DEVALUING DEATH: AN EMPIRICAL STUDY OF IMPLICIT RACIAL BIAS ON JURY-ELIGIBLE CITIZENS IN SIX DEATH PENALTY STATES

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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 accounts 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 inject 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 two different kinds of the implicit racial biases 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 who 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 have been documenting these disparities for decades,[2] and modern empirical evidence demonstrates their continued existence.[3] The most consistent and robust finding in this litera-

[1] *See generally* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002) (tracing the changes in the death penalty, from the category of crimes considered capital offenses, arguments for and against capital punishment, and the varied methods of execution); FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 1 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) ("[T]here is a long and deep connection between this country's racial politics and its uses of the killings of African-Americans through lynchings and the death penalty . . . ."); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) (addressing the ideological gap where race and criminal law intersect, the historical causes for a suspicious perception of the criminal justice system by African Americans who have also fought to suppress racial injustice and implicit racial targeting for particular crimes); *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, at 9 (1984))).

[2] *See* Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 21–22 (2002) (discussing scholarship by sociologists on the practice of lynchings in the first half of the twentieth century).

[3] *See, e.g.*, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 2 (1990) [hereinafter BALDUS ET AL., EQUAL JUSTICE] ("[A]lthough the levels of arbitrariness and racial discrimination in capital sentencing have declined in the post–*Furman* [*v. Georgia*] period, none of these promises have been fulfilled; moreover, given the Supreme Court's decision in *McCleskey v. Kemp*, little improvement in this regard appears likely."); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING, at xiii (1989) ("The Supreme Court has more or less acknowledged that race continues to play a major role in capital sentencing in America . . . . But the Court has decided to do nothing about this form of discrimination and to refuse to hear future claims based on it."). *See generally* U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, GAO/GGD 90-57 (1990) (finding a greater likelihood that a defendant would be charged with capital murder or receive the death penalty if the victim was White, rather than Black, as opposed to an outcome influenced by the race of defendant); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital*

ture 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 fall into three broad categories. The first is a spatial and cultural explanation. 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] The second category is procedural. For example,

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Punishment: Reflections on the Interaction of Fact and Perception, 53 DEPAUL L. REV. 1411 (2004) [hereinafter Baldus & Woodworth, *Legitimacy*] (recognizing the difference between public perception of race discrimination in the death penalty, a pre-*Furman* pattern, to diverge from the post-*Furman* reality, where discrimination is not necessarily inevitable); 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, 214–15 (2003) [hereinafter Baldus & Woodworth, *Administration*] (documenting evidence revealing that while the defendant's race alone is not significant in capital sentencing, race-of-victim factors, particularly Black defendant-White victim cases, offer the greatest disparate treatment *and* impact in sentencing); Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976–1991*, 20 AM. J. CRIM. JUST. 17, 30 (1995) (controlling for relevant factors, "Blacks who killed Whites were more likely to be charged with a capital offense and to receive a death sentence").

[4] *See* Anthony G. Amsterdam, *Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 40 n.21 (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."); John Blume, Theodore Eisenberg & 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").

[5] *See* Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 577 (2011) (noting that "[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.*, Baldus & Woodworth, *Legitimacy*, *supra* note 3, 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 prosecu-

prosecutors might disproportionately pursue the death penalty for crimes against White victims. Moreover, jurors may have a difficult time empathizing with mitigating evidence presented by Black defendants and, conversely, victim impact testimony might disproportionately magnify the loss of White victims compared to non-White victims.[7] The third category is structural. For example, the penological justifications for capital punishment—i.e., retribution—might be inextricably tied to race. Specifically, the process of 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 pro-

tion is likely to be higher when the victim is white."). 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* note 4, at 202–03 ("[P]rosecutors 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 [it]."); *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."); *see also* G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 445–61 (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* note 4, at 182–83, 201–02 (noting that murders involving multiple victims and murders of strangers are often considered to be "more deathworthy," and observing that Black-defendant/White-victim cases are stranger murder scenarios more often than any other race-of-defendant/race-of-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.* at 202.

[7] Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 229, 236–37 (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* note 4, at 192, 202 (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").

pose that a unifying current running through each of these partial plausible explanations is the notion that the human mind automatically introduces substantial bias into the seemingly neutral concepts and processes of death penalty administration.

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] Research shows these biases affect a broad range of behaviors and decisions; the breadth of knowledge in this area continues to expand.[10] Implicit biases, for example, have been shown to predict the way economic allocations are made,[11] the way medical treatments are rendered,[12] and the way job interviews are offered.[13] Yet knowledge

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[8] *But see* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1554 (2004) (questioning whether implicit racial bias influences trial judge decisionmaking); Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009) (questioning to what extent implicit racial bias operates to undermine racial equality in capital punishment); Smith & Cohen, *supra* note 7, at 231–42 (same).

[9] For a summary of implicit bias social science research, see Justin D. Levinson, Danielle M. 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*]. 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 117, 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, at 21–24 (reviewing research that connects implicit bias to behavior and decisionmaking); *see also* 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, 1009 (2007) (hypothesizing that "practice enables police officers to more effectively exert control over their behavioral choices (relative to untrained civilians)" to shoot or not shoot); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315 (2002) ("The primary goal of the current research was to . . . investigat[e] the effect of a target's ethnicity on [the study] participants' decision to 'shoot' that target."); Greenwald et al., *supra* note 9, at 4 (analyzing implicit stereotypes, or those that are neither conscious nor explicit).

[11] *See* Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 365–67 (2007) (finding that implicit stereotypes predicted the allocation of funding to specific groups).

[12] *See* 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) (finding that as the degree of implicit bias increased in physicians, recommendations for thrombolysis treatment decreased).

[13] *See* Jens Agerström & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790 (2011) (examining hiring managers' decisions to invite or not invite obese persons for interviews less frequently than

of implicit cognitive processes has yet to be adequately considered as an underlying source of inequity in capital punishment.[14] To address 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 was a model of productivity in early empirical legal scholarship. In the early 1970s, researchers investigated topics spanning from the role of death qualification on the composition of the jury[16] to the now-infamous race-of-victim effects that (over thirty

normal-weight persons); Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECON. 523 (2010) (finding employers less likely to invite men with Arab-Muslim sounding names for callback interviews than Swedish-sounding names).

[14] Several scholars have suggested that implicit bias plays a role in death penalty disparities, but they have yet to empirically or deeply explore these hypotheses. *See, e.g.*, Smith & Cohen, *supra* note 7, at 232 (detailing how implicit racial bias might influence the imposition of capital punishment, but not conducting any empirical testing on the question); 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 GA. CODE ANN. § 17-10-30(b)(7) (1994))); *see also* 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, 2099–106 (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, 1599–600 (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) ("[It] is likely that unconscious racism influences a prosecutor even more than it affects others.").

[15] The states are Alabama, Arizona, California, Florida, Oklahoma, and Texas. These six states (and two others, South Carolina and Pennsylvania) were the most active death penalty states between 2004 and 2009. Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 231 n.8 (2012).

[16] *See, e.g.*, Edward J. Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California.*, 3 WOODROW WILSON J.L. 11, 13 (1981) [hereinafter Bronson, *Exclusion of Scrupled Jurors*] (replicating

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 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 sought to answer a range of questions 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

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the same study in California, which shows "the exclusion of scrupled jurors . . . would tend to make the jury more conviction prone and less representative"); Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 4 (1970) [hereinafter Bronson, *Conviction Proneness*] (evaluating "whether [Colorado] jurors favoring the death penalty are more conviction prone than those who oppose it" and whether excluding potential juries who are against the death penalty thus excludes "the poor, women, racial, ethnic, and religious groups"); Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 54–55 (1984) (explaining how death-qualifying jurors are "unusually punitive" and lack proportional representation, which may have adverse consequences on a jury's deliberation); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46–48 (1984) (death qualification excludes one-sixth of fair, impartial jurors and discriminates against women and Black jurors, who "[c]ompared to the death-qualified jurors . . . are more concerned with the maintenance of the fundamental due process guarantees of the Constitution, less punitive, and less mistrustful of the defense"); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 122 (1984) (analyzing whether the process of witnessing prospective jurors dismissed based on opposition to the death penalty creates biases in jurors' minds); George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 568 (1971) (conducting cognitive tests to assess the relationship between attitudes toward capital punishment and guilt determination); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 109 (1984) (suggesting that "death-qualified jurors have a lower threshold of conviction than excludables").

