2010 Death Penalty Issue

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THE CONTINUING ROLE OF RACE IN CAPITAL CASES,
NOTWITHSTANDING PRESIDENT OBAMA’S ELECTION

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Ronald J. Tabak spoke at the Northern Kentucky Law Review’s Fall Symposium: Race and the Death Penalty, which was held on October 17, 2009. The following is based primarily on the speech Mr. Tabak gave during the Symposium.

This speech concerns the implications, both in death penalty advocacy and in representing those facing possible execution, of the now common belief that racism no longer plays a significant role in our capital cases.

I. INTRODUCTION

A. The End of Segregation and the Belief that Racism Was No Longer a Real Problem

I first experienced this belief in the late 1980s, when I was representing a death row inmate from Georgia¹ named Johnny Lee Gates.² He had been convicted and sentenced to death in 1977, little more than a decade after

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Because Mr. Tabak did not prepare a conventionally written and footnoted law review article, many of the footnotes that now appear were added by law review members. Mr. Tabak, while providing many footnotes, has not independently reviewed most of the ones that were added by the law review.

enactment of the 1964 civil rights law, by an all-white jury, in a community where African Americans constituted about thirty percent of the population.³

In Gates v. Zant, the federal habeas corpus proceeding, undisputed evidence showed a significant disparity between the percentage of African Americans in the age groups from which jurors could be selected and the percentage of African Americans on the jury rolls from which trial jurors were selected.⁴ When I represented Mr. Gates in his Eleventh Circuit appeal,⁵ the court found that we had established a prima facie case of unconstitutional racial disparity in jury composition.⁶ Thus, if the court had considered the merits of Mr. Gates’ constitutional claim, it would have required the State to rebut the prima facie case by explaining how and why this great disparity came about.⁷ However, the Eleventh Circuit refused to consider the merits of this constitutional claim⁸ because his trial lawyer failed to challenge the constitutionality of the jury rolls.⁹

Mr. Gates’ trial lawyer testified in the state post-conviction proceeding, and when asked why he did not object at or before the 1977 trial, he provided two reasons.¹¹ First, he stated that he did not know enough about the constitutional law on racial disparity in jury rolls to have made a challenge.¹² Second, he said that even if he had known enough about the constitutional law, he still would not have objected.¹³ He explained that he and other defense counsel believed that racial disparity relating to jury composition should not be attacked.¹⁴ They believed that winning such a claim would do “more harm than

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⁴ Gates, 863 F.2d at 1498 (noting Gates’ argument that if his trial attorney had “researched the matter thoroughly, he would have discovered a statistical disparity of at least 13% between the percentage of blacks in Muscogee County as a whole and the percentage of blacks on the jury list”).
⁵ See id. at 1492.
⁶ Id. at 1498 (stating “by making these allegations [the trial attorney] could have stated a prima facie case of jury discrimination”).
⁸ Gates, 863 F.2d at 1500.
⁹ Id.
¹⁰ Id.
¹¹ Id. at 1497.
¹² Gates, 880 F.2d at 294 (Clark, J., dissenting) (noting that in Gates’ trial attorney’s post-conviction deposition, he testified that “[he did] not understand that [percentage disparities] had ever been held to be basis of setting aside the Grand Jury array or petit jury” (Id. at n.1); concluding that “Cain [the trial attorney] may have been generally aware of the availability of jury composition challenges, but the facts of this case reveal that he was not aware that such a challenge was available in Muscogee County” (Id. at 294)); suggesting that Cain’s statements “[demonstrate] that Cain misunderstood the law upon which he could have based a successful prima facie claim of jury discrimination in Gates’ case” (Id. at n.1)).
¹³ Id. at 295; Gates, 863 F.2d at 1497 (noting Cain’s testimony that “he believed that such a challenge might alienate the jury that eventually would be empaneled to try the case”).
¹⁴ Gates, 880 F.2d at 296 (“Cain asserted that he did not challenge the jury composition because it was known among the criminal defense attorneys in the county that it was not ‘the thing
good” because some people who would nonetheless end up on the jury would be prejudiced against the defendant for having exposed the racial disparity.15

At the Eleventh Circuit argument, I pointed out what had occurred during segregation, which had officially ended not long before the 1977 trial.16 During that time, when a trial lawyer failed to object due to fear of the resulting prejudice against the defendant – what the courts referred to as a “Hobson’s choice of evils”17 – the fact that the lawyer faced that choice was deemed to be a sufficient reason for post-conviction consideration of the merits of the constitutional claim.18 But the Eleventh Circuit essentially stated in 1988 that constitutional claims of racial discrimination in jury composition must always be made according to state procedure; no matter how meritorious, they cannot be raised for the first time in post-conviction, even when a fearful trial lawyer faces what he believes to be a Hobson’s choice of evils.19

B. Federal Legislation and Racism in Capital Cases

In the late 1980s and the early 1990s, the belief that courts and legislative bodies no longer had to address issues of racial disparities in the context of capital punishment came to the forefront. In 1991, I testified before the Senate Judiciary Committee a few years after losing Mr. Gates’ appeal.20 I spoke on behalf of the American Bar Association21 in favor of the proposed federal
Fairness In Death Sentencing Act of 1991 (the “Fairness Act”). Part of what I addressed was the assertion that an effective Racial Justice Act (the earlier title of what became the proposed Fairness Act) was incompatible with a death penalty. I pointed out that the death penalty could continue to exist if the Fairness Act were enacted, if real proportionality review and various other reforms were initiated.

I was dismayed thereafter to read in the Congressional Record that Senator Dixon of Illinois had concluded on the basis of my testimony that he should oppose the Fairness Act. Senator Dixon stated that the legislation was unnecessary because during my testimony I had mentioned various reforms that would address racial discrimination while permitting the continued existence of the death penalty.

Thereafter, when I turned my testimony into a law review article, I argued that Senator Dixon’s logic was akin to saying, in 1963, that the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were unnecessary because the southern states could eliminate segregation if they felt like doing so. But these

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24. 134 CONG. REC. S7558-59 (1988) (Sen. McClure argued to the Senate Judiciary Committee that the Racial Justice Act would end capital punishment); see Vada Burger et al., Comment, Too Much Justice: A Legislative Response to McCleskey, 24 HARV. C.R.-C.L. L. REV. 437, 465-70 (discussing Sen. McClure’s objections to the Racial Justice Act); see also Tabak, supra note 22, at 803-05 (arguing against the belief that an effective Racial Justice Act would effectively terminate the imposition of the death penalty); see also id. at 797 (“The proposed Fairness in Death Sentencing Act would not eliminate the death penalty. It would affect only cases in which (a) a valid statistical showing is made of racial discrimination in the imposition of the death penalty and (b) the death row inmate shows that his case fits the proven pattern of racial discrimination and is not explainable by other, nonracial factors. Thus, entire categories of cases would continue to exist in which a death sentence was based on valid, nonracial factors. These cases would not be affected by the proposed Act.”).


27. Id.; see Tabak, supra note 22, at 793-96 (suggesting various measures to address the pattern of racial discrimination in capital sentencing on which Sen. Dixon relied in developing his argument against the Fairness Act, including states providing clearer guidance to prosecutors as to when it is appropriate to seek the death penalty; taking steps to make it more likely that trial attorneys ask jurors questions about race, such as requiring judges to ask defendants if they would prefer questions on race; requiring private, individual voir dire of prospective jurors in capital cases when asking racially sensitive questions; true proportionality review by state appeals courts; and clemency proceedings in which race-of-victim discrimination would be basis for granting clemency).

