and Stevens, J) (underscoring that “no convincing empirical evidence either supporting or refut[es] th[e] view [that the death penalty serves as a significantly greater deterrent than lesser penalties]”); *see also* *Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring) (“The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.”).

¹³⁸ The Court considers the retributive benefit of the death penalty when exercising its “independent judgment” as part of every Eighth Amendment capital proportionality case. *See, e.g., id.* at 2665; *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (“Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”).

¹³⁹ 554 U.S. 407

¹⁴⁰ *Id.* at 420.

¹⁴¹ *Id.* at 441 (explaining that retribution is one of the “two distinct social purposes” of capital punishment).

¹⁴² *See id.* at 447 (describing the importance of avoiding “arbitrary and capricious application” of capital punishment).

¹⁴³ *Id.* at 420.

¹⁴⁴ *Id.*

and lynch law.”¹⁴⁵ Because most victims of lynching were punished for offenses against Whites,¹⁴⁶ one might have believed that the combination of channeling the societal taste for retribution into the formal justice system and heavy anti-arbitrariness procedural regulation of the administration of capital punishment would have interacted to reduce the tendency to punish more those who commit crimes against White Americans.

ii. Death Qualification

A final explanation for the continued existence of racial disparities is that the very processes that are suppose to neutralize the system—for example, the so-called “death qualification” of jurors—unintentionally exacerbate efforts to eradicate unjustified racially disparate outcomes.

Once it is clear that existing constitutional safeguards have failed to protect citizens from continued racial bias in the death penalty, it next becomes important to consider whether regulations not only fail to eliminate racial bias, but also actually may increase it unwittingly.¹⁴⁷ One particular form of regulation that applies solely to capital cases is the process of “death qualification.” To be eligible to sit on a capital jury a prospective juror must be willing to consider as a possible sentence both life without the possibility of parole and the death penalty.¹⁴⁸ Stated as a prohibition, no juror who automatically would vote to reject (or to impose) the death penalty is eligible to sit on a capital jury.¹⁴⁹ To be clear,

¹⁴⁵ Gregg, *supra* note 45 at 183 (quoting Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart J., concurring)).

¹⁴⁶ See Cohen, *supra* note 134 at 67 ” (quoting John Paul Stevens, *On the Death Sentence*, in N.Y. REV. BOOKS, 8, 14 (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION (2010))) (“Justice John Paul Stevens, after his departure from the bench, observed the connection between the death penalty and lynchings: “That the murder of black victims is treated as less culpable than the murder of white victims provides a haunting reminder of once-prevalent Southern lynchings.””).

¹⁴⁷ See Lynch and Craig, *supra* note 5 at 598 (“Rather than remedying these potential biases, some capital trial procedures worsen them. For instance, the well-documented problem of under-representation of minorities in many jurisdictions’ jury pools 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, they are disproportionately excludable, and fewer of them are eligible to sit as jurors on capital cases. Obviously, then, White men are disproportionately likely to be death qualified, which increases the overall likelihood of “white male dominance effects.””).

¹⁴⁸ See Uttecht v. Brown, 551 U.S. 1, 9 (2007) (citing Wainwright v. Witt, 469 U.S. 412, 424 (1985)) (emphasizing that a juror can be removed for cause when (s)he is “substantially impaired in his or her ability to impose the death penalty under the state-law framework”); Morgan v. Illinois, 504 U.S. 719 (1992) (finding that jurors whom will not consider a sentence other than death are excludable for cause).

¹⁴⁹ *Id.*

mere opposition to the death penalty (or to a sentence less than death for those convicted of a capital murder) is not enough.¹⁵⁰ A prospective juror who opposes the death penalty, but states that she can follow the law and consider voting to impose a death sentence, is eligible to serve on a capital jury.¹⁵¹ Jurors are “death-qualified” pre-trial, often immediately preceding (and, in some jurisdictions, contemporaneous with) traditional *voir dire*.¹⁵²

Death qualification is freighted with controversy, but consider how a link between death qualification and increased racial bias would have an impact on two discrete concerns: 1) conviction-proneness and 2) indicia of community consensus. First, studies reveal that death-qualified jurors tend to be more conviction-prone than ordinary juries.¹⁵³ Although some scholars have attempted to explain this qualitative difference by focusing on concepts such as authoritarianism,¹⁵⁴ if death qualified jurors are more biased than non-death qualified jurors, implicit racial bias could help to explain why death-qualified jurors may exacerbate race of defendant and race of victim effects compared to a pool of all potential jurors. One could expect that these greater levels of bias would be activated and lead to disproportionately harsher and skewed evaluations of crime severity, heinousness, and cruelty; the race of the defendant, for example, could easily trigger these stereotypes.¹⁵⁵ A more novel, albeit complementary, possibility is that there are yet undocumented implicit racial stereotypes specifically relevant to the value of the defendant’s and victim’s life in a capital trial. These would be stereotypes directly related to race and the value of life, more specifically, stereotypes that White people are valuable and Black people are worthless. These stereotypes, which could be derived from age-old race related stories and cultural

¹⁵⁰ *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) (holding that a “sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction”).

¹⁵¹ *See Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (the precise standard is “whether the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath”) (internal quotations omitted).

¹⁵² *Lockhart v. McCree*, 476 U.S. 162 (1986).

¹⁵³ *Id.* at 170-173 (discussing the results of six such studies).

¹⁵⁴ *See Brooke Butler and Gary Moran, The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons’ Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 25 *BEHAV. SCI. & L.* 57, 61 (“Specifically, legal authoritarians are more likely to feel that the rights of the government outweigh the rights of the individual with respect to legal issues. Legal authoritarianism has been found to predict verdicts in both capital and non-capital criminal cases.”).

¹⁵⁵ Charles Ogletree, Robert J. Smith & Johanna Wald, *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, 45, 48 (noting that “Black citizens are often associated with violence, dangerousness, and crime” and detailing social science findings that demonstrate such associations).

reinforcement regarding individuality, value, competence, humanness, and worth could be particularly harmful in capital trials, especially if death qualified jurors possessed heightened levels of this bias. Activated in a criminal trial, such stereotypes, if proven, could potentially affect not only how the sanctity of the defendant's life is perceived, but also how the victim's life is valued.

Second, commentators have argued that the process of removing from jury eligibility any citizen who refuses to impose the death penalty inhibits an accurate assessment of modern community standards, which is a required Eighth Amendment function of the jury.¹⁵⁶ Previous research has established that death-qualified juries tend to be populated by a disproportionate number of White citizens.¹⁵⁷ The fact that non-White citizens are disproportionately excluded from jury service in capital cases alone raises obvious questions about the ability to read into jury verdicts the imprimatur of community consensus. If our hypothesis is correct, though, death-qualified jurors are not only disproportionately White, they also possess stronger implicit and explicit racial biases than jury-eligible citizens generally, and the reason why capital juries are more implicitly biased is *because* the process results in fewer non-White jurors.¹⁵⁸ These findings, taken together, would substantially undercut the notion that the verdicts of capital juries represent the community consensus on the question of capital punishment.

In light of the continued relevance of both the role of race in the administration of the death penalty, as well as the dangers of death qualification, we crafted a study that sought to provide an early yet detailed look at how race and death penalty jurisprudence would be amplified by new empirical findings. Our study therefore attempts to provide greater understanding of the ways in which knowledge of

¹⁵⁶ G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87 (2008) ("Measuring the community's sentiment concerning a specific punishment by gathering a venire, removing from the venire all people opposed to a punishment, and then taking the temperature of the remaining citizens concerning the propriety of that punishment, would be like assessing the impact of global warming by taking the temperature in a room with its air-conditioning on."); Lynch and Haney, *supra* note 5 at 600 (arguing that death-qualification "undermin[es] the representativeness of the capital jury and widen[s] the empathic divide because 'death 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.'") (internal citation omitted).

¹⁵⁷ Brooke Butler & Adina W. Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense*, 36 J. APP. SOC. PSYCH. 1744, 1745-1746 (2006) (noting that "jurors who pass the [Wainwright v.] Witt standard tend to be demographically distinguishable: They are more likely to be . . . White . . .").

¹⁵⁸ Brooke Butler has indeed found that death qualified jurors have higher levels of self reported racial bias than non-qualified jurors. See Brooke Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process*, 25 BEHAV. SCI. & L., 857 (2007) [hereinafter Butler, *Death Qualification and Prejudice*].

juror bias, particularly implicit racial bias, influences the administration of the death penalty. Specifically, we sought to add to the discourse on the topics of 1) whether implicit racial bias helps explain the ineffectiveness of death penalty regulation for eliminating racial bias, 2) whether, as a result of implicit bias, race and retribution are inextricable in the capital context, and 3) whether death penalty procedural regulations might inadvertently aggravate the risk that racial biases will seep into the capital punishment process. Section IV provides details of the study. First, however, Section III provides a foundation in implicit bias literature, particularly in the criminal law setting, by explaining what is known and not yet known about implicit bias in criminal trials generally. This knowledge is then applied to the capital context in formulating specific hypotheses for our study.