[17] BALDUS ET AL., EQUAL JUSTICE, *supra* note 3, at 149–57 (finding a lower likelihood of a death sentence in a case with a Black victim than a White victim, based on data from Georgia, Florida, and Illinois between 1976 and 1980); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 3 (synthesizing several studies and showing that the race of victim consistently influences the likelihood of receiving the death penalty); Baldus & Woodworth, *Administration*, *supra* note 3, at 214 (synthesizing decades of studies to show that there is more punitive treatment in "white-victim cases").

[18] *See* Eisenberg & Johnson, *supra* note 8, at 1540–41 (noting that, as recently as 2004, "[v]irtually nothing [was] known about the racial attitudes of lawyers in general, let alone defense lawyers or capital defense lawyers specifically"). 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 Implicit Association Test. *Id.* at 1543. 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.

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 decisionmaking depending upon the race of defendant and 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. In addition, we found—as predicted—that death-qualified jurors harbored stronger racial biases than excluded jurors.[19] These differences in racial bias levels were revealed on both implicit and self-reported (explicit) measures.

We also conducted a mock trial scenario.[20] 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. Finally, we found that self-reported (explicit) racial bias predicted death decisions based on the race of 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: Part I frames the issue by presenting the historical and constitutional problem. It considers the history of race and the death penalty, and specifically focuses on the modern prevalence of race-of-victim effects and the constitutional

[19] 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.

[20] *Infra* Part III.A.

[21] *Infra* notes 197–98 and accompanying text.

challenges surrounding racial inequalities in capital punishment. Part II introduces implicit bias to the capital context. It briefly summarizes empirical implicit bias scholarship in the criminal justice realm. It also proposes an implicit bias model of jury decisionmaking 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. Part III 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. Part IV 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.

I
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 Part 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 premodern 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. This discussion 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 the death penalty.

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 death as the pun-

[22] 408 U.S. 238 (1972).

ishment for some crimes 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 eventually faded, but the fear of freed Black men escalated across the South and, as Black Americans moved north and west, this fear permeated outside of the South as well. 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 "[o]ne 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 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 that 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:

> We are having suggestions from some of the newspapers of the State that Louisiana follow the lead of a few other States and

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[23] *See* Amsterdam, *supra* note 4, at 35 ("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.").

[24] *Id.*

[25] BANNER, *supra* note 1, at 228.

[26] *Id.*

[27] *See 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 v. Georgia, 408 U.S. 238, 303 (1972) (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 hands"); G. Ben Cohen, McCleskey*'s Omission: 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.* at 93 (labeling "the death penalty . . . as a necessary antidote to lynching" (citing Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 646–62 (2010))).

> abolish the death penalty . . . . Would 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, there to plan to elude the guards at the first opportunity?[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 defendants received visibly 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 "reward mobs for good behavior."[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 ninety percent of Americans executed for rape in the eight preceding decades were Black Americans.[35]

Indeed, the improper influence of race on the administration of the death penalty contributed to the 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

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[30] Cohen, *supra* note 29, at 94 (citing ALEX MIKULICH & SOPHIE CULL, DIMINISHING ALL OF US: THE DEATH PENALTY IN LOUISIANA 13 (2012)). Other commentators suggested *expanding* the death penalty based on the need to control freed Blacks. *See* BANNER, *supra* note 1, at 228 ("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." (internal quotation marks omitted)).

[31] *See* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 215 (2010) ("[T]he 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.").

[32] Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 422 (2009).

[33] *Id.* at 393 (quoting IOWA BYSTANDER, Jan. 30, 1932, *microformed on* Papers of the Nat'l Assoc. for the Advancement of Colored People, pt. 6, reel 8, frame 562).

[34] *Id.* at 382; *see also id.* ("Some jurisdictions enacted laws designed 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 . . . explicitly promised would-be lynch mobs that black defendants would be quickly tried and executed if the mob desisted . . . .").

[35] *See* Donald H. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43, 53 (1965) ("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, 408 U.S. 238, 239–40 (1972).

Marshall highlighted the racially unequal application of the death penalty among the races. Justice Douglas cited Lyndon Johnson's report entitled President's Commission on Law Enforcement and the Administration of 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."[37] Justice Douglas also cited to a comprehensive study of the Texas death penalty from 1924 to 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."[38]

In his concurring opinion, Justice Marshall added that it becomes "[i]mmediately apparent [from historical execution statistics] that Negroes were executed far more often than whites in proportion to their percentage of the population."[39] 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."[40] After considering the arguments put forward by Justices 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."[41] Nonetheless, Stewart concluded that "racial discrimination has not been proved," and thus he "put it to one side."[42] The *Furman* Court left the death penalty temporarily suspended, but with an implicit invitation for reform, by simply holding 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."[43]

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37 *Id.* at 249–50 (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).

38 *Id.* at 251.

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

40 *Id.*

41 *Id.* at 310 (Stewart, J., concurring).

42 *Id.*

43 *Id.* at 239–40.

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.[44] Just four years after *Furman*, the Court gave its blessing to capital punishment in the 1976 case of *Gregg v. Georgia*,[45] noting that statutes like the newly minted Georgia statute contain procedural safeguards that help prevent arbitrary or discriminatory imposition of the death penalty.[46] The Court noted that some of the procedural safeguards that Georgia adopted were aimed at stamping out racial arbitrariness. These safeguards 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."[47] The *Gregg* Court, then, did not eschew the importance of a race-neutral death penalty but rather 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.[48] The biggest post-*Gregg* race-based systemic challenge to the modern death penalty

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[44] *See* Gregg v. Georgia, 428 U.S. 153, 179–80 (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." (footnote omitted)).

[45] *Id.* at 187 ("[T]he death penalty is not a form of punishment that may never be imposed.").

[46] *Id.* at 180 ("[R]ecently 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 . . . .").

[47] *Id.* at 211–12. 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* 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 thirty states passed similar safeguards, but that most of these states either perform perfunctory review or else have repealed proportionality/arbitrariness review altogether).

[48] *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 357 (1995) (describing the Court's then twenty-year-old *Gregg* experiment and concluding that procedural regulation failed to satisfy its Eighth Amendment objectives).

came in the 1987 case of *McCleskey v. Kemp*.[49] Warren McCleskey, a Black man, had been convicted and sentenced to death in Georgia for the murder of a White police officer.[50] 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.[51] To support this proposition, McCleskey introduced the results of two large-scale statistical studies of more than 2000 Georgia capital cases.[52] These studies, known collectively as "the Baldus study," demonstrated that a capital defendant who 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.[53] The study also considered the likelihood of a death sentence given the various race-of-defendant/race-of-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."[54] 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."[55]

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, was enough to violate the Equal Protection Clause.[56] 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

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[49] 481 U.S. 279 (1987).

[50] *Id.* at 283.

[51] *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.").

[52] *Id.* at 286–87.

[53] *Id.*

[54] *Id.* at 286.

[55] *Id.* at 326 (Brennan, J., dissenting).