28. See Tabak, supra note 22.

29. Tabak, supra note 22, at 804-05.
states were not going to eliminate segregation without federal legislation.\textsuperscript{30} Similarly, it was highly unlikely that states would adopt reforms in the absence of either the proposed federal Fairness Act or a state racial justice act.\textsuperscript{31}

So, the belief that courts and legislative bodies were no longer required to address issues of racial disparities in the context of capital punishment continued, and this attitude has become even more pronounced over time, particularly in the wake of President Obama’s election.\textsuperscript{32}

\textbf{C. The Adverse Effects of President Obama’s Election and Some of His Actions}

As Christina Swarns, the leader of the capital punishment and criminal justice practice at the NAACP Legal Defense and Education Fund ("LDF"), has noted, many critical players in the criminal justice system, whether they are legislators, district attorneys, federal prosecutors, defense lawyers or jurors, believe in the post-racial rhetoric.\textsuperscript{33} And she has noted that this belief has been aggravated by some of what President Obama has himself done.\textsuperscript{34}

For example, as a presidential candidate, Mr. Obama denounced the Supreme Court for holding in \textit{Kennedy v. Louisiana}\textsuperscript{35} that it is unconstitutional to have the death penalty for non-homicide crimes committed against individuals.\textsuperscript{36} As a result, many people will infer that if even President Obama thinks the death penalty is acceptable in such situations, then a serious concern about racial disparities in the context of capital punishment cannot exist.

Furthermore, litigation efforts on behalf of people facing potential execution may be undercut by President Obama’s life experiences. He overcame many obstacles, including living in a single-parent household; being the product of a bi-racial marriage, which would have been illegal at that time in many of our states; and overcoming drug use.\textsuperscript{37} This success may make it more difficult for

\begin{footnotes}
\footnote{Tabak, supra note 22, at 804-05.}
\footnote{Tabak, supra note 22, at 804-05.}
\footnote{See Interview by Innocence Project, Inc. with Christina Swarns, Director, Criminal Justice Project, NAACP Legal Defense and Educational Fund, \textit{in 5 THE INNOCENCE PROJECT IN PRINT 1, 16-17} (Summer 2009), \textit{available at} http://www.innocenceproject.org/Images/2140/ip_summer2009.pdf [hereinafter \textit{In Their Own Words}].}
\footnote{Christina Swarns, \textit{The Uneven Scales of Justice: How race and class affect who ends up on death row}, The American Prospect (June 18, 2004), \textit{available at} http://www.prospect.org/ca/articles?article=the_uneven_scales_of_capital_justice.}
\footnote{In \textit{Their Own Words}, supra note 32.}
\footnote{Kennedy v. Louisiana, 129 S. Ct. 1 (2008).}
\footnote{See Jim Geraghty, \textit{What Does Obama Think of Kennedy v. Louisiana? (UPDATED)}, \textit{National Review Online}, June 25, 2008, http://campaignspot.nationalreview.com/post/?q=Y2E3MTc3YTEyY2M0YTQ0OW4ZmlxZjk3ZTAWZTA1OGM= (last visited Mar. 12, 2010) (quoting then-Sen. Obama: "I disagree with the decision. I have said narrow circumstances for the most egregious of crimes. The rape of a small child, 6 or 8 years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances that the death penalty can be pursued, that that [sic] does not violate the Constitution").}
\end{footnotes}
juries to give proper mitigating weight to evidence regarding defendants with somewhat similar backgrounds to the President, but who failed to overcome their difficult circumstances and instead participated in capital crimes.

However, President Obama’s election actually tends to undercut the claim that we are now a society free from racial discrimination. In several “Deep South” states, he received a lower percentage of the white vote than did Senator Kerry in 2004, even though Senator Kerry nationally received a much lower percentage of both the overall and the white vote than Mr. Obama. 38 A study by Professors Persily, Ansolabehere and Stewart also found that Obama received 75% of the white Democratic vote, as compared to Kerry’s 82%, in states covered by Voting Rights Act Section 5,39 whereas both Obama and Kerry received 85% of the white Democratic vote in the non-covered states.40 Therefore, while President Obama’s statements and background may impact racism in the death penalty, his election emphasizes the apparent existence of racial patterns in United States elections.

D. Racial Discord Helps Explain this Country’s Increasing Isolation in Keeping the Death Penalty

A report for the American Law Institute (“ALI”), written by Professors Carol and Jordan Steiker, provides a strong basis for disregarding the post-racial rhetoric, at least in the context of capital punishment.41 In response to their report about the death penalty, in 2009 the ALI revoked its past standards on the death penalty and decided not to attempt to develop new standards on how to implement the death penalty fairly because it is too fundamentally flawed.42

The Steikers’ report states that “broad scholarly literature often highlights ... racial discord” in this country as an “important explanatory variable” of why the United States continues to be so unusual among Western


40. Persily et al., supra note 38, at 19 (noting additionally that one of the principal purposes of the Voting Right Act Section 5 is to deter covered states from committing constitutional violations of minority voting rights (id. at 10-11)).


democracies with regard to the death penalty. These studies point to the overwhelming percentage of American executions taking place in the South and states bordering the South as evidence of the racial discord. These were the last states to desegregate and were the "most resistant" to civil rights laws. Thus, these states are the most likely to have people affected by the problems occurring in the lynching days that Professor Melynda Price has discussed at this conference and that remain very real to the people who were, and are still, there.

II. THE DEATH PENALTY CONFERENCES AT AIRLIE HOUSE

What I discuss below is not based on original knowledge or my research. Rather, it is based mostly on notes I took at the NAACP Legal Defense Fund’s ("LDF") annual death penalty conferences at Airlie House in Warrenton, Virginia.

A. Explicit Versus Implicit Bias

First, I address several impacts of racial attitudes on various actors in the judicial system. In that regard, it is important to delineate between explicit bias and implicit bias. Explicit bias is much less likely to occur, either in jury selection or otherwise, because people rarely make overtly racially-biased statements in court.

Bryan Stevenson of the Equal Justice Initiative and NYU Law School has noted that sometimes people will overtly reveal their racial bias, if they feel comfortable or if they respond quickly and automatically to questions. For example, Stevenson discussed an expert witness who was discussing future dangerousness, which is an aggravating factor in some states and is considered as aggravating by jurors in many other states. This expert said that the death


44. Steiker & Steiker, supra note 41, at Annex B, p. 29.


47. The Airlie Conference is sponsored annually by the Legal Defense Fund as part of its work with issues involving Capital Punishment. For more information on the Legal Defense Fund and current death penalty issues with which it is involved, see NAACP Legal Defense and Educational Fund, Inc., http://www.naaccpldf.org/issues.aspx?issue=11 (last visited March 28, 2010).


49. See Bryan Stevenson, Executive Director Equal Justice Initiative of Alabama Remarks at the American Constitutional Society’s Annual Conference, Session E: The Future of the Death
penalty is more appropriate for a black or brown defendant because _ipso facto_ such a defendant is more likely to be dangerous in the future.\(^{50}\) That is an example of explicit bias.

B. Implicit Bias and Related Studies

Research regarding the causes of implicit bias has emerged slowly.\(^{51}\) Apparently, from around 1980 to 1995, fewer people would openly discuss racism, which caused research of explicit bias to diminish.\(^{52}\) Thereafter, research increased for several reasons.\(^{53}\) One was that psychologists discovered a way of researching racism by means of implicit tests.\(^ {54}\)

1. Studies in the Context of Employment

For example, LDF lawyer Matthew Colangelo discussed two studies at the Airlie conference in 2009.\(^{55}\) In one study, social scientists submitted candidates for employment to employers with identical, false, made-up resumes, with the only difference being that one of them had the name Emily Walsh and the other had the name Lakisha Washington.\(^{56}\) The study found that the candidate with the name Emily Walsh was 50% more likely to get an interview than Lakisha Washington.\(^{57}\) That rate differential is the equivalent of having an eight-year difference in experience, even though these hypothetical resumes were the same.\(^{58}\)

Then, Princeton social scientists Devah Pager and Bruce Western sent prospective employees/testers _not_ to the Deep South, but to New York City.\(^{59}\)

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\(^{50}\) Id. at 29.