III. IMPLICIT RACIAL BIAS AND CRIMINAL JUSTICE

Considering its compelling methods and powerful findings, the growth of implicit bias research in the cognitive sciences has unsurprisingly triggered an increased interest of implicit bias in the legal context.¹⁵⁹ Legal scholars have now at least begun considering implicit bias in a broad range of domains across the law.¹⁶⁰

¹⁵⁹ See generally, *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith, eds. 2012) (considering how implicit bias functions across fifteen different areas of law). See also Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 477 (2007) [hereinafter Bagenstos, "Science," and Antidiscrimination Law]; 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) (providing a federal judge's perspective on implicit bias); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–1539 (2005) (introducing implicit bias research to legal scholars generally, and applying it to the communications law and policy context); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (introducing the concept of unconscious discrimination to the employment discrimination realm); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1027 (2006); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (drawing primarily upon Freudian psychology, but his powerful arguments set the stage for discussions of implicit social cognition); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 479 (2008) (discussing implicit bias in the context of sexual orientation bias); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 363 (2007) [hereinafter Levinson, *Forgotten Racial Equality*] (arguing that judged and juries remember and misremember case facts in racially biased ways); Justin D. Levinson, *SuperBias: The Collision of Behavioral Economics and Implicit Social Cognition and*, 45 AKRON L. REV. 591 (2012) [hereinafter Levinson, *SuperBias*] (claiming that the behavioral law and economics decision model overlooks the role of implicit biases).

¹⁶⁰ See, e.g., Michele Wilde Anderson & Victoria C. Plaut, *Implicit Bias and the Resilience of Spatial Colorlines*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 7, at 25 (examining

For example, it is now not uncommon to see a scholar arguing that implicit bias affects the way courts and the United States government treat Native American sovereignty,¹⁶¹ the way the IRS makes auditing decisions,¹⁶² or the way corporate boards allocate funds to charities and executives.¹⁶³ In the context of race and criminal justice, considerations of implicit bias have begun to appear more commonly in discourse.¹⁶⁴ In light of this rapid development of implicit bias-focused criminal law scholarship and because racial disparities in the administration of the death penalty have been so apparent for decades, it is noteworthy that scholars have yet to examine deeply implicit racial bias in the context of capital punishment.¹⁶⁵

In the past several years, scholars have tested the role of implicit bias in various areas of the criminal justice system.¹⁶⁶ These studies have begun to provide an

implicit bias in property and land use law); Danielle Conway, *Implicit Racial and Gender Bias in Right of Publicity Cases and Intellectual Property Law Generally*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 179 (focusing on gender, race, and implicit bias in the right of publicity); Michele Goodwin & Dr. Naomi Duke, *Cognitive Bias in Medical Decision Making*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 95 (looking primarily at health care disparities as a manifestation of implicit bias); Jerry Kang, *Bits of Bias*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 132 (focusing on the communications law context); Justin D. Levinson, *Biased Corporate Decision-Making?*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 144 (critiquing bias in corporate charitable giving and executive compensation); Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 ILL. L. REV. 237 (focusing on a range of cognitive biases, including automatic in-group preference); Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1 (2010) (arguing that poll workers rely on implicit bias in interacting with voters); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455 (2007); Eric K. Yamamoto & Michele Park Sonen, *Redress Bias?* in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 244 (critiquing reparations discourse for overlooking harms of women of color).

¹⁶¹ Susan Serrano & Breann Swann Nu'uhiwa, *Implicit Bias Against Native Peoples as Sovereigns*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7 at 209.

¹⁶² Dorothy A. Brown, *Implicit Bias and the Earned Income Tax Credit*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7 at 164.

¹⁶³ Justin D. Levinson, *Biased Corporate Decision Making?* in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7 at 144 .

¹⁶⁴ See, e.g., L. Song Richardson, *Police Efficiency*, 87 IND. L.J. 1143 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

¹⁶⁵ Some early projects in this area have begun to consider implicit bias in the capital context. See, e.g., Eisenberg & Johnson, *supra* note 8 (finding that capital defense attorneys possess levels of implicit racial bias similar to the population); Levinson, *Race, Death and the Complicitous Mind*, *supra* note 8; Smith & Cohen, *supra* note 7.

¹⁶⁶ See Eberhardt et al., *Looking Deathworthy*, *supra* note 69; Philip A. Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 306 (2008); Levinson, *Forgotten Racial Equality*, *supra* note 159; Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010); Levinson et al., *A*

outline of the potential impact of implicit bias across the criminal law spectrum and offer clues as to how implicit bias may manifest in the capital context, specifically leading to racial disparities. In this Section, we rely on recent empirical studies to demonstrate how implicit bias may permeate the criminal legal process, with a special focus on jury decision-making.¹⁶⁷ We then apply these lessons to the capital context and set forth the hypotheses for our empirical study.

Because jurors are often staked with the heavy burden of determining not just guilt or innocence, but also life or death, it is helpful that much of criminal law's empirical implicit bias work has focused on jury decision-making. In several different projects, Justin Levinson, Danielle Young and colleagues have attempted to build the early stages of an implicit-bias model of criminal law juror decision-making.¹⁶⁸ Amplifying established research that deconstructs how jurors make decisions,¹⁶⁹ this implicit bias research can be broken down into three sequential decision-making categories: (1) biased evidence evaluation through faulty story construction, (2) stereotype-driven representation of the decision alternatives by learning potentially corrupted verdict category attributes, (3) and the biased classification of jurors' stereotype-driven stories into the "best-fitting"

Social Science Overview, *supra* note 9; Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009).

¹⁶⁷ We do not mean to exclude other areas, such as policing, prosecutorial discretion, judicial decisions, and parole decisions, but focus on topics connected to our jury related hypotheses. For more on implicit bias and prosecutorial discretion, see Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE L. REV. 795 (2012). Although most implicit bias decision-making research has focused on jurors, one team of researchers has tested how implicit bias may affect sitting judges. Jeffrey Rachlinski and his colleagues ran race IATs on a population of judges. Rachlinski et al., *supra* note 166. Like the rest of the population, these judges displayed implicit racial biases. The researchers found, however, that the judges were perhaps able to protect against these biases from skewing their decisions when race was made salient. When race was primed subliminally, however, the effect of implicit bias appeared to be stronger on decision-making.

¹⁶⁸ See Levinson, *Forgotten Racial Equality*, *supra* note 159 at 364-73; Levinson & Young, *supra* note 166 (first critiquing Pennington and Hastie's "story model" of decision-making); Levinson et al., *A Social Science Overview*, *supra* note 9.

¹⁶⁹ We build mainly on the acclaimed Story Model of decision making. See Nancy Pennington & Reid Hastie, *Practical Implications of Psychological Research on Juror and Jury Decision Making*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 90, 95 (1990); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) [hereinafter Pennington & Hastie, *The Story Model*]; Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 189-90 (1992) [hereinafter *Explaining the Evidence*]; See also Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision-Making*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION-MAKING 192, 200 (Reid Hastie ed., 1993) [hereinafter *The Story Model*]. For an earlier detailed implicit bias amplification of the Story Model, see Levinson & Young, *supra* note 166 at 340-45.

verdict category.¹⁷⁰ We use these stages, based upon those made prominent by Professors Pennington and Hastie's Story Model,¹⁷¹ to explain the early construction of an implicit bias model of biased decision-making; in each of the stages, researchers have found that implicit bias has played at least some role in facilitating inequality.¹⁷² In the context of the death penalty, through our empirical study we attempt to add new and unique death-focused categories to the model. Each of the existing model steps, however, may already work to explain the range of biased outcomes in capital decision-making.

A. *Biased Evaluation of Evidence and Faulty Story Construction*

According to Professors Pennington and Hastie, the first stage of jury decision-making involves the construction of stories by jurors. That is, jurors “engage in an active, constructive, comprehension process in which evidence is organized, elaborated, and interpreted by them during the course of the trial.”¹⁷³ In our proposed implicit bias model of decision-making, when jurors evaluate evidence and construct stories about what they believe happened, at least two types of implicit biases may manifest. First, jurors may automatically remember and misremember case facts in racially biased ways.¹⁷⁴ And second, jurors may evaluate ambiguous evidence in a stereotyped way based on racial or skin tone cues.¹⁷⁵ In a study of juror implicit memory bias, Justin Levinson found that mock jurors more accurately remembered aggression-related case facts when presented with an aggressive Black actor than when presented with an aggressive White actor.¹⁷⁶ Furthermore, mock jurors sometimes even had false memories for facts that had not actually happened when these “facts” were consistent with stereotypes of Black men.¹⁷⁷ In a later study, Levinson and Danielle Young found that mock jurors evaluated ambiguous evidence differently based upon whether a

¹⁷⁰ These categories are derived from the three cognitive processing components that explain how jurors interpret information. See Pennington & Hastie, *Explaining the Evidence*, *supra* note 169 at 192.

¹⁷¹ See Pennington & Hastie, *The Story Model*, *supra* note 169. The Story Model seeks to explain how jurors process information and decide cases.

¹⁷² Although Pennington and Hastie have not endeavored to examine the role of implicit bias in the Story Model, they have recognized that the process of juror evaluation and interpretation of evidence includes both conscious and automatic cognitive processes. Reid Hastie, *Conscious and Nonconscious Cognitive Processes in Jurors' Decision*, in *BETTER THAN CONSCIOUS? DECISION-MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS* 371, 384 (Christoph Engel & Wolf Singer eds., 2008).

¹⁷³ Pennington & Hastie, *The Story Model*, *supra* note 169 at 523.

¹⁷⁴ See Levinson, *Forgotten Racial Equality*, *supra* note 159 at 373-74.

¹⁷⁵ Each of the bias-driven steps has at least initial empirical support. See *Id.* at 407-17. See also Levinson & Young, *supra* note 166 at 316-18.

¹⁷⁶ See Levinson, *Forgotten Racial Equality*, *supra* note 159 at 398-406.