[56] *Id.* at 293.

could not be guaranteed that he received a death sentence based on rationally and consistently applied non-racial factors.[57]

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."[58] The Court explained that "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]."[59] 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 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."[60] After noting its own "unceasing efforts to eradicate racial prejudice from our criminal justice system,"[61] the Court characterized the Baldus study as "[a]t most . . . indicat[ing] a discrepancy that appears to correlate with race."[62] The Court "decline[d] to assume that what is unexplained is invidious,"[63] and "h[e]ld that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."[64] Finally, the Court worried that if it "accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, [the Court] could soon be faced with similar claims as to other types of penalty."[65] This fear, Justice Brennan quipped in his dissent, is best labeled "a fear of too much justice."[66]

The discouragement from the *McCleskey* Court has not stopped researchers from documenting continued racial arbitrariness in the

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[57] *Id.* at 299.

[58] *Id.* at 297.

[59] *Id.* at 294–95.

[60] *Id.* at 294.

[61] *Id.* at 309 (internal citation omitted) (referring to Batson v. Kentucky, 476 U.S. 79, 85 (1986)).

[62] *Id.* at 312.

[63] *Id.* at 313.

[64] *Id.*

[65] *Id.* at 315.

[66] *Id.* at 339 (Brennan, J., dissenting).

administration of capital sentencing schemes.[67] Indeed, a host of empirical studies measuring race-of-defendant effects, race-of-victim effects, or both, have been published since *McCleskey*.[68] Most of the post-*McCleskey* studies that report unjustified racial disparities in the imposition of the death penalty have found that the influence of racial bias centers on the race of victim rather than on the race of defendant.[69] In other words, the imposition of the death penalty is disproportionately common for the homicide of White victims. This effect is particularly stark—as it was in the Baldus study presented in *McCleskey*[70]—when the victim is White *and* the defendant is Black.[71]

The evidence we examine 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.[72] Indeed, in the two Arkansas judicial circuits included in the study, the only death-eligible cases ($N = 63$) to

[67] *See, e.g.*, *infra* notes 81–86 and accompanying text (describing some of these studies and the theories developed to explain the racial disparity in the administration of capital sentencing).

[68] *See* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1726 (1998) (finding that Black defendants are over nine times more likely to receive a sentence of death in a penalty trial than non-Black defendants with comparable levels of culpability); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006) (finding that the degree with which the offenders in the Philadelphia dataset possess stereotypically Afrocentric facial features predicts death-sentencing); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 105–06 (1984) (finding "remarkably stable and consistent" race-of-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 [they] considered could not explain these disparities, whether [they] controlled for these variables one at a time, organized them into a scale of aggravation, or used multiple regression analysis"); Lynch & Haney, *supra* note 5, at 576 ("[N]umerous 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." (footnotes omitted)).

[69] *See, e.g.*, Gross & Mauro, *supra* note 68, at 105 (finding disparities in capital sentencing based on the race of victim in all eight states examined).

[70] *Supra* note 54 and accompanying text.

[71] *Id.* at 287 ("[B]lack defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty."); *see also infra* notes 82–86 (suggesting reasons for the greater imposition of the death penalty when the victim is White and the defendant is Black).

[72] David C. Baldus et al., *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, 561, 573 (2009).

result in a death sentence involved Black defendants and White victims.[73] A 2010 review of 191 death-eligible homicides that occurred in East Baton Rouge, Louisiana over a nineteen 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.[74] 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 Black person.[75] These race-of-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 for a Black defendant almost twice as often when the victim was non-Black than when the victim was Black.[76] Similarly, a 2011 study found statistically significant race-of-victim effects in the context of the military death penalty and multi-victim cases.[77] These differences could not "be explained by legitimate case characteristics or the effects of chance in a race-neutral system."[78] These studies demonstrate that the race-of-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-defendant effects, though these effects are comparatively more modest today than they were forty years ago.[79] The decreased disparities probably stem from restricting

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[73] *See id.* at 587 (showing that, of the sixty-three death-eligible cases, all five resulting in a death sentence involved Black defendants and White victims).

[74] *See* Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647, 647–48, 659–60 (2011) (stating that between 1991 and 2001, 82.8% of homicide victims were Black, but that twelve of the twenty-three death sentence cases in the 1990–2008 study involved White victims).

[75] Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2123, 2145 (2011).

[76] *See* U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000), at 15–16 (2000), *available at* http://www.justice.gov/dag/pubdoc/dpsurvey.html (finding that U.S. Attorneys recommended seeking the death penalty for Black defendants with Black victims 20% of the time, but for Black defendants with non-Black victims, 36% of the time).

[77] *See* 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, 1293 (2012) (finding that the aggravating effect of multiple victims is stronger when victims are White).

[78] *Id.*

[79] *See* BANNER, *supra* note 1, at 289 (noting that race-of-defendant effects decreased after *Coker v. Georgia*); Baldus et al., *supra* note 77, at 1273 n.144 (providing an example of race-of-defendant effects found in a study of Philadelphia capital cases from 1983–1993); Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The*

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* to ban the death penalty for the rape of an adult woman,[80] led to a decrease in race-of-defendant disparities because capital rape convictions constituted the largest source of such disparities.[81] 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-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.[82] The charging stage is a far more important sorting tool in the modern era than are capital trials because the vast majority of felony cases (even those that are death-eligible) do not proceed to a capital trial.[83] Professors Lynch and Haney hypothesize that one normally does not find significant race-of-defendant effects until the jury decisionmaking 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.[84] 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, past and present, there has been no shortage of scholarly attempts to deconstruct the reasons behind this continuing and disturbing trend. This Subpart addresses why racial disparities persist,

Rosenthal Era, 50 HOUS. L. REV. 131, 146–47 (2012) (finding race-of-defendant effects in Harris County, Texas).

[80] 433 U.S. 584, 592 (1977).

[81] BANNER, *supra* note 1, at 289.

[82] *See* Lynch & Haney, *supra* note 5, at 586 ("The intriguing finding that the race of victim appears to be an important factor . . . 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.").

[83] *See Felony Defendants*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=qa&iid=405 (last visited Mar. 27, 2014) (noting that 95% of felony convictions occurred through a guilty plea).

[84] *See* Lynch & Haney, *supra* note 5, at 586 ("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).").

both by considering legal commentators' work, as well as by proposing new implicit bias-based explanations. We sketch three categories 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 tend to possess a core lower-status minority group population of "outsiders," and a thick ring of higher-status White citizens (the spatial explanation).[85] These jurisdictions also tend be more "parochial," which results in the community punishing most harshly crimes committed by lower-status outsiders against higher-status insiders (the cultural explanation).[86] The second category, which is procedural, has two component parts. First, it questions whether the death qualification process, a central tenet in death penalty jurisprudence that was enacted for the purpose of reducing the risk of bias, has the unintended consequence of increasing unjustified racial disparities.[87] Second, it evaluates the stages where racial factors can enter into the capital punishment process.[88] The most important stage involves prosecutorial charging decisions. Another important 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 "heinous, atrocious or cruel" murder, 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 manifest.[89] In considering mitigating evidence, jurors evaluate the evidence in different ways depending on the race of the defendant.[90] In addition, when they weigh victim impact testi-

[85] *See* James S. Liebman & Peter Clarke, *David H. Bodiker Lecture on Criminal Justice: Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 272 (2012) (offering, for example, "Baltimore County, Maryland—the predominantly white, suburban donut that encircles the majority African-American Baltimore City").

[86] *See id.* at 288 ("Parochialism helps explain . . . why insular communities demand extra punishment, especially death, for cross-culture crime.").

[87] *See* Levinson, *supra* note 8, at 603 (proposing that the death qualification process itself may trigger implicit racial bias).

[88] *See generally*, Smith & Cohen, *supra* note 7 (reviewing the ways in which implicit bias flourishes in the capital context).