\(^{52}\) Id.

\(^{53}\) Id.


\(^{55}\) Matthew Colangelo, NAACP Legal Defense & Educational Fund, Remarks at the NAACP Legal Defense Fund's annual Airlie Capital Punishment Conference (Summer 2009).


\(^{57}\) Id. at 992.

\(^{58}\) Id.

Among the candidates of the same race, those who indicated having criminal records were, not surprisingly, much less likely to get employment.60 However, a white candidate who indicated that he had just been released from jail was more likely to be hired than an African American with the same qualifications and no criminal record.61

2. The Implicit Association Test

I have also heard discussion about the Implicit Association Test. This test measures automatic associations, such as associating black with being bad or white with being good.62 This test measures quick responses.63 Of the white Americans who took the test as part of a study, 75-80% had a moderate to strong association of white being good and black being bad.64 Asian Americans had similar associations.65 African Americans and Hispanics did not exhibit much of a difference in their attitudes regarding white and black.66

Notably, capital defense lawyers (and law students) responded about the same as the general population.67 They had these same stereotypical attitudes, whether or not they believed they had them.68 These stereotypes did not appear in what the study referred to as chronic egalitarians.69 Chronic egalitarians are people who actively work on these issues and are internally motivated or who have very close personal relationships with people of other races.70

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60. Id. at 6.
61. Id. at 7.
63. See Kang, supra note 54, at 1509.
64. See Gaertner & McLaughlin, supra note 62.
65. See Kang, supra note 54, at 1538; see also Katherine Hamilton, A Deadly Response: Unconscious Racism and California's Provocative Act Doctrine, 7 HASTINGS RACE & POVERTY L.J. 71, 86-7 (2010).
66. See Kang, supra note 54, at 1538.
68. Id.
70. Glaser & Knowles, supra note 69, at 164.
According to Professor Jerry Kang, "[t]here is now persuasive evidence that implicit bias against a social category, as measured by instruments such as the Implicit Association Test, predicts disparate behavior toward individuals mapped to that category . . . notwithstanding contrary explicit commitments in favor of racial equality."\(^\text{71}\)

3. Neuropsychological Correlations to Behavior

Another way of assessing implicit bias involves neuropsychological correlations of behavior. Assessments of these correlations indicate which parts of the brain are activated when people do different tasks. In one such study, people were asked to identify someone of another race, which caused much less activity in the part of the brain than is correlated with identification. This level of activity may explain the greater extent of errors that occur in the criminal justice system when somebody of one race purports to identify somebody of a different race.

In these assessments, one analytical group consisted of people with low explicit admissions but high implicit bias. If you asked such people whether they had racial attitudes, they would respond in the negative. However, when these people were asked to shake hands with or touch someone of another race, the revulsion center of the brain reacted significantly. This reaction did not particularly occur in the people who explicitly said they were biased, but it did occur in many of those who did not think they were biased.

4. The Association of African Americans with Being Dangerous

Many presenters at the Airlie Conference reported the result of various studies demonstrating that African Americans are associated with being dangerous. At the 2008 Airlie conference, Dr. Jennifer L. Eberhardt presented the results of a study concerning the association of African Americans as being criminals.\(^\text{72}\) She stated that although over eighty percent of white people disclaim having racial-based attitudes, stereotypes of African Americans as criminals appear repeatedly in studies.\(^\text{73}\) For example, one study demonstrated

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\(^{72}\) Jennifer L. Eberhardt, Associate Professor of Psychology, Stanford University, Address at the Legal Defense Council’s Annual Airlie Conference (Summer 2008).

that being shown an image of a black face somehow better enabled people to “see” weapons better.\textsuperscript{74} In this study, white university students were asked to say at which side of a computer screen a particular dot appeared.\textsuperscript{75} They were either shown all black faces, all white faces, or no faces.\textsuperscript{76} Then, they were shown objects and were asked to indicate when they could recognize it.\textsuperscript{77} Some of the objects were crime-relevant and some were crime-irrelevant.\textsuperscript{78} Those who had been exposed to black faces recognized the crime-relevant objects much faster than those who had seen white faces and somewhat faster than those who had seen no faces.\textsuperscript{79} There was no difference in speed of recognizing crime-irrelevant objects.\textsuperscript{80}

A speaker at the 2006 Airlie conference discussed similar results from another study. That speaker referred to a study by Keith Payne in which people were asked to identify whether the object somebody was holding was a tool or a weapon.\textsuperscript{81} Whites and blacks both over-identified the object as being a tool if the person holding it were white and under-identified it as a tool if the person holding it were black.\textsuperscript{82}

In her 2008 presentation, Dr. Eberhardt also discussed a study in a video game setting context. People were faster to “shoot” a black who had a gun than a white who had a gun and were more likely to “shoot” a black who didn’t have a gun than a white who did not have a gun.\textsuperscript{83} This was true of both black and white community members.\textsuperscript{84} In another study using a video game, the black model was more likely to be mistaken as being armed when actually unarmed, and the white model was more likely to be mistaken as being unarmed when actually armed.\textsuperscript{85} The black participants in this video game study showed the same “shooter bias” as white participants.\textsuperscript{86}

Dr. Eberhardt also discussed a somewhat similar study in which police officers were primed with crime-related words.\textsuperscript{87} When errors of recollection

\begin{itemize}
\item \textsuperscript{74} Eberhardt et al., supra note 73, at 881.
\item \textsuperscript{75} Eberhardt et al., supra note 73, at 879.
\item \textsuperscript{76} Eberhardt et al., supra note 73, at 880.
\item \textsuperscript{77} Eberhardt et al., supra note 73, at 880.
\item \textsuperscript{78} Eberhardt et al., supra note 73, at 880.
\item \textsuperscript{79} Eberhardt et al., supra note 73, at 880.
\item \textsuperscript{80} Eberhardt et al., supra note 73, at 880.
\item \textsuperscript{81} See Kang, supra note 54, at 1525 (citing B. Keith Payne, Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 183-86 (2001)).
\item \textsuperscript{82} Kang, supra note 54, at 1525 (citing Payne, supra note 81, at 183-86).
\item \textsuperscript{83} Joshua Correll, et al., The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314 (2002).
\item \textsuperscript{84} Id. at 1314; see Kang, supra note 54, at 1525-27 (discussing Correll et al., supra, note 83).
\item \textsuperscript{85} Correll et al., supra note 83, at 1315-1317.
\item \textsuperscript{86} Correll et al., supra note 83, at 1315-17, 1319, 1325.
\item \textsuperscript{87} Eberhardt et al., supra note 73, at 885.
\end{itemize}
occurred, people recalled seeing a more stereotypically black face than they had actually seen.\textsuperscript{88}

Another study assessed the extent of hostility people would exhibit when a computer crashed.\textsuperscript{89} Where black faces were subliminally shown before the computer crashed, there was much more hostility about the situation than when no faces were shown before the computer crashed.\textsuperscript{90}

In yet another study, people reviewed two variations of an otherwise identical TV news story.\textsuperscript{91} In one version, a black suspect was shown for five seconds, and in the other version, the suspect was shown for five seconds with the same facial expression and features except that he was white.\textsuperscript{92} The participants in the study who saw the crime story believed that everything else about the suspects was the same.\textsuperscript{93} White participants in the study who saw the black suspect were six percent more likely to support punitive measures than a control group that did not know the suspect’s race.\textsuperscript{94} White participants in the study who saw the white suspect were only one percent more likely than the control group to support punitive sanctions, a difference that had no statistical significance.\textsuperscript{95}

Mark Bookman, a presenter at the 2007 Airlie conference, discussed a National Basketball Association study about split-second foul calls.\textsuperscript{96} The study found that under similar circumstances, white referees tended to call more fouls on African Americans, and to a slightly lesser extent, that African American referees tended to call more fouls on white players.\textsuperscript{97}

Clearly, these various studies have implications about lineups, other identifications, and what witnesses remember about what they saw (or what they think they saw) with regard to people having weapons, etc.