¹⁷⁷ *Id.* at 407-10.

perpetrator had lighter or darker skin.¹⁷⁸ When a perpetrator possessed darker skin, participants were more likely to interpret ambiguous evidence as indicating guilt than when a perpetrator possessed lighter skin.¹⁷⁹ These studies show that juror story construction and evidence evaluation, two key processes of juror decision-making, can be tainted by implicit bias. This type of bias may manifest in capital trials, as well.¹⁸⁰

B. Stereotype-Driven Decision Alternatives

Similarly, when jurors enter the next stage of decision-making, learning the decision category attributes, research has shown that their decision-making also may be infected by implicit bias. According to Pennington and Hastie, during this second stage of juror decision-making, jurors learn about their verdict options, such as first degree murder, second degree murder, guilty, not guilty, and so on, primarily through judicial instructions.¹⁸¹ As jurors learn the relevant categories, existing knowledge structures can interfere with their cognitive processes. For example, a study by Levinson, Huajian Cai, and Young found that people implicitly associate the racial category of Black with the legal concept of guilty and the racial category of White with not guilty.¹⁸² In that study, the researchers devised a “Guilty- Not Guilty IAT” in which participants had to pair the racial categories of Black and White (exemplified by photos of Black and White faces) with words representing the legal concepts of guilty and not guilty.¹⁸³ Consistent with the experimenters’ predictions, participants implicitly associated Black with guilty and White with not guilty.¹⁸⁴

During this stage of decision-making, jurors in capital trials also learn about and begin to consider death as a possible penalty. Although it has yet to be tested empirically, it is possible that even the introduction of the penalty of death as an outcome possibility actually primes the racial stereotype of violent and dangerous Black males. Levinson has argued that media, culture, and a history of racial disparities in the death penalty have led American citizens to cognitively associate

¹⁷⁸ See Levinson & Young, *supra* note 166.

¹⁷⁹ *Id.* at 337. These decisions were shown to be related to implicit bias and not self reported (explicit) racial attitudes. *Id.* at 338.

¹⁸⁰ *Id.* at 344

¹⁸¹ Pennington & Hastie, *The Story Model*, *supra* note 169 at 529.

¹⁸² Levinson et al., *A Social Science Overview*, note 9.

¹⁸³ *Id.* at 201-03. For an explanation of how the IAT works, see *supra* note 19.

¹⁸⁴ *Id.* at 204. Participants also displayed more traditional race-based stereotyped implicit biases, and these biases predicted the way jurors made verdict decisions based upon the perpetrator’s skin tone.

the death penalty with Black male perpetrators.¹⁸⁵ If this hypothesis were confirmed, simply talking about death as a possible penalty, death qualifying jurors, or both, could trigger (or “prime”) these racial stereotypes. These triggered stereotypes of death-worthy Black perpetrators could potentially prejudice the ensuing trial.¹⁸⁶ Thus, implicit bias could not only bias the learning of the verdict categories of guilty and not guilty, but also could be triggered or heightened simply by a discussion of the death penalty as being a potential trial outcome.

C. *Biased Classification of Stories into Verdicts*

In the final stage of Pennington and Hastie’s decision-making model, jurors match the stories they construct in the first stage of decision-making into the verdict categories they learned about in the second stage.¹⁸⁷ According to our implicit bias theory, this means that jurors classify their already biased stories into the most fitting already biased verdict categories. The risks here are obvious. Yet this stage even creates novel risks of bias. According to jury researchers, the final stage of decision-making is not simply a combination of the first two stages; it also involves the incorporation of the presumption of innocence.¹⁸⁸ Interestingly, even this stage, presumed by many to be one of the core protections underlying the American criminal trial,¹⁸⁹ may introduce bias into an already infected process. A study by Young, Levinson, and Scott Sinnett provides preliminary evidence that presumption of innocence jury instructions themselves may prime jurors in ways consistent with racial stereotypes.¹⁹⁰ In that study, mock juror participants viewed a video containing jury instructions from a federal judge in which the judge either gave instructions regarding the presumption of innocence and burden of proof, or other (more innocuous, yet of similar length)

¹⁸⁵ Levinson, *Race, Death and the Complicitous Mind*, *supra* note 8. Levinson also argued that implicit bias might account for the unintentional masking of race of defendant effects in large scale statistical studies. *Id.* at 632-33.

¹⁸⁶ After all, priming racial stereotypes has been shown alter decision-making. Levinson et al., *A Social Science Overview*, *supra* note 9.

¹⁸⁷ *Id.* at 530.

¹⁸⁸ Pennington & Hastie, *Explaining the Evidence*, *supra* note 169 at 191; Pennington & Hastie, *The Story Model*, *supra* note 169 at 201.

¹⁸⁹ *Coffin v. United States*, 156 U.S. 432, 453 (1895). *See also Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“The presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice.”). According to Scott Sundby, “the presumption of innocence is given vitality primarily through the requirement that the government prove the defendant’s guilt beyond a reasonable doubt.” Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458 (1989).

¹⁹⁰ Danielle K. Young et al., *Presumption of Innocence: Biasing Racial Cues* (2011) (unpublished manuscript) (on file with authors).

instructions.¹⁹¹ Jurors were then immediately given a dot-probe task, a computerized visual measure used by attention-perception researchers to determine where a person is attending/focusing.¹⁹² The study showed that participants who received the presumption of innocence instructions were more likely to visually focus on a Black face compared to participants who received the other instructions.¹⁹³ Drawing on the literature from perception studies, in which studies have shown that the activation of crime causes people to attend to Black faces,¹⁹⁴ and that the priming of Black stereotypes leads to the faster identification of weapons,¹⁹⁵ the researchers interpreted this finding as indicating the counterintuitive – that people actually implicitly associate the presumption of innocence with Black aggression and guilt.¹⁹⁶ If it is indeed true that instructing jurors on the presumption of innocence could presumably prime implicit associations of Black guilt (all added on top of the biases that have already occurred in the previous stages), it would serve as a powerful reminder that the jury decision-making process could serve as an automatic bias delivery mechanism.

In light of this research on implicit bias in the various stages of criminal trial decision-making, one could predict that implicit bias could manifest in capital decision-making in similar ways. Specifically, it could be predicted that jurors will implicitly associate Black defendants with racial stereotypes, including aggressiveness, guilt, and perhaps even lack of worth. These same stereotypes could apply to victims, too. Similarly, juries might remember and misremember facts from trial in racially biased ways. These facts, too, could include those relevant to both the defendant (e.g. facts relevant to aggravating or mitigating factors) and the victim (e.g. facts relevant to their value to their employers, families, and communities). Jurors may also automatically evaluate ambiguous evidence in an unjust manner, and be primed by various jury instructions. In the study we conducted, we were motivated by related research questions that build on these previous studies as well as draw on decades of research on racial disparities in the death penalty.

¹⁹¹ The instructions were based upon the Ninth Circuit Model Jury Instructions, *available at* <http://www3.ce9.uscourts.gov/web/sdocuments.nsf/crim> (last visited Oct. 5, 2012).

¹⁹² Young et al., *supra* note 190 at 5.

¹⁹³ Young et al., *supra* note 190 at 9.

¹⁹⁴ Eberhardt et al., *Seeing Black*, *supra* note 9 at 888 (“Indeed, thinking about the concept of crime not only brought Black faces to mind but brought stereotypically Black faces to mind.”).

¹⁹⁵ *Id.* at 881 (explaining that participants who saw a Black face were more apt at identifying “crime-relevant objects”).

¹⁹⁶ Young et al., *supra* note 190.

The history of racial bias in the death penalty, the still troubling application of death qualification, and the emergence of implicit racial bias scholarship and methods led us to conduct an empirical study. Consistent with our discussion in the previous sections, we hypothesized as follows:

Hypothesis 1: Jury eligible citizens harbor implicit racial stereotypes that may prove relevant to capital cases, including stereotypes specific to the value of human life. Specifically, jurors will associate Black with aggressive, lazy, and worthless, and White with virtuous, hard-working, and valuable.

Hypothesis 2: Death qualified jurors will display greater implicit bias and self-reported bias than jurors who would be excluded from jury service. Thus, the process of death qualification will remove the least racially biased jurors and lead to the empanelling of more biased juries.

Hypothesis 3: Implicit racial bias will predict which defendants are sentenced to death; specifically, the more implicit bias jurors display, the more likely they will be to sentence a Black defendant to death, and the more likely they will be to sentence to death a defendant on trial for killing a White victim.

IV. THE EMPIRICAL STUDY

To test these hypotheses, we conducted an empirical study designed to examine the role of implicit racial bias in death qualification and in capital decision-making. This Section presents the methodology and results of the study.

A. *Methods*

1. *Participants.*

The study involved 445 jury eligible citizens in six leading death penalty states: Alabama, Arizona, California, Florida, Oklahoma, and Texas.¹⁹⁷ Participants were recruited on the Internet by a specialized survey recruitment firm.¹⁹⁸ The

¹⁹⁷ At least 75 participants from each state initially completed the study, totaling 478 participants. This ranged from a minimum of 75 participants in Alabama to a maximum of 82 participants in Florida. Participants who were not United States citizens (N=2), or did not meet other qualifications to serve as jurors (e.g., having been convicted of a felony, N=27), or who were not from the targeted states (N=4) were removed from the data set.

¹⁹⁸ These participants were part of a national database maintained by the private survey company; they received minimal compensation for participating. Because the participants had chosen to receive survey solicitations from the soliciting company, the participant pool was not a random

participant pool was diverse, as indicated by several measures. The age of the participants ranged from 18 to 81, with an average age of 53.39 ($SD=14.62$) years. Of the participants, 57.7 percent were women. Participants in the study came from a wide range of ethnic backgrounds. 82.7 percent of participants identified themselves as Caucasian, 5 percent of participants identified themselves as African-American, 3.4 percent of participants identified themselves as multiracial, 2.7 percent of participants identified themselves as Latino, 2.5 percent identified as Asian, 2.5 percent identified as Native American/Hawaiian, and 1.4 percent identified themselves as members of other ethnic groups.¹⁹⁹ The participant pool contained tremendous educational diversity. For example, 40.6% of the pool had completed some college, but did not hold a degree, 20.1% held a bachelor's degree, 10.9% held Masters or other non-PhD advanced degrees, 1.4% held PhDs, and 18.6% of the pool completed less than high school or high school with no college. There was also substantial religious diversity in the participant pool (with members of over fifteen different religions represented).