[89] *See* Smith & Cohen, *supra* note 7, at 235 (explaining that a "HAC"—heinous, atrocious, or cruel—determination is different from an objective, fact-based jury decision, because it requires weighing community values and describing the opportunity for racial bias in this context).

[90] *See id.* at 236, 237–38 (explaining that implicit racial bias can taint jury consideration of mitigating evidence by creating hostility toward or dehumanizing a Black defendant, or fostering empathy for a White defendant).

mony, they do so differently based on the race of the victim.[91] 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.[92]

1. Spatial and Cultural Explanations

Jurors empanelled in state capital trials are culled from the county in which the homicide occurred.[93] This Subpart explores how the spatial and cultural realities of this process influence 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.[94] 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 counties in the federal district, and the counties surrounding the county of offense tend to be heavily White.[95]

Political scientist 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 [the issue of executions] depending on their surrounding social environments."[96] Support for the 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.[97] Explicit racial bias is a strong predictor of death penalty support for White Americans generally, but the predictive quality varies depending on the racial

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[91] *See id.* at 236, 240–41 (suggesting that White jurors will be more sympathetic to the impact testimony for White victims, because they can better imagine a personal application of the story).

[92] *See* Cohen, *supra* note 29, at 101 (describing "as the original sin in Fourteenth Amendment jurisprudence" that *Gregg*, "[i]nstead of holding fast to the premise that those who lynch and seek vigilante justice should be prosecuted to the fullest extent of the law, . . . held the death penalty constitutional based upon the need for retribution—to accommodate the instinct to lynch and terrorize").

[93] *See* Cohen & Smith, *supra* note 6, at 432 (explaining that the jury lottery system is based on county).

[94] *See supra* note 85 and accompanying text (discussing the example of Baltimore).

[95] *See* Cohen & 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.").

[96] Joe Soss, Laura Langbein & Alan R. Metelko, *Why Do White Americans Support the Death Penalty?*, 65 J. POL. 397, 414 (2003).

[97] *Id.*

demographics of a particular location.[98] 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 twenty percent Black population.[99] 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.[100] 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 twenty percent or greater Black population, explicit anti-Black prejudice is "staggering[ly]" higher than in all-White counties.[101]

Liebman and Clarke 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.[102] By parochial, Liebman and Clarke 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."[103] 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."[104] 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."[105]

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

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98 *Id.* at 414–15.

99 *See id.* (finding that White people with the highest levels of anti-Black prejudice have a .86 probability of supporting the death penalty when they live in all-White counties, but a .95 probability of supporting it when they live in a twenty percent Black county).

100 *Id.* at 414.

101 *Id.*

102 *See* Liebman & Clarke, *supra* note 85, at 269 ("There is evidence that the minority of localities that frequently impose the death penalty is parochial . . . .").

103 *Id.* at 268.

104 *Id*. at 269.

105 *Id.*

of the community that we can predict will have greater influence over local law enforcement, prosecution, and judicial officials."[106]

Professors Shatz and Dalton recently studied 473 first-degree murder convictions that occurred in Alameda County, California, over twenty-three years.[107] There are two distinct neighborhoods in Alameda County—North County, with a thirty percent Black population, and South County, with a five percent Black population.[108] Blacks were four and one-half times more likely to be a homicide victim than Whites in North County, whereas Whites were three times more likely to be a homicide victim in South County.[109] 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, [and] were substantially more likely to impose death, for murders that occurred in South County."[110]

Indeed, Liebman and Clarke 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 toward[ ] the harshly retributive response of capital punishment."[111] Professor Garland is more blunt: Legislators and juries express the moral consensus of a community, and when those local decisionmakers "identify with offenders, or with the groups to which they belong, the death penalty becomes less likely."[112] Conversely, "[w]herever punishers and punished are deeply divided by race or class, death sentences become easier to impose."[113] 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."[114] These dynamics could feed race-of-victim effects by overvaluing the lives of White victims relative to Black victims—even when Black homicide victims are more numerous—and simultaneously intensifying the perceived need for retribution because the offender crossed geographic and social boundaries.

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106 *Id.* at 270.

107 Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1260 (2013).

108 *Id.* at 1262.

109 *Id.*

110 *Id.* at 1228.

111 Liebman & Clarke, *supra* note 85, at 270.

112 GARLAND, *supra* note 31, at 168.

113 *Id.*

114 *Id.* at 169.

Professor Boddie, supplementing the spatial and cultural explanations, suggests that implicit racial bias might be at play here.[115] Labeling the interaction of implicit bias and physical space as a form of "racial territoriality,"[116] she hypothesizes that, "buttressed by social and cultural norms of racial separation and fear,"[117] 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."[118] 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."[119] Instead, these "racialized spaces . . . correlate with and reinforce cultural norms about spatial belonging and power."[120]

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

a. Prosecutorial Charging Decisions

Discrimination can enter into capital punishment determinations at the point where prosecutors decide to pursue cases capitally.[121] The typical claim is that prosecutors choose to pursue the death penalty more often in cases where the victim is White.[122] There is strong support for this proposition. For example, the East Baton Rouge study, discussed in Part I.B, indicated that prosecutors in that jurisdiction pursued capital cases far more often when the victim was White than when the victim was Black.[123] The Baldus study similarly found that charging practices significantly contribute to the race-of-victim effects

115 *See* Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 438–42 (2010) (discussing the connection between spatial domains and implicit racial bias).

116 *Id.* at 406.

117 *Id.* at 441.

118 *Id.* at 437.

119 *Id.* at 438.

120 *Id.*

121 *See* McCleskey v. Kemp, 481 U.S. 279, 287 (1987) ("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.").

122 *See* Gross & Mauro, *supra* note 68, at 106–07 ("Since death penalty prosecutions require large allocations of scarce prosecutorial resources, prosecutors must choose a small number of cases to receive this expensive treatment. . . . [T]hey may favor homicides that are visible and disturbing to the majority of the community, and these will tend to be white-victim homicides.").

123 Pierce & Radelet, *supra* note 74, at 670–71.

in Southwest Arkansas.[124] 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.[125] 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.[126] 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.[127] 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 to be both more punitive and more likely to wield political power. As such, the humanity of the White victims can be overvalued

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124 *See* Baldus et al., *supra* note 72, at 585 ("These large black-defendant/white-victim race effects were overwhelmingly the product of prosecutorial charging and jury sentencing decisions.").

125 There is mixed data on this question. *Compare* Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 43, 65 (2002) (noting that "if homicides with white victims are more aggravated or otherwise more death-eligible than homicides with black victims, [race-of-victim] disparit[ies] 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, at 200–02, 201 tbl.9 (noting that Black-offender/White-victim cases involve "stranger crimes" more than any other combination of offender/victim racial groupings, but noting that these categorizations are themselves potentially subject to racially tinged decision-making and, in any event, that homicide characteristics do not eliminate race-of-victim effects).

126 *See* Baldus & Woodworth, *Legitimacy*, *supra* note 3, 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.").

127 *See 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 & Cohen, *supra* note 7, at 240 ("[W]hite [decisionmakers] are more likely to magnify the humanity of white victims and marginalize the humanity of black perpetrators. This dynamic also negatively affects defendants who murder white victims[;] . . . [the] implicit biases that flow toward white victims enhance the perceived harm of the crime when the victim is white.").

and the humanity of the Black offender (and Black victims) undervalued.

b. Capital Jurors

Jury decisionmaking 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.[128] 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-victim bias might enter into the trial during the introduction of victim impact evidence, which is a type of evidence introduced in the sentencing phase of a capital trial by a surviving family member.[129] 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.[130] Robert J. Smith and G. Ben Cohen have observed:

> [W]hite jurors are more likely to magnify the humanity of white victims and marginalize the humanity of black perpetrators. This dynamic . . . negatively affects defendants who murder white victims, because the favorable implicit biases that flow toward white

[128] *See* 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, 1531 (2004) (discussing statistical evidence of racial disparities in capital jurors' perceptions of Black defendants' dangerousness, remorse, and emotional disturbance); Lynch & Haney, *supra* note 5, 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."); *id.* at 586 ("[T]he 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 . . . . Rather, there appear to be important group level processes . . . at work, such that . . . jury deliberations[ ] may activate and exacerbate racial bias under certain conditions.").