\textsuperscript{88} Eberhardt et al., supra note 73, at 886-888; see also Hamilton, supra note 65, at 89-92 (discussing police-related shooter bias).
\textsuperscript{90} Id. at 239; see Kang, supra note 54, at 2005 (discussing the Bargh study).
\textsuperscript{92} Id. at 563.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 568.
\textsuperscript{95} Id.
\textsuperscript{97} Id.
5. The Association of African Americans with Apes

Another implicit association that Dr. Eberhardt discussed is the association of African Americans with apes.\textsuperscript{98} This association is made mostly by people who would deny having any such belief if explicitly asked.\textsuperscript{99} For example, white students who had been primed with great ape words were presented with a hypothetical of police beating a suspect.\textsuperscript{100} They were much more likely to say that the beating was justified when they thought the suspect was black than when they thought the suspect was white.\textsuperscript{101}

This association of African Americans with apes does not show up merely in a sociological study. The \textit{Philadelphia Inquirer} newspaper has published articles discussing defendants eligible for the death penalty due to the nature of the crime committed.\textsuperscript{102} These articles used animal-related words significantly more often when describing black death penalty-eligible defendants than when describing white death penalty-eligible defendants.\textsuperscript{103} Moreover, African Americans who were executed were depicted in such newspapers stories with more ape-like representations than African American defendants who were not executed.\textsuperscript{104}

Implicit “knowledge” that comes from sources like the wording of newspaper articles, Tarzan movies, and many other sources is the reason for the association of African Americans with apes.\textsuperscript{105} While the existence of such implicit “knowledge” is not dependent on an anti-black prejudice, it can have implications for people who react to actual cases, no matter what their roles are in the criminal justice system.\textsuperscript{106}

Indeed such “knowledge” can come into play even when no racial information is provided in a news account. Thus, in a study by Frank Gilliam and Shanto Iyengar, sixty percent of participants in a study “who saw no suspect falsely recalled having seen a photo of a suspect, and of those participants, seventy percent falsely remembered seeing a Black suspect.”\textsuperscript{107}

\textsuperscript{99} Id. at 294.
\textsuperscript{101} Goff et al., \textit{supra} note 98, at 304; see also Goff & Eberhardt, \textit{supra} note 100.
\textsuperscript{102} Goff et al., \textit{supra} note 98, at 303-305.
\textsuperscript{103} Goff et al., \textit{supra} note 98, at 304.
\textsuperscript{104} Goff et al., \textit{supra} note 98, at 303-04; see also Levinson, \textit{supra} note 67, at 642 (citing the Goff study involving ape-like representations in the \textit{Philadelphia Inquirer}).
\textsuperscript{105} Goff et al., \textit{supra} note 98, at 304.
\textsuperscript{106} See Eberhardt et al., \textit{supra} note 73, at 890.
\textsuperscript{107} Levinson, \textit{supra} note 67, at 630 (citing Gilliam & Iyengar, \textit{supra} note 91, at 561-64).
The impact of stereotypical African American features can be seen in *Looking Deathworthy*, a study led by Professor Eberhardt and published in 2006 which concerned Philadelphia men. In the study, people were shown many photographs of death-eligible defendants in a neutral fashion (i.e., nothing good or bad was said about them). Those defendants whose physical characteristics were more stereotypically black-featured, such as thick lips, broad nose, or dark skin, were more likely to be viewed as deserving the death penalty when the victim was white than when the victim was not white.

6. Cross-Racial Identifications

There is substantial literature on cross-racial identifications. Studies show that the ability to make a match, i.e., whether a witness is able to identify the suspect as the individual actually observed, decreases significantly when the observed person's race is different than the observer's race. This occurs because race is viewed as highly significant, and witnesses tend to pay less attention to the facial features of a person of a different race than they would to the facial features of a person of their own race.

The impact of this phenomenon apparently is not diminished by using sequential lineups, in which the witness is shown people one by one rather than all together. However, sequential lineups do enhance the accuracy of intra-racial identifications, where somebody is identifying someone of his or her own race. It has also been found that there is greater accuracy in a lineup if the person conducting the lineup is of the same race as the suspect.

C. Some Potential Impacts on Capital Cases of Implicit Bias

Aside from what I already have suggested or discuss below, what are potential impacts in capital punishment cases of implicit bias?

- It can affect how jurors react to assertions that someone acted in self-defense.

109. Id. at 383-384.
110. Id. at 385.
112. Id. at 208.
- It can affect assertions that there was excessive force by the police.
- It can affect whether there really is a presumption of innocence — something that defense counsel really need to go over with a fine tooth comb in voir dire.\textsuperscript{116}
- It can affect whether the jury believes that remaining silent, which is a defendant’s constitutional right, is an admission of guilt.
- It can even affect how the jury perceives an expert witness who is a person of color.\textsuperscript{117}

A practice-related thought is that these kinds of studies regarding implicit bias need to be used in seeking better voir dire and better jury instructions, and to expand the kind of race-oriented mitigation that is allowed. For example, in terms of mitigation, if there is a situation in which the defendant has been subjected to a history of racial attitudes, he may, as a result, have experienced an adverse psychological impact from living in such a situation.\textsuperscript{118} This is wholly aside from, although related to, the impact of living in a community where there is communal memory of racial violence, such as a notorious lynching or outrageous racial discrimination, even many years after the fact.\textsuperscript{119} This can cause psychic harm to the defendant, in addition to potential jurors, potential witnesses, or others in the community.\textsuperscript{120} If defense counsel does not persuasively argue, pre-trial, that this is a legitimate mitigating factor that should be allowed to be presented, then counsel is being ineffective.\textsuperscript{121} These psychologically traumatic experiences are, in fact, mitigating.\textsuperscript{122}

Also, based on these studies, other courtroom personnel, in addition to the judge, may be sensitized to how the defendant is treated while in the courtroom.\textsuperscript{123} This can include whether the defense’s mitigation specialist, who may be the only other African American in the courtroom besides the defendant, is permitted to be with the defendant during sidebars so that the defendant does not appear to be thoroughly isolated, disinterested, or both.