2. *Materials.*

Participants completed several measures, including two IATs and a mock trial life or death sentencing task. Participants also completed death qualification questions prior to the mock trial, two questionnaire style measures of racial attitudes, and demographic questions. The IATs measured implicit racial stereotypes, but each had a different focus. One was a Back-White stereotype IAT that has been used regularly in implicit social cognition research.²⁰⁰ This IAT measures implicit associations between race and traditional stereotypes, such as aggression and laziness. The other was a new IAT we created for purposes of this study, which we called the "Value of Life IAT." This IAT required participants to group together photos of Black and White people with words inciding value/worth (e.g. valuable, worthwhile) and lack of value/worth (e.g. worthless, expendable).²⁰¹ The purpose of this IAT was to determine whether people hold implicit stereotypes relating to race and human worth. We developed this particular IAT because we believed that racial disparities in the death penalty

sample of the entire population. Nonetheless, as our reported statistics suggest, the diversity of the sample was notable.

¹⁹⁹ These were groups that were not listed on the checklist the survey instrument provided. Some of the participants who were in this category separately indicated their ethnic identity on a line next to the check mark, including participants who checked one or more of the listed ethnicities in addition to marking "other." The groups identified by those who marked "other" included Koreans, Samoans, Vietnamese, North Africans, Portuguese, Puerto Ricans, and others.

²⁰⁰ Anthony Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 *J. PERSONALITY & SOC. PSYCHOL.* 1464, 1478 (1998).

²⁰¹ The stimuli words used for worth were: Merit, Worthwhile, Worthy, Value, Valuable. The stimuli words used for worthless were: Drain, Expendable, Worthless, Waste, Valueless.

may be at least partially explained by differential values placed on the lives of defendants and victims.

The explicit (self-reported) measures of racial bias consisted of a measure known as the Modern Racism Scale (MRS).²⁰² The MRS asks participants to rate their agreement or disagreement with a series of statements, such as “Discrimination against Blacks is no longer a problem in the United States.”

The mock-trial presented to the participants was inspired by an actual case. The trial facts were presented as follows:

At 10:00 p.m. on May 22, 2009, Edward Walsh, a 48 year old Caucasian man, just finished his shift as assistant manager at Walmart. He noticed a Walmart private security employee stop a customer as the customer was leaving the store. The security guard thought that the customer had shoplifted two disposable cameras.

Walsh proceeded to the location where the security officer had stopped the customer. When he saw the customer, he remembered ringing up his purchases. He did not recall him purchasing any cameras. A physical struggle ensued between the security officer and the customer.

As Walsh attempted to aid the security officer in detaining the customer, the customer pulled out a handgun and discharged the weapon several times. The customer then fled the scene. Edward Walsh died from a gunshot wound to the chest. The customer, who was later identified as Tyrone Jones, a 22 year old African-American man, subsequently turned himself in to the police.

After the description of the crime, participants read the Victim Impact Testimony given by the victim’s wife.²⁰³ During this testimony, the prosecutor questions the victim’s wife about the loss of his life. The following is an excerpt:²⁰⁴

Attorney: Where do you stand today?

²⁰² See J.B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in PREJUDICE, DISCRIMINATION, AND RACISM 91 (John F. Davido & Samuel L. Gaertner eds., 1986).

²⁰³ This was a portion of the actual victim impact statement given at trial.

²⁰⁴ Appendix A contains this complete testimony.

Mrs. Walsh [Mrs. Washington]: Obviously life is not the same. It has completely fallen apart, for all the dreams, you know. I was probably married longer than possibly some of y'all in here were alive at the time. And, you know, it's your friend, it's your lover, it's your confidant and your husband, and that more than disappeared one morning, you never get that back. You never get that back.

The death qualification questions were presented at the beginning of the sentencing mock trial task, and were designed to comport with existing case law on death qualification.²⁰⁵ Thus participants were asked:

- (1) If the State proves beyond a reasonable doubt that Mr. Baker²⁰⁶ intentionally murdered Edward Walsh, would you be able to find the defendant guilty even though he would then be eligible for the death penalty?
- (2) If the State proves beyond a reasonable doubt that Mr. Baker intentionally murdered Edward Walsh, you will be responsible for deciding his punishment. Would you: a) Automatically vote for a life sentence without the possibility of parole, b) Automatically vote for the death penalty, c) Be able to consider both a life sentence without the possibility of parole and a sentence of death.

If participants answered that they were unwilling to convict the defendant (N= 27) or if participants answered that they would be unwilling to consider giving a convicted defendant the death penalty (N= 51), those participants completed the remainder of the study, and their data was retained in order to compare how death qualified jurors compare with non death qualified jurors.²⁰⁷

²⁰⁵ The death qualification questions were presented at the beginning of the sentencing mock trial task, and were designed to comport with existing case law on death qualification. See *Wainwright v. Witt*, *supra* note 151.

²⁰⁶ There were two conditions based on the race of the defendant and two conditions based on the race of the victim, known as a 2 * 2 study design.

²⁰⁷ Participants who answered that they would automatically vote for the death penalty (N= 53) were similarly not treated as death qualified and were removed from statistical analyses of death qualified only jurors.

The tasks described above were all completed on computers of the participants' choice and were presented in the following manner. Participants first responded to death qualification questions, after which they read a written description of the case. The case summation was followed by an evidence slideshow consisting of four photographs shown for four seconds each. One of these photos was a tombstone that displayed the name of the victim; the name could be altered depending upon the race of victim condition.²⁰⁸ After viewing this slideshow, participants were informed that the defendant had been found guilty, and that their job was to decide if the defendant should be sentenced to either death or life in prison. They read that "One important factor to take into consideration is the impact that the crime had on the family members of [the victim]," and then were presented with the Victim Impact Testimony. After reading the testimony, participants decided how the defendant should be punished. Next, participants completed counterbalanced implicit and explicit measures of bias, with the order of the IATs also counterbalanced. Demographic questions were completed last.

B. Results- Implicit Bias and the Death Penalty

To test our hypotheses, and to analyze the results more generally, we conducted several statistical analyses: For hypothesis one, we tested whether death qualified jurors harbor significant implicit biases using one-sample t-tests.²⁰⁹ Hypothesis two was tested using a multivariate ANOVA (MANOVA)²¹⁰ comparing death qualified jurors and non-death qualified jurors on the three bias measures (two implicit and one explicit). To test hypothesis three, dichotomous death penalty decisions (life in prison v. death sentence) were regressed upon race of defendant and victim, explicit and implicit biases, and the two-way interactions between these variables.²¹¹

1. White Jurors More Racially Biased Than Non-White Jurors

²⁰⁸ These slides are attached as Appendix B.

²⁰⁹ A one-sample t-test tests whether or not a single population differs from a hypothesized value. In the case of the IAT, the hypothesized value is zero, or no bias. Thus, the one-sample t-test referenced here tested whether or not the study population's IAT score was significantly different than zero. RONALD CHRISTENSEN, *ANALYSIS OF VARIANCE, DESIGN AND REGRESSION- APPLIED STATISTICAL METHODS* (2000).

²¹⁰ MANOVA is a special case of ANOVA that allows the testing of several dependent variables while reducing Type 1 error, or the probability of finding a significant difference between groups when there is not a true difference. BARBARA G. TABACHNICK ET AL., *USING MULTIVARIATE STATISTICS* (2001).

²¹¹ The regression controlled for race and gender of the participant.

White jurors displayed higher levels of implicit racial bias ($M=.48$) than non-White jurors ($M=.34$), as measured by both the stereotype IAT ($F(1,311)=15.11$, $p<.001$, $\eta^2=.05$), and the Value of Life IAT (White juror $M= .38$; non-White juror $M= .15$), ($F(1,311)=4.50$, $p=.035$, $\eta^2=.01$). White jurors also displayed higher levels of explicit racial bias ($M=2.49$), as measured by the Modern Racism Scale, than non-White jurors ($M=2.04$; $F(1,311)=12.97$, $p<.001$, $\eta^2=.04$).²¹²

2. Male and Female Jurors Similarly Biased

Male jurors displayed marginally higher levels of explicit racial bias ($M=2.51$), as measured by the Modern Racism Scale, than female jurors ($M=2.36$; $F(1,311)=2.91$, $p=.09$, $\eta^2=.01$).²¹³ Male jurors did not display significantly higher levels of implicit racial bias ($M=.49$) or higher levels on the Value of Life IAT ($M=.34$) than female jurors ($M=.44$; $M=.36$, all $ps>.05$).

3. Male Jurors More Likely to Sentence to Death

30.9 percent ($N=137$) of the participants voted to sentence the defendant to death. Male jurors (38.3%) were significantly more likely to vote for death than female jurors (25.4%) ($\chi^2=8.46$, $p=.004$), a result that was true for all jurors as well as death-qualified jurors only (Male= 34.1%, Female=24.0%, $\chi^2=3.84$, $p=.05$). Although the percentages trend in that direction, White participants were not significantly more likely to levy the death penalty (32.2%) than non-White participants (24.7%; $\chi^2=1.67$, $p=.20$).