[129] *See* Smith & Cohen, *supra* note 7, at 240 ("[A]ll things being equal, white jurors are more likely to magnify the humanity of white victims and marginalize the humanity of black perpetrators. . . . This process occurs most clearly through the introduction of victim impact evidence in capital cases."); *see also* Booth v. Maryland, 482 U.S. 496, 517 (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" (quoting *id.* at 506 n.8 (majority opinion))), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

[130] *See, e.g.*, Kelly v. California, 555 U.S. 1020, 1021 (2008) (Stevens, J., statement respecting the denial of certiorari) (describing a twenty-minute video the prosecution presented as victim impact evidence in one of the consolidated cases before the Court).

> victims enhance the perceived harm of the crime when the victim is white.[131]

Another factor that is likely to induce racial unevenness in the penalty phase of capital trials is the fact that jurors can have difficulty giving adequate mitigating value to evidence introduced by Black defendants. In *Woodson v. North Carolina*, 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" that tend to suggest that death is not an appropriate penalty.[132] Mitigation evidence comes in all shapes and forms, but brain injuries, significant intellectual deficits, severe mental illness, and rotten social background tend to dominate.[133] Each of the mitigating factors requires that the capital jury empathize with the defendant, not so 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:

> [T]he racial disparities that we found in sentencing outcomes were likely the result of the jurors' inability or unwillingness to empathize with a defendant of a different race—that is, White jurors who simply could not or would not cross the "empathic divide" to fully appreciate the life struggles of a Black capital defendant and take those struggles into account in deciding on his sentence.[134]

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131 Smith & Cohen, *supra* note 7, at 240. The following reflection offered by Sam Gross and Robert Mauro in 1984 remains at least partially relevant today: "In a society that remains segregated socially . . . 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 . . . simply a reflection of an emotional fact of interracial relations in our society." Gross & Mauro, *supra* note 68, at 108. We hypothesize that the powerful relationship that has developed, according to which White victims' lives have become overvalued relative to Black victims' lives, is 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 being of lesser worth or value than Whites.

132 428 U.S. 280, 303–04 (1976).

133 *See* Robert J. Smith et al., *The Failure of Mitigation*, 65 HASTINGS L.J. (forthcoming 2014) (manuscript at 8) (on file with the *New York University Law Review*) (finding that eighty-seven percent of executed offenders fall into at least one mitigation category: intellectual disability, youthfulness, mental illness, or childhood trauma).

134 Lynch & Haney, *supra* note 5, at 584.

Interviews with over one thousand jurors who 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."[135]

3. Structural Explanations

a. 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,[136] has led commentators to question whether race might be inextricable from retribution.[137] The close nexus 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 to a particular class of offenders (e.g., juveniles).[138] 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" embodied in the core punishment rationales.[139] The Court finds "capital punishment . . . excessive when . . . it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."[140] While the Court has expressed ambivalence towards the deterrence rationale,[141]

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135 *Id.* at 580.

136 *See infra* notes 143–47 and accompanying text (discussing the link between retribution and race in capital punishment).

137 *See* Cohen, *supra* note 29, at 93 ("To the extent that the death penalty relied upon retribution to establish the constitutionality of capital punishment under the Eighth Amendment, capital punishment's effort to appease the angry lynch-mob raises constitutional concerns under the Fourteenth Amendment.").

138 *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (barring capital punishment for the rape of a child); Roper v. Simmons, 543 U.S. 551 (2005) (barring the death penalty for juvenile offenders).

139 *Kennedy*, 554 U.S. at 441.

140 *Id.*

141 *See id.* ("[T]here is no convincing empirical evidence either supporting or refuting th[e] view [that the death penalty serves as a significantly greater deterrent than lesser penalties]." (alterations in original) (citing Gregg v. Georgia, 428 U.S. 153, 185–86 (1976) (plurality opinion)) (internal quotation marks omitted)); *see also* Baze v. Rees, 553 U.S. 35, 79 (2008) (Stevens, J., concurring in judgment) ("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 . . . .").

it has closely monitored the retributive value of the death penalty.[142] In recent years, and especially in *Kennedy v. Louisiana* (the most recent capital case decided under this analysis), the Court justified the death penalty primarily on retributive grounds and simultaneously 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."[143] Thus the relationship between race and retribution is important because retribution has been cast as an indispensable component to the constitutionality of the death penalty,[144] while racial arbitrariness is an impermissible consideration for imposing capital punishment.[145] Yet, it might be that one cannot be contemplated without also considering the corresponding impact of the other.

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, and lynch law."[146] Most victims of lynching were punished for offenses against Whites.[147] However, the tendency to punish crimes against White Americans more severely should have been reduced by the combination of channeling society's taste for retribution into the formal justice system and requiring heavy anti-arbitrariness procedural regulation in the administration of capital punishment. This has not been the case.

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142 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.*, *Kennedy*, 554 U.S. at 442, 446 (discussing retribution as a factor in the Court's "independent judgment"); *Roper*, 543 U.S. at 571 ("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.").

143 554 U.S. at 420.

144 *See id.* at 441 (explaining that retribution is one of the "two distinct social purposes" of capital punishment).

145 *Cf. id.* at 447 (noting the importance of avoiding "arbitrary and capricious application" of capital punishment).

146 *Gregg*, 428 U.S. at 183 (plurality opinion) (quoting Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

147 *See* Cohen, *supra* note 29, at 66 ("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.'" (quoting John Paul Stevens, *On the Death Sentence*, 57 N.Y. REV. BOOKS, Dec. 23, 2010, at 8, 14 (reviewing GARLAND, *supra* note 31))).

b. Death Qualification

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

Upon realizing that existing constitutional safeguards have failed to protect citizens from continued racial bias in the death penalty, it becomes important to consider whether these regulations not only fail to eliminate racial bias, but instead unwittingly increase it.[148] One particular form of regulation that applies solely to capital cases is the death-qualification process. To be eligible to sit on a capital jury, a prospective juror must be willing to consider sentencing a defendant to both life without the possibility of parole and the death penalty.[149] Thus, no juror who would automatically vote to reject (or to impose) the death penalty is eligible to sit on a capital jury.[150] To be clear, mere opposition to the death penalty (or to a sentence less than death for those convicted of a capital murder) is not enough.[151] 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.[152] Jurors are "death-qualified" pretrial, often immediately preceding—and, in some jurisdictions, contemporaneous with—traditional *voir dire*.[153]

Death qualification is freighted with controversy. Consider how a link between death qualification and increased racial bias would have

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[148] *See* Lynch & Haney, *supra* note 5, at 598 ("Rather than remedying these potential biases, some capital trial procedures worsen them. For instance, the well-documented problem of underrepresentation of minorities in many jurisdictions' jury pools is exacerbated in capital cases by the added impact of disproportionate exclusion of minorities via death qualification.").

[149] *See* Uttecht v. Brown, 551 U.S. 1, 9 (2007) (noting 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" (citing Wainwright v. Witt, 469 U.S. 412, 424 (1985))); Morgan v. Illinois, 504 U.S. 719, 729 (1992) (finding that jurors who will not consider a sentence other than death are excludable for cause).

[150] *Morgan*, 504 U.S. at 728–29.

[151] *See* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) ("[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.").