\textsuperscript{116} See id. at 417.
\textsuperscript{117} See Rutledge, supra note 111.
\textsuperscript{118} See Leona D. Jochnowitz, Missed Mitigation: Counsel’s Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing, 43 NO. 1 CRIM. L. BULL. ART 5 (2007) (discussing what mitigation factors are in relation to how a defendant has been raised, and how those factors affect jurors in the capital punishment setting).
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} American Bar Assoc. Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 1021 (2003); see also Jochnowitz, supra note 118, at Sect. IV.; Alycee Lane, "Hang Them If They Have to be Hung": Mitigation Discourse, Black Families, and Racial Discourse., 12 NEW CRIM. L. REV. 171 (2009) (describing the standards which must be met to show ineffective assistance of counsel based on the failure to properly present mitigation evidence).
\textsuperscript{122} See Lane, supra note 121; Richard G. Dudley & Pamela Blume Leonard, Getting It Right: Life History Investigation as The Foundation For a Reliable Mental Health Assessment, 36 HOFSTRA L. REV. 963 (2008).
\textsuperscript{123} See Lane, supra note 121; see also Dudley & Leonard, supra note 122.
1. Defense Counsel’s Problems Arising from Their Limitations Regarding Race

Another pernicious factor can be defense counsel’s difficulties with recognizing his own limitations regarding race.124 Sometimes, counsel may find it difficult to empathize with clients of color. Sometimes, counsel’s attitudes, of which he may often be unaware, may be noticed by the defendant or his relatives. This may impede counsel’s ability to elicit information about mitigation or the crime that would be truly helpful. Indeed, Dr. Richard Dudley, a frequent presenter at the Airlie conference, stated that seventy to eighty percent of the defendants on whose cases he has worked have told him that they believe race negatively impacts their relationship with their attorneys.125

Diversity within the defense team can increase the likelihood of finding mitigating factors.126 As attorney Maurie Levin127 has noted, defense teams without such diversity are more likely to miss the very kind of evidence of racism in the community and its history that Dr. Melynda Price has discussed at this conference.128 Ms. Levin believes that someone on the team must be aware that this kind of evidence can exist, as it does in many communities, and that the team must have the ability to look into it.

Additionally, the frequent lack of diversity in the prosecution team could have adverse impacts. This can particularly affect the discretionary decision regarding whether to seek the death penalty.129

2. Implications of Cognitive Psychology with regard to Jurors

Cognitive psychology has the greatest implications with regard to jurors.130 According to studies of implicit bias, most people cannot easily ignore their implicit beliefs.131 Accordingly, if the first thing a juror with implicit bias knows about a person is that he or she is African American and the juror later gets more information that might be mitigating, the race information tends to adversely affect how the other information is viewed.132 Jurors with negative implicit
beliefs also pay more attention than is warranted to personal rather than situational factors in deciding why somebody acted the way they acted. 133

As defense counsel, it is difficult to decide whether to discuss this openly. I mention below what is known as a “pink elephant” effect: if a juror is told that which is stated in certain pattern jury instructions, i.e., “you are not to consider race,” the juror may end up considering race more than if the juror had not been told to avoid considering race. 134 This will particularly occur if the juror has a high degree of prejudice. 135

However, it is possible that having such an instruction may force jurors to consider and become aware of their biases. 136 That may be particularly true if a juror has an internal motivation to control his or her prejudice. 137 It is, in any event, challenging to write an instruction that both minimizes the “pink elephant” effect and permits proper consideration of race in mitigation contexts. 138 It is important, for example, to avoid writing instructions that could have the effect of limiting consideration of mitigation evidence that comes through a racial lens, such as the racial history of a jurisdiction or the racial context of a particular crime. 139

One other point that should be of interest to defense counsel is that people who have less practice in disregarding negative factors are also less likely to shape and to correct their reactions to such factors. 140 One implication of this is that in voir dire, when considering prospective jurors, defense counsel might prefer someone who acknowledges racist attitudes and says he or she is trying to work on this over someone who denies having such attitudes but whom the lawyer suspects to hold such attitudes implicitly. 141

133. Id.
135. Id.
137. Id. at 608-09.
138. David A. Aranson, Cross Racial Identification of Defendants in Criminal Cases, 23-SPG CRIM. JUST. 4, 8-11 (2008); see also Cynthia Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 MINN. L. REV. 367, 488-89 (1996) (discussing the use of “race-switching” jury instructions, in which jurors are told to evaluate how their decision would have come out had the victim and defendant’s races been “switched.”
139. See Lane, supra note 121 (proposing proper ways to introduce mitigation evidence so as to produce the most useful result).
140. See Sommers, supra note 136, at 607-608.
141. Sommers, supra note 136, at 601-608.
3. Studies Regarding the Impact of Jurors' Implicit Biases on Capital Case Outcomes

A University of California at Berkley study dated June 24, 2009, by Jack Glaser, Karen Martin and Kimberly Kahn, found that when jurors were told that the most serious sentence for triple murders was life without parole, they were not significantly more likely to convict African American defendants than white defendants.142 But when they were told that the death penalty was the maximum sentence for triple murders, they were significantly more likely to convict African American defendants than white defendants.143

This and some of the other things I address in this article relate to this question referred to during the Northern Kentucky Law Review fall symposium on Race and the Death Penalty by Professor Howe: "Who deserves the death penalty?"144 Some of the implicit attitudes of jurors do seem to affect their views on their fateful decisions, in otherwise identical situations, regarding who deserves the death penalty.145

I noted above the question of how much to discuss the subject of race in the courtroom. One of the speakers at the 2009 Airlie conference, LDF's Vincent Southerland, said that talking about race can expose these explicit and implicit biases and can sensitize everyone in the courtroom to the issue of race and its potential influence in the courtroom.146 If you can alert jurors to the fact that race could have an impact on their decision-making or on the case in general, this can help them account for their own racial biases.147

4. Impact of Juries' Racial Compositions on Case Outcomes

Then, there is the question of the racial composition of juries and its impact. There is strong reason to believe that the race of capital jurors affects outcomes.148 LDF's Vincent Southerland says that study after study of juries by the Capital Jury Project and others show that diversity in jury composition leads to: more defense-favorable outcomes and longer deliberations; fewer inaccuracies that are uncorrected during the longer, less angry jury deliberations;

143. Id.
147. Id.
148. Sommers, supra note 136, at 598.
and more discussion of missing evidence and of case facts than if the jury is not diverse.149

One such study is Samuel Sommers’s “On Racial Diversity and Group Decisionmaking: Identifying Multiple Effects of Racial Composition on Jury Deliberations.”150 In this study, diverse groups deliberated longer than the all-white groups.151 These groups, particularly due to the white participants, discussed more case facts and had “more comprehensive” discussions than the all-white groups.152 The white jurors in racially heterogeneous groups led these groups to make “fewer factual errors and were more amenable to discussion of race-related issues” than did whites who were part of all-white groups.153 “Moreover, inaccuracies were more likely to be corrected in diverse groups,”154 and even prior to deliberations, white jurors “were less likely to believe the defendant was guilty when they were in a diverse group.”155 In a study of jurors who actually served on trials in Indianapolis, Indiana, “the confidence of both black and white jurors about the guilt of a defendant decreased as the number of blacks on the jury increased, regardless of the strength of the evidence.”156

Studies in which mock juries engage in discussions as to whether to impose the death penalty generally “have shown that white mock jurors have the strongest tendency to impose death as punishment in cases were the defendant is black and the victim is white.”157 Moreover, a study of actual capital sentencing by juries in Philadelphia, Pennsylvania, found that “death sentences are less likely when black jurors are more numerous” and that the impact of the jury’s “racial composition was greater for black than for white defendants.”158 Furthermore, the likelihood that black defendants will “be treated more harshly than white ones as the number of whites on the jury increases” is particularly pronounced when a black defendant is accused of killing a white victim.159 However, the likelihood that black defendants will be “treated more harshly” is

149. Southerland, supra note 146.
150. Sommers, supra note 136, at 597-612.
151. Sommers, supra note 136, at 605 tbl. 2.
152. Sommers, supra note 136, at 608.
153. Sommers, supra note 136, at 606.
154. Sommers, supra note 136, at 608.
155. Sommers, supra note 136, at 607.
157. See Bowers et al., supra note 130, at 184 for a discussion on various studies, including one by Mona Lynch and Craig Haney).
159. Bowers et al., supra note 130, at 188.
diminished when "young black males and middle-aged black females are better represented on the jury."\footnote{160}

So, the failure to have diversity in jury composition, which in some court decisions is viewed simply as harmless error under the apparent belief that having an all-white jury does not have a significant prejudicial effect, often greatly increases the risk of an unfair outcome. The studies of both actual juries and simulated juries show that the way that diverse juries view guilt/innocence evidence is different than in non-diverse juries, factual determinations are more accurate in diverse juries, and the very discretionary decisions on who truly deserves the death penalty are greatly affected by jury diversity.