4. Women and Non-White Jurors Less Likely to be Death Qualified²¹⁴

Female jurors were significantly more likely to be excluded for failing to be death qualified. 24% percent of female jurors indicated that they would be unwilling to sentence a defendant to death, compared to 14.3% of male jurors ($\chi^2=5.85$, $p=.02$). White participants were significantly more likely to be death qualified (83.2%) than non-White participants (64.3%; $\chi^2=12.82$, $p<.001$). These results indicate that death qualification leads to more male and White juries.

5. Death Qualified Jurors Possess Moderate to Strong Implicit Racial Biases

²¹² We ran a MANOVA on all of the bias DVs, multivariate significance is: $F(3,309)=7.86$, $p<.001$, $\eta^2=.07$. The results presented are for death qualified jurors.

²¹³ A MANOVA on all of the bias DVs failed to reach multivariate significance. We report the results here to demonstrate the trends in the data: $F(3,309)=1.89$, $p>.05$, $\eta^2=.08$. The results reported are for death qualified jurors.

²¹⁴ Due to our limited sample size, we combine jurors who would be excluded because they either could not vote to convict (traditionally called “nullifiers”) and could not vote for death (traditionally called “Witherspoon Excludables).

Death qualified jurors displayed moderate to strong implicit biases both on the racial stereotype IAT, $M=.46$, $t(312)=19.75$, $p<.001$, and the Value of Life IAT, $M=.35$, $t(312)=16.02$, $p<.001$, such that they implicitly associated White with positive stereotypes and Black with negative stereotypes and implicitly associated White with worth and Black with worthless.²¹⁵

6. Death Qualified Jurors held Greater Self-Reported (Explicit) Racial Bias

Jurors who were death qualified displayed higher levels of racial bias ($M=2.42$) on the MRS than jurors who would be excluded because they may be unwilling to convict or unwilling to sentence a defendant to death ($M=2.03$; $F(1,390) 14.35$, $p<.001$, $\eta^2=.04$).²¹⁶

7. Death Qualified Jurors Held Greater Implicit Racial Bias

Jurors who were death qualified displayed higher levels of implicit racial bias ($M=.46$), as measured by the stereotype IAT, than jurors who would be excluded because they may be unwilling to convict or unwilling to sentence a defendant to death ($M=.36$, $F(1,390)=3.87$, $p=.05$, $\eta^2=.01$). Similarly, jurors who were death qualified displayed higher levels of bias related to implicit racial worth ($M=.34$), as measured by the Value of Life IAT, than non-death qualified jurors ($M=.25$, $F(1,390)=4.46$, $p=.035$, $\eta^2=.01$).

8. Death Qualification Implicit and Explicit Bias Differential Driven By Exclusion of Non-White Jurors

We next investigated whether the exclusion of non-White individuals contributes to the higher levels of racial bias (on the Value of Life IAT, Stereotype IAT, and MRS) in death qualified juries. To test this, three separate mediation models were run on each of the three measures of bias using the *z*Mediation method.²¹⁷ The mediation results for the Value of Life IAT suggest that the race of a juror fully mediates the relationship between death qualification and implicit worth.²¹⁸ This

²¹⁵ These two measures were moderately positively correlated, $r(313)=.46$, $p<.001$.

²¹⁶ We conducted a MANOVA on all of the bias DVs: $F(4,387)=4.14$, $p=.003$, $\eta^2=.04$.

²¹⁷ Dawn Iacobucci, *Mediation Analysis and Categorical Variables: The Final Frontier*, 22 J. CONSUMER PSYCHOL. 582 (2012).

²¹⁸ The direct effect of death qualification on value of life bias was, as in previous analyses, significant, $B = .10$, $p = .04$. As expected, the relationship between death qualification and race of the individual (White/Not-White) was significant, $B = -1.01$, $SE=.29$, $p < .001$, as was the relationship between race of the individual and value of life bias, $B = .22$, $SE=.05$, $p < .001$.

suggests that the difference between White and non-White jurors' implicit value of life bias completely mediates the differences between death qualified jurors and non-death qualified jurors, $z_{\text{Mediation}} = -2.69$, $p < .05$. Similarly, the mediation results for implicit bias as measured by the stereotype IAT mirror those of the value of life IAT.²¹⁹ The difference between White and non-White jurors' implicit stereotype bias completely mediates the differences between death qualified jurors and non-death qualified jurors, $z_{\text{Mediation}} = -2.12$, $p < .05$. Finally, the mediation results for the explicit racism, as measured by the MRS, suggest that the race of a juror partially mediates the relationship between death qualification and explicit racism.²²⁰ This suggests that the difference between White and non-White jurors' explicit bias partially mediates the differences between death qualified jurors and those who would not consider the death penalty, $z_{\text{Mediation}} = -2.60$, $p < .05$.

[Insert Table 1 Here: Implicit Racial Bias and Probability of Death Based on Race of Defendant]

9. No Main Effects for Race of Defendant or Race of Victim

Although studies on actual court decisions have revealed consistent effects across jurisdictions over the past thirty years, particularly on race of the victim, the results of our study did not reach statistical significance in this regard. Neither race of the defendant ($\beta = .20$, $p = .62$), race of the victim ($\beta = .26$, $p = .67$), nor their interaction ($\beta = -.59$, $p = .55$), predicted increased probability of giving a death sentence (See Table 3).

[Insert Table 2 Here: Self Reported Bias and Probability of Death based on Race of Victim]

10. Racial Bias, Implicit and Explicit, Predicts Death Verdicts

Including race of the individual in the model reduced the effect of death qualification to non-significance, $B = .06$, $SE = .05$, $p = .18$.

²¹⁹ The direct effect of death qualification on stereotype bias was significant, $B = .1$, $p = .05$. The relationship between death qualification and race of the individual (White/Not-White) was significant, $B = -1.01$, $SE = .29$, $p < .001$, as was the relationship between race of the individual and stereotype bias, $B = .15$, $SE = .05$, $p = .006$. Including race of the individual in the model reduced the effect of death qualification to non-significance, $B = .08$, $SE = .05$, $p = .15$.

²²⁰ The direct effect of death qualification on explicit racism was significant, $B = .39$, $p < .001$. The relationship between death qualification and race of the individual (White/Not-White) was significant, $B = -1.01$, $SE = .29$, $p < .001$, as was the relationship between race of the individual and explicit bias, $B = .43$, $SE = .11$, $p < .001$. Including race of the individual in the model does not reduce the effect of death qualification to non-significance, $B = .31$, $SE = .10$, $p = .002$.

Logistic regression analysis on the life/death decision partially supported our hypothesis that biases would interact with race of the defendant and victim to increase the likelihood that the jurors would support the death penalty for a convicted defendant (See Tables 1 & 2). Specifically, interaction effects involving racial bias measures and the race of either the defendant or the victim significantly increased the odds of a death penalty outcome. Having a higher “value of life” implicit association between White and worth and Black and worthless increased the probability of sentencing a defendant to death when the defendant was Black ($\beta=-1.77$, $p=.03$). Interestingly, the “value of life” IAT did not interact with the race of the victim, nor did the stereotype IAT significantly increase the odds of a death penalty decision (all $ps >.05$).

The explicit measure of racial bias interacted with the race of the victim. Specifically, the MRS interacted with the race of the victim, such that a higher self-reported racial bias score led to an increased chance of giving the death penalty when the victim of the murder was White ($\beta=.75$, $p=.05$). The MRS did not interact with the race of the defendant.

[Insert Table 3 Here: Regression Results]

V. SUMMARY OF RESULTS AND IMPLICATIONS

The study we conducted helps to build a model of implicit bias in the law, provides corroborating evidence for spatial and cultural understandings of death penalty usage, supports critiques of both procedural and substantive safeguards that supposedly add fairness to the capital process, and raises questions with implications for a broad range of issues relating to the constitutionality of capital punishment. We address each of the contributions in turn.

A. *Building an Implicit Bias Model of Criminal Law*

The expansion of knowledge of implicit bias in the law is significant; only a handful of studies have empirically examined how implicit bias functions in legal processes. The findings of the study raise several implications for building a broader understanding of implicit bias in criminal law and beyond. Several of our specific findings contribute to this literature. First, as expected, the study confirmed that jury eligible citizens display moderate to strong implicit racial stereotypes of Black Americans. Because these particular implicit stereotypes,

such as aggression and laziness, have been shown to predict a wide range of decisions and behaviors,²²¹ this alone raises concerns regarding the role of racial bias, not only in life and death decisions, but also in all criminal proceedings. Other results heighten the concerns. Specifically, in addition to the traditional measure of stereotype biases that we used, we also found that jury eligible citizens held specific biases related to race and the value of life. The idea that jury eligible citizens specifically associate Black with worthless and White with value is both unsurprising (considering death penalty statistics, economic and job figures, etc.) and yet hard to fathom (because of the deep moral implications). This result suggests that people not only still hold age-old stereotypes of Black Americans, such as aggression and laziness, but that they normatively and implicitly value them as humans less than their White American counterparts.²²² This finding is concerning in all areas of the law, with all types of remedies (in tort and contract, for example) and sentencing (in criminal law) potentially implicated, but is particularly heightened because human life is actually at stake in capital trials.

Unfortunately, as our study showed, the strength of these implicit biases was actually heightened by the exclusion of less biased Americans in the death qualification process. Specifically, a process designed to ensure fairness in the implementation of the law was found to create a situation in which the chances of injustice became magnified. But what kind of injustice? Our results show that, indeed, implicit bias has the potential to implicate race-based decision-making. Because of our finding that increased implicit bias predicted a higher likelihood of death decisions for Black defendants, we are left to wonder about all the other domains in which it too may be active. One mild surprise in our results, however, was that explicit bias matters, too. Even though the days of rampant and overt racism are gone, our study shows that it is still valuable to monitor explicit racial bias, at least in capital cases. If higher self-reported bias indeed leads, as we found, to more death sentences for the killers of White victims, then it seems natural that courts would place energy in rooting out those jurors who will acknowledge their own biases. It is unclear, however, whether existing questioning efforts in most trials succeed in this regard (and it is similarly unclear whether jurors in real trials will admit these biases as readily to judges, as they did in an anonymous questionnaire).