[152] *See Wainwright*, 469 U.S. at 424 (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)).

[153] *See* Lockhart v. McCree, 476 U.S. 162, 166 (1986) (noting that prospective jurors who state that they cannot vote for the imposition of death under any circumstances are removed by the trial judge for cause during *voir dire*).

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 jurors.[154] Although some scholars have attempted to explain this qualitative difference by focusing on concepts such as authoritarianism,[155] 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. These greater levels of bias could 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.[156] A more novel, albeit complementary, possibility is that there are undocumented implicit racial stereotypes specifically relevant to the value of the defendant's and victim's lives in a capital trial—value of life 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 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 could potentially affect not only how the sanctity of the defendant's life is perceived, but also how the victim's life is valued.

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154 *See* Bronson, *Conviction Proneness*, *supra* note 16, at 18 ("Only 19% of the answers given by *Witherspoon*-excludable respondents showed conviction proneness, while 51% of the answers of the non-excludable respondents show conviction proneness."); Bronson, *Exclusion of Scrupled Jurors*, *supra* note 16, at 15 ("Excluding scrupled jurors from capital juries measurably increases the likelihood of a finding of guilt, possibly in violation of constitutional rights but certainly in disregard of common notions of fairness and justice."); Cowan et al., *supra* note 16, at 53 ("Death-qualified subjects were significantly more likely than excludable subjects to vote guilty . . . ."); Fitzgerald & Ellsworth, *supra* note 16, at 31 ("On the attitudinal measures, the death-qualified respondents were consistently more prone to favor the point of view of the prosecution . . . ."); Thompson et al., *supra* note 16, at 111 ("[P]eople's attitude toward the death penalty affects both their interpretations of testimony and their threshold of reasonable doubt.").

155 *See* Brooke Butler & 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 (2007) ("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 . . . ."(citation omitted)).

156 *See* Charles Ogletree, Robert J. Smith & Johanna Wald, *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 45, 48 (noting that "Black citizens are often associated with violence, dangerousness, and crime" and detailing social science findings that demonstrate such associations).

Second, commentators have argued that the process of death qualification—i.e., 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.[157] Death-qualified juries tend to be populated by a disproportionate number of White citizens.[158] 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, but they also possess stronger implicit and explicit racial biases than jury-eligible citizens generally.[159] We also hypothesize that capital juries are more implicitly biased *because* the death-qualification process results in fewer non-White jurors. These hypotheses, taken together, would substantially undercut the notion that the verdicts of capital juries represent 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 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 a greater understanding of the ways in which knowledge of juror bias, particularly implicit racial bias, influences the administration of the death penalty. Specifically, we sought to shed light on several topics: (1) whether implicit racial bias helps explain the ineffectiveness of

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157 G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87, 99 n.54 (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 . . . [is] like assessing the impact of global warming by taking the temperature in a room with its air-conditioning on."); Lynch & Haney, *supra* note 5, at 600 (arguing that death qualification "undermine[s] the representativeness of the capital jury. Indeed, [d]eath qualified juries are less likely to share the racial and status characteristics or the common life experiences with capital defendants that would otherwise enable them to bridge the vast differences in behavior the trial is designed to highlight." (internal citation and quotation marks omitted)).

158 *See* Brooke Butler & Adina W. Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense*, 36 J. APPLIED SOC. PSYCH. 1744, 1745–46 (2006) (noting that jurors who pass the *Wainwright* test are more likely to be, *inter alia*, White than excluded jurors).

159 Brooke Butler has indeed found that death-qualified jurors are more likely than excluded jurors to believe that discrimination against Blacks is no longer a problem. 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, 865 (2007).

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. Part III provides details of the study. First, however, Part II provides an overview of the 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. We then apply this background to the capital context in formulating specific hypotheses for our study.

II
Implicit Racial Bias and Criminal Justice

The compelling methods and powerful findings of implicit bias research in the cognitive sciences has unsurprisingly triggered an increased interest in implicit bias in the legal context.[160] Legal scholars have begun to consider implicit bias in a broad range of legal contexts.[161] For example, it is not uncommon to see a scholar argue that

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[160] *See*, *e.g.*, Implicit Racial Bias Across the Law, *supra* note 7 (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) (describing the use of psychological research on implicit bias by scholars in the field of 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, 151–58 (2010) (providing a federal judge's perspective on implicit bias); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (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); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. Davis L. Rev. 471, 480, 536–49 (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 (2007) [hereinafter Levinson, *Forgotten Racial Equality*] (arguing that judges and juries remember and misremember case facts in racially biased ways); Justin D. Levinson, *SuperBias: The Collision of Behavioral Economics and Implicit Social Cognition*, 45 Akron L. Rev. 591, 593 (2012) (claiming that the behavioral law and economics decision model overlooks the role of implicit biases).

[161] *See, e.g.*, Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 Mich. J. Race & L. 1 (2009) (arguing that poll workers rely on implicit bias in interacting with voters); Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 U. Ill. L. Rev. 237, 250 (2009) (focusing on a range of cognitive biases, including automatic in-group preference); Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. Marshall L. Rev. 455, 500–07 (2007) (considering how implicit bias may help to explain continued housing discrimination); Eric K. Yamamoto & Michele Park Sonen, *Reparations Law: Redress Bias?*, *in* Implicit Racial Bias Across the Law, *supra* note 7, at 244, 245–46

implicit bias affects the way courts and the United States government treat Native American sovereignty,[162] the way lawmakers decide tax reforms,[163] or the way corporate boards make decisions.[164]

In the context of race and criminal justice, considerations of implicit bias appear more commonly in discourse.[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 provide an 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.[167] In this Part, we rely on recent empirical studies to demonstrate how implicit bias may permeate the criminal legal process, with a special focus on jury decisionmaking.[168] We then apply these lessons to the capital context and set forth the hypotheses for our empirical study.

(critiquing reparations discourse for overlooking harms done to women of color due to implicit bias).

[162] Susan K. Serrano & Breann Swann Nu'uhiwa, *Federal Indian Law: Implicit Bias Against Native Peoples as Sovereigns*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 209, 210–11.

[163] Dorothy A. Brown, *Tax Law: Implicit Bias and the Earned Income Tax Credit*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 165.

[164] Justin D. Levinson, *Corporations Law: Biased Corporate Decision-Making?*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 7, at 146.

[165] *See, e.g.*, L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011) (claiming that police behavior may be best explained by implicit racial bias rather than conscious animus); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012) (arguing that the "reasonable suspicion" standard for stop and frisk does little to eliminate problems of implicit bias).

[166] *See* Eberhardt et al., *supra* note 68, at 386 (demonstrating that in cases with White victims, jurors are more likely to impose death on more stereotypically Black-looking defendants); Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 304 (2008) (showing evidence of a bidirectional association between a Black individual and an ape); Levinson et al., *A Social Science Overview*, *supra* note 9, at 21–24 (reviewing these studies); 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, 331–39 (2010) (finding that participants evaluated evidence differently based upon the skin tone of the perpetrator); Levinson, *Forgotten Racial Equality*, *supra* note 160, at 390–406 (demonstrating that mock jurors more accurately remember aggressive case facts when the defendant is Black); Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (finding that trial judges hold implicit racial biases).

[167] Some early projects in this area have begun to consider implicit bias in the capital context. *See, e.g.*, Eisenberg & Johnson, *supra* note 8, at 1553 (finding that capital defense attorneys possess levels of implicit racial bias similar to the general population); Levinson, *supra* note 8, at 602 (proposing hypotheses why capital cases may be infused with racial bias); Smith & Cohen, *supra* note 7, at 230–31 (describing how implicit racial bias can operate in a capital trial).