5. The Importance of Identifying Racially Biased People During Jury Selection

How is it that we can so often end up with juries that are far less diverse than the jury-age population? One important factor, discussed above in the context of the Gates case, is the composition of the venire (i.e., the pool of potential jurors) from which a jury is selected.\footnote{161} The venire’s composition can be distorted in various ways. For example, if the venire is based solely or principally on voter rolls, it can be distorted if African Americans are less likely to register to vote.\footnote{162} People who are in the jury venire may be excluded for cause if, as is far more likely among African Americans, people they know are caught up in the criminal justice system.\footnote{163} While I do not think that is a proper “cause” for exclusion, some jurisdictions deem this to be a legitimate “cause”, i.e., the prosecutor does not have to use up a discretionary challenge to exclude such a prospective juror.\footnote{164}

In capital punishment cases, the jury’s diversity can also be undermined by the fact that if a prospective juror would never be willing to vote for the death penalty, that juror will be excluded for cause – even from the determination of

\footnote{160} Bowers et al., supra note 130, at 188.
\footnote{161} See Gates v. Zant, 863 F.2d 1492, 1500 (11th Cir. 1989).
\footnote{162} See Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1276 n.87 (2000) (noting that “the use of registered voter rolls as source lists tends to produce lower numbers of people of color in the venire, given lower voter registration rates among minority populations”).
\footnote{163} See, e.g., Marc Mauer & Tracy Huling, Young Black Americans and the Criminal Justice System: Five Years Later 1 (1995) (finding that one in three African American men between the ages of twenty and twenty-nine is under criminal justice supervision, as compared to one in fifteen white men of that age and still lower rates among women).
\footnote{164} See Melynda J. Price, Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection, 15 Mich. J. Race & L. 57, 90, 95 (2009) (noting that “[b]lack men generally entangled in the criminal justice system are characterized as kind of Black ‘Everymen,’ making their stories generally familiar to many in the Black community” and “[t]he removal of African Americans for either familiarity with the criminal justice system or hostility to the state and its agents is, most arguably, not race neutral”).
guilt or innocence. Because African Americans oppose capital punishment far more than white people, these Witherspoon exclusions aggravate the normal difficulty of achieving diverse juries.

Some prospective jurors might come to realize in advance of being questioned that there are situations in which they would be willing to vote for capital punishment — such as Sirhan Sirhan, the “Hillside Strangler,” Charles Manson, Timothy McVeigh, or a perpetrator of 9/11. But I believe that most potential jurors who generally oppose the death penalty are unaware of answers they could truthfully give that might cause them to qualify for service on a capital jury. So, it stands to reason that Witherspoon questioning excludes African Americans disproportionately.

To be sure, there can be reverse-Witherspoon questioning, in which people who would always vote for the death penalty for capital murder are excluded for cause. But studies suggest that such questioning occurs much less often and much less effectively than Witherspoon questioning. For example, as shown in studies by the Capital Jury Project and others, people who will always vote to impose the death penalty if there is a capital conviction often remain on juries.


169. The “Hillside Strangler” refers to two men, Kenneth Bianchi and Angelo Buono, cousins who were convicted of kidnapping, raping, torturing, and killing women ranging in age from twelve to twenty-eight years old during a four-month period from late 1977 to early 1978 in the hills above Los Angeles, California. The Hillside Strangler, http://www.hillside-strangler.com/ (last visited March 19, 2010).

170. “[O]n Aug. 9, 1969, Manson’s hippie-styled followers, the Manson Family, murdered actress Sharon Tate, wife of director Roman Polanski, and four other visitors to her Los Angeles estate. The murders were gruesome, with numerous stabbings and shootings, and PIG written on the wall in blood. The next night, the group brutally murdered a married couple, Leno and Rosemary LaBianca, in their Los Angeles home, again leaving messages in blood all over the house.” Andrea Sachs, Manson Prosecutor Vincent Bugliosi, TIME, Aug. 7, 2009, available at http://www.time.com/time/nation/article/0,8599,1915134,00.html (last visited March 19, 2010).

171. Timothy McVeigh was “convicted of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City that killed 168 people.” Lois Romano & Tom Kenworthy, McVeigh Guilty On All 11 Counts, WASH. POST, June 3, 1997, at A01.

Such people are also more likely than the average adult population to have racist attitudes.  

Besides Witherspoon and reverse-Witherspoon questioning, there are other aspects of questioning prospective jurors, i.e., voir dire, in capital cases. Steve Bright, the long-time leader of the Southern Center of Human Rights, noted at the 2009 Airlie conference that the Supreme Court’s decision in Turner v. Murray 174 allows capital defense counsel to ask questions about race during voir dire if there is an interracial crime. 175 Bright added that defense counsel may want the jury to include people who talk honestly about their views about race rather than denying that they have any racial attitudes. 176

The significance of this potential questioning is highlighted by the conclusion by William Bowers and others involved in Capital Jury Project interviews of actual jurors in post-Turner cases. 177 These interviews demonstrated that Turner had failed “to purge sentencing decisions of race-linked attitudes and their consequences . . .” 178 Bowers concluded that white and black jurors’ different views of “the basic sentencing considerations of lingering doubt, remorse, and dangerousness are most manifest and egregious” in cases involving interracial murders – the very cases in which the questioning authorized by Turner is permitted. 179 My guess is that defense counsel in those cases did not ask the kinds of questions that Mr. Bright believes should be asked.

LDP’s Vincent Southerland, speaking as did Mr. Bright at the 2009 Airlie conference, said that while defense counsel may be anxious about asking such questions, counsel should look for the people who are uncomfortable talking about race. 180 Their words, their actions, their attitudes, or their facial expressions can demonstrate their racism or bias, and it may affect their decisions. 181

Such questioning does not achieve its purposes as easily as in 1986, when Turner was decided, because people are now much less likely to explicitly state their biases. 182 But, as Mr. Southerland pointed out, even when the ability to

173. See James D. Unnever, et al., Race, Racism, and Support for Capital Punishment, 37 Crime & Just. 45, 66 (2008) (citing several studies to support the allegation that “racial animosity is one of the most robust and consistent predictors of support for the death penalty”).
177. Bowers, et al., supra note 130, at 263.
178. Bowers, et al., supra note 130, at 263.
179. Bowers, et al., supra note 130, at 266.
181. See id.
identify biased people is limited, good questioning can raise the jurors’ awareness that race and racial bias can have the “elephant” effect discussed above.\footnote{Southerland, supra note 146.} Accordingly, alerting the jury to the danger of acting on the basis of racism can make jurors less likely to do so, and thus can significantly affect the outcome.\footnote{Southerland, supra note 146.} Indeed, the Sommers study (discussed above) found that when there was race-relevant \textit{voir dire}, jurors were less likely to vote guilty than when there was race-neutral \textit{voir dire}.\footnote{See Sommers, supra note 136, at 606.} However, as pointed out by Professor Benjamin Fleury-Steiner\footnote{For more information on this author, visit Ben Fleury-Steiner, Ph.D., http://www.benjaminfleurysteiner.com/.} of the Capital Jury Project, many jurors are annoyed by questions about racism, which can make their answers unreliable. So, defense counsel must carefully determine what to do.