B. *Spatial and Cultural Explanations of Death Penalty Usage*

²²¹ See, e.g., Rudman & Ashmore, *supra* note 11.

²²² See generally Goff et al, Not Yet Human, *supra* note 166.

The spatial and cultural “explanation” is largely a sociological description of the places where death sentences are still imposed with regularity. Recall that these jurisdictions tend to have unique spatial (relatively high Black populations in a central zone, surrounded by bands of predominately White areas) and cultural (tend to be parochial, with anxiety towards outsiders and hostility to cultural change) attributes. Implicit racial bias helps to explain the psychological dynamics that undergird the sociological phenomenon. For example, previous research on implicit associations between “Black” and “dangerousness”, as well as research showing the exposure to a Black face causes a disproportionate response in the area of the brain associated with fear,²²³ would suggest that residential isolation between Blacks and Whites bolsters the intensity of the anxiety towards outsiders.

Our finding that death-qualified participants more rapidly associate White subjects with the concept of “worth” or “value” and Black subjects with the concepts “worthless” or “expendable” suggests that another form of implicit racial bias—implicit in-group favoritism—is at play in “donut” jurisdictions that regularly impose death sentences. One of the social groups for which people show the strongest and most consistent preferences is the racial in-group. In the United States, of the nearly two million Americans that have completed an IAT, roughly 75-80% of White and Asian (and about 50% of Black Americans) implicitly favor White Americans. In donut jurisdictions, the outer ring occupied disproportionately by White residents tends to be more affluent. Prosecutors and capital jurors alike tend to be White, and, in donut jurisdictions, probably tend to live in the outer ring. In other words, in many Black-defendant, White-victim cases, the decision-makers are “insiders”, the White victim is an “insider” and the Black defendant is an “outsider.” Of the factors that create insider / outsider boundaries—spatial segregation and affluence, for example—race is the most salient. The fact that participants, who were predominately White, associated White with “worth” and “value” suggests that White insiders implicitly associate the loss of a White citizen with more harm or loss than the death of a Black citizen. True, these same dynamics could exist even in spatially and culturally integrated communities, but the spatial segregation and outsider anxiety associated with donut jurisdictions facilitates and intensifies the problem.

C. Discretion Points: Prosecutors and Capital Jurors

²²³ Matthew D Lieberman et al., *An fMRI Investigation of Race-related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCIENCE 720 (2005), available at <http://www.scn.ucla.edu/pdf/nature%20neuroscience%20press/nn1465.pdf>.

Our results suggest that it is plausible that prosecutors magnify the damage done to white victims while paying too little attention to the redeeming quality of black offenders. Capital jurors are susceptible to the same dynamics. Although we did not find a race of defendant main effect, the white / worth and black / expendable findings have haunting implications for the penalty phase of capital trials. The defendant is humanized during the penalty phase. Jurors hear about the defendant's background and his character. In many cases, the defendant suffers from mental deficiencies or severe mental illness or has suffered extreme physical abuse. If jurors—who mostly are white—are faster to associate value or worth with a white defendant than a black defendant—then the race of the defendant effects during the penalty phase might be attributable to an unintentional decrease in receptivity to mitigation evidence proffered by a Black defendant.

D. Racially Partial Impact of Mechanisms Designed to Reduce Impartiality

1. Value of Life and the Core Justifications for Capital Punishment

Our findings challenge the idea that retribution—the core justification for capital punishment—is race-neutral. Instead, taken together, three of our findings suggest that the retributive rationale could be inextricably tied to race. First, we found that death-qualified jurors implicitly valued White lives over Black lives by more rapidly associating White subjects with the concepts of “worth” or “value” and Black subjects with the concepts of “worthless” or “expendable.” This finding could potentially help to explain why real capital juries impose death sentences more regularly for White victims: at least at an implicit level we value White lives more than Black lives, and thus, perhaps, we seek to punish those individuals who have destroyed those whom we value most.²²⁴ Next, our finding that explicit racial bias predicts life and death decisions based on the race of the victim also offers support for the idea that we demand more retribution when the life of a White person is lost. Finally, our findings also demonstrate that a higher value of life implicit association between White and worth and Black and worthless increased the probability of sentencing a defendant to death when the defendant was Black. This finding might suggest that jurors who are predisposed to seeing Black Americans as comparatively worthless have an easier time retaliating by voting to take the life of a Black offender whom himself has taken a life. Considered together, our findings strengthen the notion that the relationship between race and retribution continues to contribute to the same disparities in

²²⁴ Future research would be needed in this regard, as our regression did not significantly link this score to race of victim effects.

capital punishment that it did in the context of extra-legal lynching. Importantly, our findings suggest that the race-retribution link is not simply historically inextricable, but might also be culturally programmed into minds of those citizens that serve on death-qualified juries.

2. *Death-Qualification*

Although the operation of implicit racial bias in the criminal justice system generally has been considered fairly extensively, comparatively little empirical evidence evaluates the role that implicit bias plays in capital sentencing. A more technical aim in this study, then, was to gather more information about the location and manner in which racial bias enters into capital cases. Our findings that the death qualification process results in jurors that are more implicitly and explicitly racially biased suggest that jury selection is a location where racial bias operates.

Scholars' first major critique of death qualification was that death-qualified juries tend to be more conviction-prone than ordinary juries. In other words, those citizens that refuse to consider voting to impose a death sentence are the same jurors that are more likely on the margins to vote not guilty during the guilty / innocence phase of the trial. By 1986, when the Supreme Court heard arguments in *Lockhart v. McCree*²²⁵ on whether "the Constitution prohibit[s] the removal ... of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors[,]"²²⁶ a variety of empirical studies provided support for the contention that death qualified juries are comparatively more conviction prone than ordinary juries.²²⁷ The defendant relied upon these studies to argue that a conviction-prone

²²⁵ *Lockhart v. McCree*, 476 U.S. 162 (1986).

²²⁶ *Id.* at 165.

²²⁷ *See id.* at 169-170 (noting the existence of fifteen studies, of which the Court found six to be relevant); *see, e.g.*, Claudia L. Cowan, William C. Thompson, & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Pre-disposition to Convict and on the Quality of Deliberation*, 8 *Law & Hum. Behav.* 53 (1984) (finding that death-qualified jurors are more likely to vote guilty both on initial ballots and after one hour of twelve-person jury deliberations). Social science scholars have continued to document that death qualification leads to conviction-prone juries, and have done so while addressing the specific deficits that the Supreme Court found in the original studies. *See* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 *ARIZ. ST. L.J.* 769, 784-785 (2006) *quoting* Benjamin Fleury-Steiner, *Juror's Stories of Death: How America's Death Penalty Invests in Inequality*, University of Michigan Press, pp. 24-25 (2004) (using data collected from 1201 real capital jurors from more than 350 trials and concluding that death-qualified jurors are "disproportionately punitive orientations toward crime and criminal justice, are more likely to be conviction-prone. . . ."); *id.* at 784 (noting that the findings of the Capital Jury Project eliminate any "nullifier effect" by using

jury is a partial jury and that the Sixth Amendment prohibits partial juries.²²⁸ Responding to this argument, the *Lockhart* Court spent little energy in reviewing the studies themselves, instead avoiding the experiments' thoughtful methods and important findings by seeking to dismiss their validity.²²⁹ One notable dismissal of all of these studies' external validity was the Court's claim that the research did not use actual jurors deciding actual cases, a standard that would essentially be impossible to meet.²³⁰

Nonetheless, the Supreme Court assumed for the sake of argument that the "studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries," and held that the Constitution still would "not prohibit the States from 'death qualifying' juries in capital cases."²³¹ The Court reasoned that jurors that are excluded due to death qualification are not a "distinct group" in the same way that "Blacks" or "women" are distinct groups.²³² Furthermore, the Court noted that the jurors excluded by death qualification are not historically disadvantaged (unlike the groups, e.g. Black Americans, that are traditionally covered under the Sixth Amendment's Fair Cross Section requirement).²³³ Instead, they are eliminated based on chosen conscious choices—an unwillingness to follow the law by considering a possible death sentence.

We found that the process of death qualification results in capital jurors with significantly stronger implicit racial biases—on both the stereotype and value of life IAT—and explicit racial biases than jury-eligible citizens generally. We also found that stronger implicit biases scores predict the likelihood that death-

actual jurors who survived the process of death qualification and thus by definition are not nullifiers).

²²⁸ *Lockhart*, 476 U.S. at 165.

²²⁹ *Id.* at 186 ("[T]he Court was unable to conclude that 'the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.'") (quoting *Witherspoon v. State of Ill.*, 391 U.S. 510, 518).

²³⁰ *Id.* at 171-173. Interestingly, a range of studies have continued to emerge post-*Lockhart* that build on the research showing that death qualified jurors are quite different from non-death qualified jurors. See Butler, *Death Qualification and Prejudice*, *supra* note 158 at 857 (finding that death-qualified jurors display higher levels of explicit racism, sexism (modern sexism scale) and racism (modern racism scale)); Brooke Butler and Adina Wasserman, *supra* note 157 at 1745-46.

²³¹ *Lockhart v. McCree*, 476 U.S. 162, , 173 (1986).