[168] 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

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 decisionmaking. 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 decisionmaking.[169] Expanding upon established research that deconstructs how jurors make decisions,[170] this implicit bias research can be broken into three sequential decisionmaking stages: (1) biased evidence evaluation through faulty story construction; (2) stereotype-driven representation of the decision alternatives by learning potentially corrupted verdict category attributes; and (3) the biased classification of jurors' stereotype-driven stories into the "best fitting" verdict category.[171] We use these stages, based upon those made prominent by Professors

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 U. L. REV. 795 (2012). Although most implicit bias decisionmaking 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. *Id.* at 1209–11. The researchers found, however, that when race was made salient, White judges were able to protect against these biases from skewing their decisions. *Id.* at 1217–20. When race was primed subliminally, however, implicit bias appeared to affect their decisionmaking. *Id.* at 1217.

169 *See* Levinson et al., *A Social Science Overview*, *supra* note 9, at 21–24 (providing an overview of this model); Levinson & Young, *supra* note 166, at 339–45 (first critiquing Pennington and Hastie's "Story Model" of decisionmaking); Levinson, *Forgotten Racial Equality*, *supra* note 160, at 384–90 (surveying literature on implicit bias and group decisionmaking).

170 We build mainly on the acclaimed Story Model of juror decisionmaking, developed by Nancy Pennington and Reid Hastie in a series of articles. *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520–21 (1991) [hereinafter Pennington & Hastie, *A Cognitive Theory*] ("[T]he Story Model includes three component processes: (1) evidence evaluation through story construction, (2) representation of the decision alternatives by learning verdict category attributes, and (3) reaching a decision through the classification of the story into the best fitting verdict category . . . ."); 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 Pennington & Hastie, *Explaining the Evidence*] (same); Nancy Pennington & Reid Hastie, *Practical Implications of Psychological Research on Juror and Jury Decision Making*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 90, 95 (1990) (same); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192, 192–93 (Reid Hastie ed., 1993) [hereinafter Pennington & Hastie, *The Story Model*] (same). For an earlier detailed implicit bias amplification of the Story Model, upon which we build here, see Levinson & Young, *supra* note 166, at 340–45.

171 These categories are derived from the three cognitive processing components that explain how jurors interpret information. *See supra* note 170 and accompanying text (describing the three component processes).

Pennington and Hastie's Story Model,[172] to explain the early construction of an implicit bias model of biased decisionmaking. In each of the stages, implicit bias has played some role in facilitating inequality.[173] In the context of the death penalty, we attempt to add new and unique death-focused categories to the model. Each of the existing model steps, however, may already explain the range of biased outcomes in capital decisionmaking.

A. Biased Evaluation of Evidence and Faulty Story Construction

According to Professors Pennington and Hastie, the first stage of jury decisionmaking 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."[174] In our proposed implicit bias model of decisionmaking, 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.[175] Second, jurors may evaluate ambiguous evidence in a stereotyped way based on racial or skin tone cues.[176] 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

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[172] *See* Pennington & Hastie, *The Story Model*, *supra* note 170 (outlining the Story Model and how it seeks to explain how jurors process information and decide cases).

[173] Although Pennington and Hastie have not endeavored to examine the role of implicit bias in the Story Model, Hastie has 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' Decisions*, *in* BETTER THAN CONSCIOUS? DECISION MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS 371, 384 (Christoph Engel & Wolf Singer eds., 2008) (acknowledging the unconscious automatic processes involved in jury decisionmaking).

[174] Pennington & Hastie, *The Story Model*, *supra* note 170, at 194.

[175] *See* Levinson, *Forgotten Racial Equality*, *supra* note 160, at 373–74 (describing jurors as misremembering "trial information in systematically biased ways"). For an earlier study that tested how ethnic stereotypes affected mock jurors' memories and evidence evaluation, see Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCHOL. 726, 728, 731 (1988) (finding that participants better recalled stereotype-consistent evidence of a defendant with a Hispanic name compared to a defendant with an ambiguous name, so long as the ethnic identifying information was presented first).

[176] Both of the bias-driven steps have at least initial empirical support. *See* Levinson, *Forgotten Racial Equality*, *supra* note 160, at 374–81 (describing social science literature on how stereotypes drive systematic misremembering of information); *see also* Levinson & Young, *supra* note 166, at 322–23 ("Participants who implicitly associated Black and guilty were more likely to make harsher judgments of ambiguous evidence.").

actor.[177] Furthermore, mock jurors sometimes created false memories of facts that had not actually happened when consistent with stereotypes of Black men.[178] In a later study, Levinson and Danielle Young found that mock jurors evaluated ambiguous evidence differently based upon whether a perpetrator had lighter or darker skin.[179] When a perpetrator possessed darker skin, participants were more likely to interpret ambiguous evidence as indicating guilt than when a perpetrator possessed lighter skin.[180] These studies show that juror story construction and evidence evaluation, two key processes of juror decisionmaking, can be tainted by implicit bias. This type of bias may manifest in capital trials, as well.[181]

B. Stereotype-Driven Decision Alternatives

Similarly, when jurors enter the next stage of decisionmaking—learning the decision category attributes—their decisionmaking also may be infected by implicit bias. According to Pennington and Hastie, during this second stage of juror decisionmaking, jurors learn about their verdict options—such as first degree murder, second degree murder, guilty, not guilty, and so on—primarily through judicial instructions.[182] As jurors learn the relevant categories, existing knowledge structures can interfere with their cognitive processes. For example, a study by Levinson, 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.[183] 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.[184] Consistent with

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177 Levinson, *Forgotten Racial Equality*, *supra* note 160, at 398–401.

178 *Id.* at 400–01.

179 Levinson & Young, *supra* note 166, at 337.

180 *Id.* at 337. Further research showed that these decisions were related to implicit bias and not self-reported (explicit) racial attitudes. *Id.* at 338. *See also* Bodenhausen, *supra* note 175, at 731 (finding that a Hispanic-sounding name led to more negative evidence evaluations than a nondescript name, but only when evidence evaluations were made after the participants' judgments of guilt).

181 *See* Levinson, *supra* note 8, at 602 (discussing social cognition theory in the context of capital trials).

182 Pennington & Hastie, *The Story Model*, *supra* note 170, at 199–200.

183 Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010).

184 *Id.* at 201–03. 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." Levinson et al., *A Social Science Overview*, *supra* note 9, at 16. Test subjects sit at a computer and "pair an attitude object (for example, black or white; man or woman; fat or thin)

the experimenters' predictions, participants implicitly associated Black with guilty and White with not guilty.[185]

During this stage of decisionmaking, 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 the death penalty with Black male perpetrators.[186] If this hypothesis were confirmed, simply talking about death as a possible penalty, the process of death qualification, or both, could trigger (or prime) these racial stereotypes. These triggered stereotypes of death-worthy Black perpetrators could potentially prejudice the ensuing trial.[187]

C. Biased Classification of Stories into Verdicts

In the final stage of Pennington and Hastie's decisionmaking model, jurors match the stories they construct in the first stage of decisionmaking into the verdict categories they learned about in the second stage.[188] 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 creates novel risks of bias by itself. The final stage of decisionmaking is not simply a combination of the first two stages; it also

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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." *Id.* at 16. 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, the same participants pair African-American faces with negative words. *Id.* at 16–17. "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)." *Id.* at 17.

185 Levinson et al., *supra* note 183, at 204. Participants also displayed more traditional race-based stereotyped implicit biases, such as Black-unpleasant compared to White-pleasant. *Id.* at 204. These biases predicted the way jurors made verdict decisions based upon the perpetrator's skin tone. *Id.* at 206.

186 Levinson, *supra* note 8, at 603. 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.

187 After all, giving presumption of innocence instructions to mock jurors has been shown to prime racial attention. Levinson et al., *A Social Science Overview*, *supra* note 9, at 23.