One final thought about \textit{voir dire} does not specifically deal with race. The Supreme Court has held that you cannot have an automatic death penalty for people convicted of capital murder.\footnote{See Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (plurality opinion) (finding that a death sentence imposed under a mandatory death sentence statute violated the Eighth and Fourteenth Amendments).} It seems that many jurors do not realize this. That is why reverse-\textit{Witherspoon} questioning is allowed—although I believe that it is conducted far too infrequently.

6. Improper Racially-based Exclusions of Prospective Jurors

As noted above, in \textit{voir dire}, aside from challenges “for cause,” each side is typically permitted to exercise a certain number of discretionary challenges, \textit{i.e.}, challenges for which they do not have to give a reason that disqualifies the juror as a matter of law.\footnote{See Antony Page, \textit{Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge}, 85 B.U. L. Rev. 155, 157-58 (2005) (noting that “[t]he peremptory challenge, almost by definition, was permitted “without cause, without explanation, and without judicial scrutiny” (citing Swain v. Alabama, 380 U.S. 202, 212 (1965))).} The Supreme Court in \textit{McCleskey v. Kemp}\footnote{481 U.S. 279, 296-98 (1987).} relied on \textit{Batson v. Kentucky}\footnote{476 U.S. 79 (1986).} as a means of preventing racial discrimination in capital jury selection. In \textit{Batson}, the Court said that if, in a particular case, it appears that a prosecutor may be exercising discretionary challenges to exclude people on a racial basis, the prosecutor can be questioned about the reasons behind these exclusions.\footnote{Id. at 100 (remanding the case because the trial court “flatly rejected” the “timely objection of the prosecutor’s removal of all black men on the venire” without making the prosecutor give an explanation for his action).} If the judge is persuaded that the prosecution exercised discretionary challenges based on race, then those peremptory challenges cannot
be honored.\textsuperscript{192} In some cases, this can lead to overturning the entire jury selection or the results of a trial in which such jury selection occurred.\textsuperscript{193}

The Steikers' report to the ALI says that the Court's reliance on \textit{Batson} as a way of preventing prosecutors' racial discrimination in exercising peremptory challenges is "profoundly misplaced."\textsuperscript{194} In fact, a challenge of discrimination based on \textit{Batson} has never led to a reversal in either North Carolina or Tennessee, and in over 2,000 cases tried to jury since 1997 in Jefferson Parish, Louisiana, only two have been reversed.\textsuperscript{195} The Steikers' report cites various studies, including one by William Bowers and his colleagues at the Capital Jury Project, which show that requiring prosecutors to justify their discretionary challenges has an "extremely modest" effect in reducing the racially based use of peremptory challenges.\textsuperscript{196} This is largely because prosecutors are very well schooled in coming up with non-racist-sounding rationales for their exclusions.\textsuperscript{197}

However, prosecutors can sometimes make mistakes which reveal the discriminatory challenges. For example, a prosecutor may say that he didn't like an African American prospective juror because he said he was going to have to miss work. But this rationale may not hold up if the record shows that the prosecutor did not exclude a white prospective juror who also said he was going to have to miss work.\textsuperscript{198} Accordingly, it is sometimes possible to obtain relief on a \textit{Batson} claim.

However, relief will not be granted in all states under such circumstances. As the Equal Justice Initiative stated in a June 2010 report, the South Carolina Supreme Court no longer finds a \textit{Batson} violation when the core of a prosecutor's purportedly race-neutral explanation for striking an African American prospective juror would also have applied to a white prospective juror whom the prosecutor did not strike.\textsuperscript{199} The report adds: "Indeed, no criminal defendant has won a \textit{Batson} challenge in that state since 1992."\textsuperscript{200}

\begin{enumerate}
\item \textsuperscript{192} \textit{Id.} at 100-102.
\item \textsuperscript{193} \textit{See, e.g.}, State v. Rosa-Re, 190 P.3d 1259 (Utah 2008).
\item \textsuperscript{194} \textit{See Steiker & Steiker, supra note 41, at 15.}
\item \textsuperscript{195} \textit{Shalia Dewan, Blacks Still Being Blocked From Juries in the South, Study Finds, N.Y. Times, June 2, 2010, at A14.}
\item \textsuperscript{196} \textit{See Steiker & Steiker, supra note 41, at 15 (discussing Bowers, et al., supra note 130).}
\item \textsuperscript{197} \textit{See Brian J. Serr & Mark Maney, Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance, 79 J. CRIM. L. & CRIMINOLOGY 1, 53-54 (1988) (noting that "facially neutral reasons [for exclusion] provide prosecutors with a 'cover' for racial discrimination, especially if the trial is in a large city where the burden of unemployment, low income, or poor education is likely to fall disproportionately upon minorities").}
\item \textsuperscript{198} \textit{See Dewan, supra note 195.}
\item \textsuperscript{199} \textit{Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy} (June 2010), at 26-27, (discussing Sumpter v. State, 439 S.E.2d 842, 844 (S.C. 1994) (finding that a prosecutor did not violate \textit{Batson} by striking an African American prospective juror, purportedly due to a "prior DUI involvement," while not striking a white juror who had been convicted of DUI, because a different office had prosecuted the white prospective juror); and State v. Dyar, 452 S.E.2d 603, 603-04 (S.C. 1994) (finding no violation of \textit{Batson} where prosecutor}
\end{enumerate}
The report goes on to say that in Alabama, no matter what other evidence exists that a prosecutor has engaged in race-based strikes and that his purported race-neutral justifications for the strikes are implausible, *Batson* relief will almost never be granted unless there is also proof that the prosecutor did not strike a similarly situated white prospective juror.201

In any event, the fact that prosecutors base their peremptory challenges on racial grounds is better hidden.202 This is clear from highly unusual circumstances in which, for totally unrelated reasons, this race-based prosecutorial misconduct is exposed. Perhaps the most notable, scandalous example of race-based prosecutorial misconduct occurred in Philadelphia, Pennsylvania. We know about this situation only because the incumbent District Attorney Lynne Abraham, who sought the death penalty far more than any other District Attorney in Pennsylvania,203 was being opposed for re-election by Jack McMahon, a former Assistant District Attorney.204 District Attorney Abraham knew that Mr. McMahon had appeared prominently in an internal training videotape on how to conduct *voir dire*,205 which she released publicly because he was running against her.206 On the videotape, Mr. McMahon trained Philadelphia prosecutors how to get away with evading *Batson* while still exercising racism in challenging prospective black jurors.207 In one example, he said that he would exercise a peremptory challenge solely due to the fact that a prospective juror’s name was Reynard Boykin.208 Of course, that is not the rationale he would have offered had he been asked why he had challenged that prospective juror.209 That videotape exposed the racism in exercising peremptory challenges in Philadelphia.