²³² *Id.* at 175-176.

²³³ *Id.* at 162-63 ("[T]he essence of a fair-cross-section claim is the systematic exclusion of a 'distinctive group' in the community such as blacks, women, and Mexican-Americans-for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case.").

qualified jurors vote to impose a death sentence when the defendant is Black, and that explicit bias scores predict the likelihood that death-qualified jurors vote to impose a death sentence when the victim is White. These findings themselves are a significant indictment of the death-qualification process. The biggest indictment, however, is our finding that death qualified juries possess stronger implicit biases *because* the process results in the disproportionate elimination of non-White jurors.

These findings, then, not only shine light on where in the capital punishment structure racial bias might operate, but also suggest a deeper structural concern: the procedures that regulate capital punishment might inadvertently increase the risk that racial arbitrariness will infect capital proceedings. A number of studies document that implicit racial biases already operate to the detriment of Black defendants by: undermining the presumption of innocence, affecting the evaluation of ambiguous evidence of guilt, and triggering stereotypes of the guilty Black male.²³⁴ The fact that death-qualified jurors possess greater implicit biases might be one reason why death-qualified juries are conviction-prone in cases involving Black defendants (and especially in cases with White victims and Black defendants). Thus, our findings that death-qualified jurors are more implicitly biased, that these implicit racial biases could drive death-proneness, and that the increased implicit racial bias on death-qualified juries is explained by the exclusion of minority group jurors cast considerable doubt on a core rationale that undergirds the *Lockhart* decision. The Fair Cross Section requirement is primarily motivated out of a concern for jury legitimacy.²³⁵ The *Lockhart* Court's point that jurors who are excluded due to death qualification are not a "distinct group" in the same way that "Blacks" are distinct group loses much of its power in the face of these findings that suggest that the Court substantially underestimated the racial influence that death qualification has on the cross section of citizens that hear and decide capital cases.

Finally, our findings also lend credence to the notion that death qualification impedes accurate assessment of community standards.²³⁶ The Eighth Amendment's Cruel and Unusual Punishment clause draws meaning from "the

²³⁴ *Id.* at 169-70.

²³⁵ *Id.* at 184 ("But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial . . .").

²³⁶ See, e.g., G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87 (2008) ("Measuring the community's sentiment concerning a specific punishment by gathering a venire, removing from the venire all people opposed to a punishment, and then taking the temperature of the remaining citizens concerning the propriety of that punishment, would be like assessing the impact of global warming by taking the temperature in a room with its air-conditioning on.").

evolving standards of decency that mark the progress of a maturing society.”²³⁷ In order to assess whether modern decency prohibits a particular sentencing practice, courts look to several “objective indicia,” including the behavior of juries.²³⁸ The idea is that juries, as Justice Scalia has put it, “maintain a link between contemporary community values and the penal system that this Court cannot claim for itself.”²³⁹ Eliminating jurors that refuse to impose a particular punishment practice (here, the death penalty), then, has the effect of eliminating the voice of a discrete segment of the community, and thus, making it impossible to get a true read on community consensus. Our findings that death-qualified jurors possess greater implicit racial biases than jury-eligible citizens generally—especially when considered alongside our findings that implicit racial bias predicts race of defendant effects and explicit racial bias predicts race of victim effects—suggests that, for Eighth Amendment purposes, assessing “community consensus” based on the jury verdicts of a more biased pool of Americans (i.e. death-qualified jurors) might not be a methodology particularly prone to accuracy. This broken thermometer for gauging community consensus is even more troubling when one considers that the disproportionate exclusion of non-White jurors explains the difference in implicit bias score between death-qualified jurors and those jury-eligible citizens that cannot survive death-qualification. Stated broadly, our findings both hint at where in the capital case racial biases might seep into the system and suggest that regulating—as opposed to eliminating—the death penalty through mechanisms like death-qualification might have had the unintended effect of contributing to rather than detracting from racial arbitrariness.

E. *Global Challenges to the Constitutionality of the Death Penalty*

In *Gregg*, the Court espoused the belief that a combination of carefully drafted statutes and well-crafted procedural mechanisms would reduce the *Furman* arbitrariness (including racial discrimination) concerns.²⁴⁰ In *McCleskey*, the Court had—and exercised—the option of ducking the reality that these new statutes and all of the extensive regulations were not, in fact, reducing the risk of racial discrimination to a constitutionally tolerable level. If the source of the racial bias in the death penalty is not just conscious (and perhaps capable of eradication

²³⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²³⁸ *See Gregg v Georgia*, 428 U.S. 153 (1976) (“The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.”).

²³⁹ *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J. dissenting) (internal quotation omitted).

²⁴⁰ *Gregg*, 428 U.S. at 195 (“[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”).

through rigid procedural regulations), but is implicit, then the Court should address head-on whether there is a constitutionally intolerable risk of arbitrariness when states inflict the death penalty despite evidence that racialized sentencing is built-in to the capital punishment regulatory structure via the implicit biases that operate in the minds of death-qualified jurors. In other words, if, as we found, death-qualified jurors implicitly believe that White Americans possess higher worth than Black Americans, then the *McCleskey* Court focused on the wrong question when considering evidence of intentional bias; the real question was whether the Court had fallen short on its promise in *Gregg*: that new and improved procedural regulation would suffice to eliminate arbitrariness.²⁴¹ If the seeds of that arbitrariness live literally within death-qualified jurors, and if we continue to see race of victim or defendant effects when researchers study state and local death sentencing, then, perhaps, Justice Blackmun was correct in his assessment that no amount of “tinker[ing] with the machinery of death” could create a fair, rational, race-neutral death sentencing scheme.²⁴²

Our findings also question the wisdom and validity of particular assumptions that the Supreme Court has made in effecting constitutional regulation of capital punishment. The *McCleskey* Court took the findings of the Baldus studies at face value, but nonetheless found that proof of racial bias in the form of a large-scale statistical study does not suffice to prove racial bias in a particular capital case. The finding that death-qualified juries implicitly value White Americans over Black Americans provides a potential pathway to explaining how the statistical studies that show race of the victim effects in a county (or a state) could stem, at least in part, from broad swaths of the population (and especially death-qualified jurors). Thus, implicit racial bias evidence contributes to the broader literature on race and the death penalty both by diversifying the type of evidence that documents the influence of race on death sentencing and because implicit bias evidence is not as easily subjected to the argument that one cannot deduce racial discrimination from racial disparities (the primary complaint lobbied at the Baldus study), nor is it hostage to the claim that any racial discriminatory outcome is based on vestiges of past racism (in fact, people continue to harbor these implicit attitudes and stereotypes). The fact that we tend to implicitly value White lives over Black lives demonstrates a potential explanation for the results found in the Baldus studies, and it powerfully illustrates that the seeds for discriminatory decision-making in the capital context are not dead and gone; but instead, they live, literally, within us.

²⁴¹ *Id.* at 204-05.

²⁴² See *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting) (statement regarding the denial of certiorari).

CONCLUSION

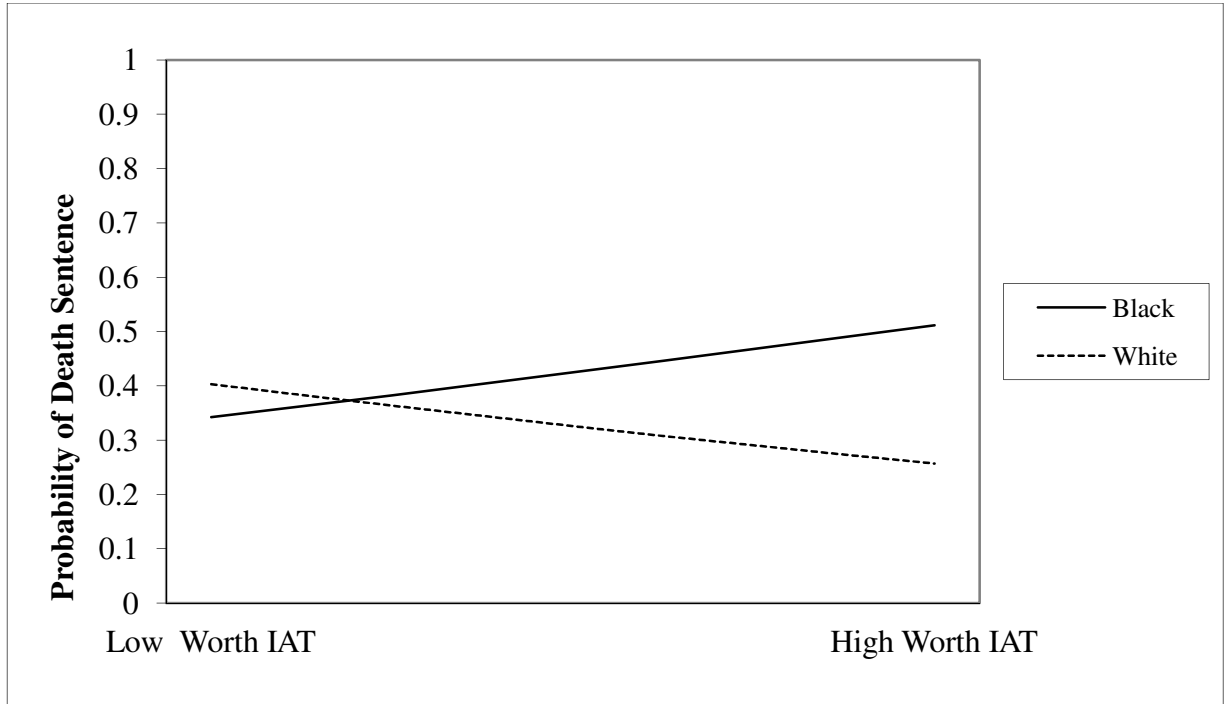
This Article presented the results of an experimental study of 445 jury eligible citizens located in six of the most active death penalty states in the country. Cognizant of persistent racial disparities in the administration of the modern death penalty, we sought to examine whether implicit racial bias helps to shed light on where and how race influences death penalty outcomes. Our findings—among them: jury eligible citizens implicitly associate Whites with “worth” and Blacks with “worthless,” death-qualified jurors hold stronger implicit and self reported biases than do jury eligible citizens generally, the exclusion of non-White jurors accounts for the differing level of implicit racial bias between death-qualified and non-death qualified jurors, implicit racial bias predicts race of the defendant effects and explicit racial bias predicts race of the victim effects—strongly suggest that implicit racial bias does have an impact on the administration of the death penalty in America. Specifically, we conclude that implicit bias complicates the Supreme Court’s reliance on retribution as the legitimizing punishment rationale for the death penalty, complements and diversifies the proof that the post-*Gregg* procedural regulation of capital punishment has not been successful at eliminating racial arbitrariness, and hints that procedural regulations intended to promote impartiality—for example, death-qualification—might, in fact, exacerbate the influence of race on death penalty outcomes.

We hope that this Article is seen as a beginning—proof that research into the locations and procedures that drive racial disparities are worth exploring through the lens of implicit social cognition. Future researchers might want to explore directly the relationship between race and retribution by testing, for example, whether implicit racial bias scores predict support for capital punishment as expressed through policy statements (or even newspaper stories) that present retributive (compared to, say, deterrence) rationales for capital punishment. Scholars might also test whether implicit racial bias plays a role in pre-trial sorting of capital cases. For example, do prosecutors perceive cases to be more serious when they involve White victims, and, if so, do value of life implicit bias scores predict these seriousness evaluations?

Whether the audience consists of state legislators examining whether capital punishment remains a wise policy choice, the Supreme Court deciding if the death penalty can be sustained on retributive grounds or if procedural regulations have eradicated intolerable racial arbitrariness, or even individual prosecutors or capital jurors deciding whether to impose the death penalty in a particular case, more research is needed to isolate when, where and how race influences the administration of capital punishment. Tools such as the methods developed in the

field of implicit social cognition provide the mechanisms necessary to glean the answers that decision-makers need in a way that scholars simply could not imagine at the time that *Furman* and *Gregg* were decided. We hope that this Article—and the study that anchors it—is the first of many studies to engage these questions through the implicit social cognition lens.

TABLES

**Table 1.**

Implicit Racial Bias and Probability of Death Based on Race of Defendant

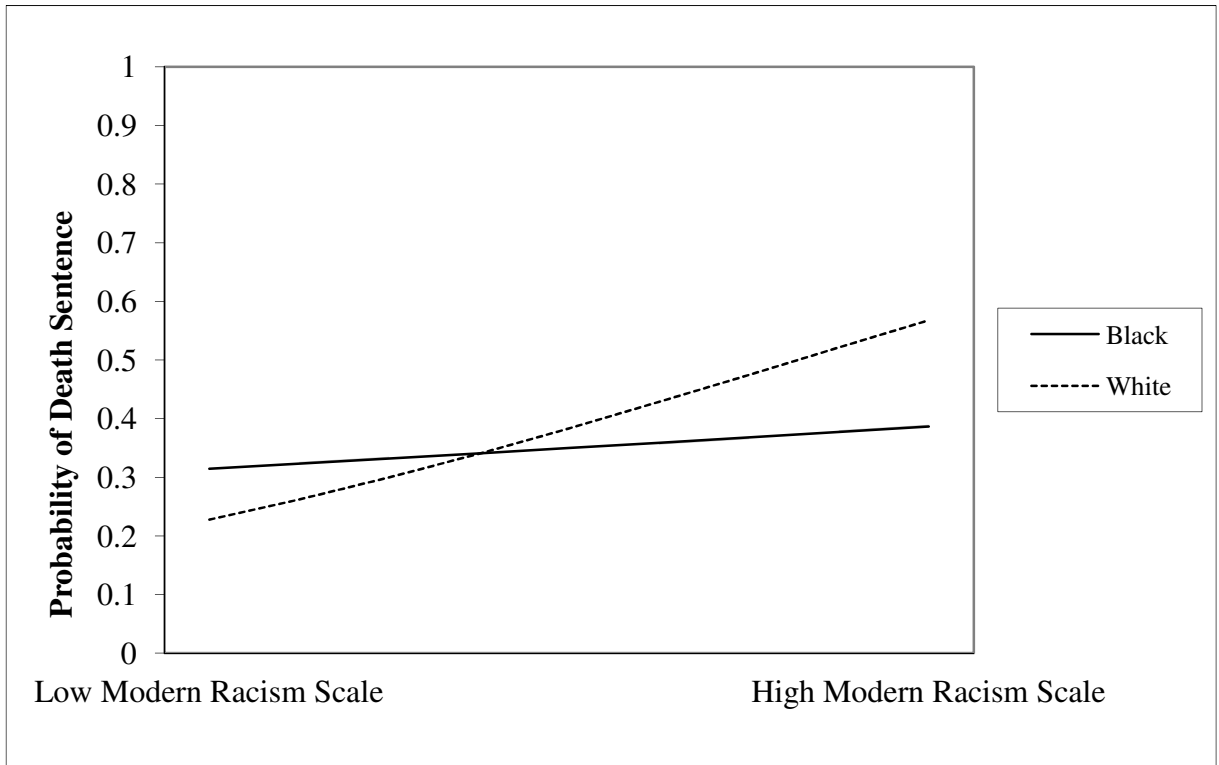


Table 2.

Self Reported Bias and Probability of Death based on Race of Victim

	B	Wald	Exp(B)
Race of Victim (RV)	0.15	0.08	1.16
Race of Defendant (RD)	0.20	0.16	1.22
Value of Life IAT (VIAT)	0.91	1.97	2.48
Stereotype IAT (SIAT)	-0.68	1.31	0.51
MRS	0.20	0.50	1.22
RV*RD	-0.54	0.91	0.58
RV*VIAT	-0.77	0.88	0.46
RD*VIAT	-1.77	4.69	0.17*
RV*SIAT	0.19	0.06	1.21
RD*SIAT	0.87	1.35	2.38
RV*MRS	0.75	3.95	2.12*
RD*MRS	0.17	0.20	1.18
Gender	-0.44	2.65	0.64
White Participant	-0.18	0.18	0.83

* $p < .05$

Table 3.
Regression Results

Appendix A

Attorney: And what was your relation to Edward Walsh [Jamal Washington]?

Mrs. Walsh [Mrs. Washington]: He was my husband.

Attorney: How long had Edward [Jamal] and you been married prior to his death?

Mrs. Walsh [Mrs. Washington]: Over 25 years.

Attorney: And we've heard some testimony that Edward [Jamal] worked a lot. Would you ever go see him?

Mrs. Walsh [Mrs. Washington]: Yeah. I'd go see him. I was working days at the time, you know, a regular 8 to 5 job. So in the evening I'd usually go pick up supper somewhere and take it and go meet him and we'd sit and have supper.

Attorney: And what types of things did you and Edward [Jamal] like to do together?

Mrs. Walsh [Mrs. Washington]: Just about everything.

We had both decided that we were going to retire early and spend a lot of time together we would take trips, you know, short weekend trips, sneak off for a day somewhere. Go down to the city, walk through the center of town.

Attorney: Despite your busy schedules, did you make time for each other?

Mrs. Walsh [Mrs. Washington]: Yes, sir, we tried to. Tried to make the time we could.

Attorney: Did you and Edward [Jamal] have children?

Mrs. Walsh [Mrs. Washington]: Yes, sir. We have one boy and one girl, both grown now.

Attorney: Had Edward just passed some tests that was of importance to you and to him, as well?

Mrs. Walsh [Mrs. Washington]: Edward [Jamal] just found out that, I'm sorry, [Witness sobbing. Requests tissues from bailiff] Edward had just found out that he had passed the test for manager, and he would have probably made manager. So when he made assistant manager, which was his job at the time he was killed, he had passed me up because when I left I was a department manager. So when he made assistant manager, his first joke was now you've got to take orders from me. But it was, it was, it was a milestone we were both proud of.

Attorney: Where do you stand today?

Mrs. Walsh [Mrs. Washington]: Obviously life is not the same. It has completely fallen apart, for all the dreams, you know. I was probably married longer than possibly some of y'all in here were alive at the time. And, you know, it's your friend, it's your lover, it's your confidant and your husband, and that more than disappeared one morning, you never get that back. You never get that back.

Attorney: Thank you very much, Mrs. Walsh [Mrs. Washington].

Appendix B



Photo 1



Photo 2



Photo 3

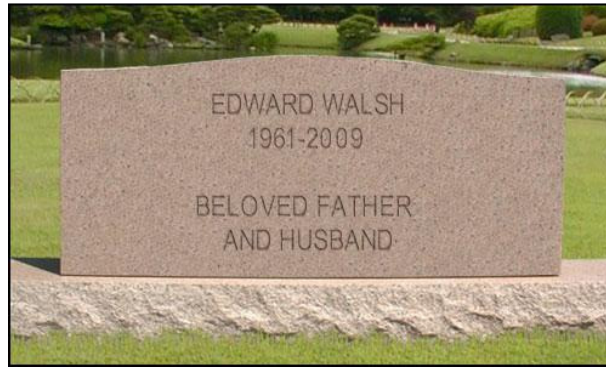


Photo 4 (White Victim)



Photo 4 (Black Victim)