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200. *Id.* at 27.
201. *Id.*
203. *See* Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 Mo. L. Rev. 73, 95 (2007) (noting that “[t]he long-time district attorney for Philadelphia County, Lynne Abraham, makes it a practice to seek the death penalty whenever it is available”).
205. *Id.*
206. *Id.*
208. *See id.*
209. David Lindorff, *The Death Penalty’s Other Victims*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/node/607 (last visited March 22, 2010) (“Ironically, McMahon, now in private practice, has become a vocal critic of the very practice he once championed. ‘The reason district attorneys like Abraham so frequently seek the death penalty is that they get a conviction-prone jury,’ says McMahon, who now defends clients in capital cases. ‘Now they’ll all tell you they don’t do that, but they’re full of crap and they know it. No one who’s
Then, in the case of Thomas Miller-El, who came within hours of being executed, lawyers from LDF found manuals and training materials used during past decades in Dallas, Texas, that similarly trained prosecutors on how to get away with excluding blacks as jurors. Although this did not lead the Texas courts or the Fifth Circuit to grant relief, the Supreme Court ruled in Mr. Miller-El’s favor.

The Equal Justice Initiative’s June 2010 report on continuing racial discrimination in jury selection advocates, as one of its many recommendations, that “[e]xcluded jurors, who suffer measurable, real victimization at the hands of government prosecutors, should have access to civil remedies.” In such lawsuits, the relatively few favorable Batson rulings from criminal cases could be used to expose particularly egregious practices.

7. Legal Steps to Create More Diverse Decisionmakers

In a talk at the Airlie conference, Bryan Stevenson, the Equal Justice Initiative’s Executive Director and a Professor at New York University Law School, suggested that counsel should make change of venue motions based on studies mentioned above, which find that certain types of people are likely to view African Americans as prone to engage in criminal conduct; automatic but implicit associations of African Americans with other negative characteristics; and polling data. These studies or polling data would have to be combined with the particular case’s racial dynamics. Furthermore, Prof. Stevenson said that such motions might make particular sense in racially-charged cases, such as cases taking place in communities such as those described elsewhere in the symposium by Professor Melynda Price. For example, defense counsel could argue that the defendant would have to overcome a presumption of guilt for young men of color, and that there cannot be a fair trial unless the jury includes individuals who have had interactions with the two-thirds of young men of color who have not engaged in problematic behavior.

been working in this business would say that if they were honest. The whole process of death-qualification is terribly unfair.”

212. Miller-El, 545 U.S. 231.
216. Price, supra note 46.
As Prof. Stevenson has further stated, even if such a motion loses, by making and litigating the motion you may affect the dynamics and the postures, attitudes, and thinking of everybody involved, including the District Attorney and the judge. It also may effect how the voir dire will be conducted, particularly if, when rejecting the change of venue motion, the judge promises not to allow unconscious racism to affect the case. Good defense counsel would try to hold the judge to such a promise.

Moreover, significant under-representation of African Americans in the jury pool or the grand jury pool should be challenged, which did not occur in Johnny Lee Gates’ case.\textsuperscript{217} The case law concerning such challenges is often somewhat deficient. Thus, some decisions deny relief if the court can say that the percentage of African Americans in the jury pool is only five percent less than the percentage of African Americans in the population.\textsuperscript{218} But using that statistic of five percent can be highly misleading. If African Americans are twenty percent of the jury pool and twenty-five percent of the population, that five point difference is actually a difference of twenty-five percent, because to increase the percentage in the jury pool to that in the population, you would have to increase from twenty to twenty-five, which is a twenty-five percent increase. To put it another way, in this hypothetical, the jury pool contains one-fourth fewer African Americans than in the population. So, what is relevant is not the raw difference in percentage points, but rather the relative difference. Yet, many court decisions fail to recognize this basic arithmetic that many of us learned in elementary school. For these reasons, the June 2010 Equal Justice Initiative report recommends that “[r]eviewing courts should abandon absolute disparity as a measure of underrepresentation of minority groups and utilize more accurate measures, such as comparative disparity, to prevent the insulation from remedy of unfair underrepresentation.”\textsuperscript{219}

8. Potential Systemic Attacks on a State’s or a County’s Ability to Use Capital Punishment

Prof. Stevenson has suggested that, in places such as those that Professor Price has discussed in this conference,\textsuperscript{220} which could include (as noted above) Philadelphia, Pennsylvania, the question should be whether a particular state or county should be permitted to seek the death penalty, given its history of racial bias, lynching, or other problems. He has pointed out that a pre-trial motion

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  \item[217.] Gates v. Zant, 880 F.2d 293 (11th Cir. 1989).
  \item[218.] See, e.g., United States v. Carter, 65 F. App’x 559 (7th Cir. 2003) (“disparity between percentage of African Americans in 100-member jury pool, which was 4%, and number of African Americans in the community, which was 6%, was not large enough to show that the jury pool was not a fair cross-section of the community”).
  \item[219.] Equal Justice Initiative, supra note 214, at 48; see also id. at 35-37 (discussing this issue and existing case law).
  \item[220.] See Price, supra note 46.
\end{itemize}
\end{footnotesize}
seeking to preclude the use of the death penalty in the particular jurisdiction can be used to bring such histories into the litigation, even if the motion does not succeed. Professor Anthony G. Amsterdam pointed out in 2007 at a Columbia Law Symposium that the error at the heart of *McCleskey* is the notion that we only care when a particular decisionmaker overtly bases his action on discrimination. This idea leads us to ignore “color-coded” results that reflect the prejudices of an entire community.

Prof. Amsterdam’s article suggests a litigation strategy aimed at invalidating a death penalty statute due to its racially discriminatory implementation. If such a litigation strategy succeeded, I do not believe that it would lead directly to abolition, but it would force the legislature to create a non-discriminatory statute—which could include the various kinds of provisions I discussed in my United States Senate Judiciary Committee testimony explaining why if reforms were made, the death penalty could co-exist with the Racial Justice Act. Indeed, the Baldus study presented in *McCleskey* found, as Justice Blackmun’s dissent noted, that in the most aggravated cases (the ones most often cited by proponents of capital punishment), no pattern of racial disparity existed. However, the pattern of racial disparity did exist in the much larger proportion of cases that are less aggravated.

**III. CONCLUSION**

Many death penalty proponents ignore the vast majority of capital cases, including ones in which someone becomes involved in a felony that leads to an unanticipated murder and is executed. If you favor the death penalty and do not ignore this fact, you can— if you ignore all the evidence that it does not deter crime and you don’t care about all the extra money capital punishment costs at a time of incredible deficits—adopt the view of the conservative Ninth Circuit.

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222. See id.; see also Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 525 (1994) (noting that “criminal defendants and the society as a whole are affected by the indifference to racial bias in criminal proceedings”).

223. See Amsterdam, supra note 221.

224. See Tabak, supra note 22 and accompanying text.


226. See id.

227. See Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1116 (1990) (explaining that “the felony murder rule has the potential to equate any participant in the felony with the cold-blooded deliberate killer, no matter how unforeseeable the death or how attenuated that defendant’s participation in the felony or the events leading to death”).
Justice Alex Kozinski, who says that the scope of the death penalty should be greatly narrowed.\(^{228}\)

It is incumbent on those of us who know about the various facts discussed at this symposium to tell courts about them, tell defense counsel about them, tell prosecutors about them, and tell jurors and the general public about them. The public, which overwhelmingly rejects explicitly expressed racism, would be horrified by all the ways that implicit racial attitudes as well as explicit racism continue to permeate our capital punishment system in this country.

Significant progress can be achieved only when this travesty of a justice system is exposed and understood. To be sure, President Obama’s election and his positions on certain issues – as well as the increasing implicit nature of the racial bias – make this task more daunting. Fortunately, the numerous studies discussed herein provide us with a compelling basis for changing the public and judicial discourse on racism and the death penalty.

\(^{228}\) Id. at 29 (explaining that the objective of the death penalty is “to ensure that the very worst members of our society—those who, by their heinous and depraved conduct have relinquished all claim to human compassion—are put to death”).