188 Pennington & Hastie, *A Cognitive Theory*, *supra* note 170, at 530.

involves the incorporation of the presumption of innocence.[189] Interestingly, even this stage, presumed by many to be one of the core protections underlying the American criminal trial,[190] may introduce additional 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.[191] 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—instructions.[192] 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.[193] The study showed that participants who received the presumption of innocence instructions were quicker to visually focus on a Black face compared to participants who received the other instructions.[194] Drawing on the literature from perception studies, which have shown that the activation of crime causes people to attend to Black faces[195] and that the priming of Black stereotypes leads to faster identification of weapons,[196] the researchers suggested that this finding may indicate the counterintuitive—that people actually implicitly associate the presumption of innocence with Black aggression and guilt.[197] If instructing jurors on the presumption of

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189 Pennington & Hastie, *Explaining the Evidence*, *supra* note 170, at 191; Pennington & Hastie, *The Story Model*, *supra* note 170, at 201.

190 *See* 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).

191 Danielle M. Young et al., *Innocent Until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence*, PLOS ONE (forthcoming 2014) (on file with the *New York University Law Review*).

192 The instructions were based upon Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Jury Instructions*, U.S. CTS. FOR THE NINTH CIRCUIT (July 2010), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Jury_Instructions_2014_02.pdf.

193 Young et al., *supra* note 191, at 8.

194 Young et al., *supra* note 191, at 10.

195 Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 888 (2004) ("Indeed, thinking about the concept of crime not only brought Black faces to mind but brought stereotypically Black faces to mind.").

196 *See id.* at 881 (explaining that participants who saw a Black face were quicker to identify "crime-relevant objects").

197 Young et al., *supra* note 191, at 10–11.

innocence indeed primes implicit associations of Black guilt (in addition to the biases that have already occurred in the previous stages), this would be a powerful indication that the jury decisionmaking process could serve as an automatic bias delivery mechanism.

In light of this research on implicit bias in the various stages of criminal trial decisionmaking, one would suspect that implicit bias would manifest in capital decisionmaking in similar ways. Specifically, 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 as well. Similarly, juries might remember and misremember facts from trial in racially biased ways. These facts 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 our study, we aim to expand on these previous studies and draw on decades of research on racial disparities in the death penalty.

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 Subparts, we developed three hypotheses.

Hypothesis One: 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 the racial category of Black with aggressive, lazy, and worthless and the racial category of White with virtuous, hardworking, and valuable.

Hypothesis Two: 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 Three: Implicit racial bias will predict which defendants are sentenced to death. Specifically, the greater 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.

III
The Empirical Study

To test our hypotheses, we conducted an empirical study designed to examine the role of implicit racial bias in death qualification and in capital decisionmaking. This Part 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.[198] Participants were recruited through the Internet by a specialized survey recruitment firm.[199] The participant pool was diverse, as indicated by several measures. Of the participants, 57.7% were women. The age of the participants ranged from 18 to 81, with an average age of 53.39 (SD = 14.62) years. Participants in the study came from a wide range of ethnic backgrounds: 82.7% of participants identified themselves as Caucasian, 5% of participants identified as African-American, 3.4% of participants identified as multiracial, 2.7% of participants identified as Latino, 2.5% identified as Asian, 2.5% identified as Native American/Hawaiian, and 1.4% identified as members of other ethnic groups.[200] The participant pool contained a wide range of 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

198 At least 75 participants from each state completed the study, with 478 participants in total. The numbers ranged from a minimum of 75 participants in Alabama to a maximum of 82 participants in Florida. Participants who were ineligible to serve as jurors because they were not U.S. citizens (N = 2) or had been previously convicted of a felony (N = 27) were removed from the data. Similarly, data was excluded for participants who were not from the targeted states (N = 4).

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

200 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.

religious diversity in the participant pool, with members of over fifteen different religions represented.

2. *Materials*

Participants completed several measures, including two implicit association tests (IATs) and a mock trial sentencing task in which jurors were asked to choose between life imprisonment and a death sentence. The tasks were all completed on computers. Participants first responded to death qualification questions, after which they engaged in a mock trial sentencing task. Next, participants completed two IATs and a questionnaire-style measure of explicit racial attitudes, and then answered demographic questions.

The death qualification questions were presented at the beginning of the mock trial sentencing task and were designed to comport with existing case law on death qualification.[201] Thus, participants were asked:

> If the State proves beyond a reasonable doubt that Mr. Baker[202] intentionally murdered Edward Walsh, would you be able to find the defendant guilty even though he would then be eligible for the death penalty?
>
> 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, or (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 examine how death-qualified jurors compare with non-death-qualified jurors.[203]

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[201] *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985) (holding that prospective jurors may be excluded if their personal views prevent them from following the law on capital punishment).

[202] There were two conditions based on the race of defendant and two conditions based on the race of victim, known as a 2 * 2 study design. Each participant therefore read about either a White or Black defendant and a White or Black victim (thus, there were four possible conditions). Participants were randomly assigned to one of the four conditions.

[203] 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 that concerned only death-qualified jurors.

The mock trial presented to the participants was inspired by an actual case.[204] 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.

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.[205] 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.[206] The jury instructions read, in part: "One important factor to take into consideration is the impact that the crime had on the family members of [the victim]."

The jurors next read the Victim Impact Testimony given by the victim's wife.[207] In this testimony, the prosecutor questioned the victim's wife about the loss of the victim's life. The following is an excerpt:[208]

> *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

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204 *See* State v. Williams, 22 So. 3d 867, 872–74 (La. 2009) (describing the facts of the case, which involved a defendant accused of fatally shooting a police officer who confronted him for shoplifting).

205 These slides are attached as Appendix C.

206 The jurors were not presented with any aggravating or mitigating evidence.

207 This was substantially similar to a portion of the actual victim impact statement given at trial.

208 Appendix B contains this complete testimony.

> confidant and your husband, and that more than disappeared one morning, you never get that back. You never get that back.

After reading the Victim Impact Testimony, each participant decided how he or she thought the defendant should be punished.

Next, participants completed counterbalanced implicit and explicit measures of bias, with the order of the IATs also counterbalanced.

The IATs measured implicit racial stereotypes, but each had a different focus. One was a Black-White stereotype IAT that has been used regularly in implicit social cognition research.[209] This IAT measures implicit associations between race and traditional stereotypes, such as aggression and laziness.[210] The other was a new IAT we created for this study, which we called the "Value of Life IAT."[211] This IAT required participants to group together photos of Black and White people with words indicating value/worth (e.g., "valuable" and "worthwhile") and lack of value/worth (e.g., "worthless" and "expendable").[212] 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 hypothesized that racial disparities in the death penalty may be at least partially explained by differential values placed on the lives of defendants and victims.

The self-reported (explicit) measure of racial bias consisted of a measure known as the Modern Racism Scale (MRS).[213] 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."[214]

Demographic questions were completed last.

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[209] *See, e.g.*, Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1478 (1998) (introducing attitude and stereotype IATs and concluding that the IAT is a useful measure of implicit racial bias).

[210] The stimuli words used for positive stereotypes were "ambitious," "industrious," "successful," "calm," "trustworthy," "ethical," and "lawful." The stimuli words used for negative stereotypes were "lazy," "shiftless," "unemployed," "hostile," "dangerous," "threaten," and "violent."

[211] For a definition of "IAT," see *supra* note 184.

[212] The stimuli words used for worth were "merit," "worthwhile," "worthy," "value," and "valuable." The stimuli words used for worthless were "drain," "expendable," "worthless," "waste," and "valueless."

[213] *See* John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 91, 93–98 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (defining the content and detailing the procedural aspects of the Modern Racism Scale, in contrast to older methods of measuring racism).

[214] *Id.* at 108.

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.[215] Hypothesis Two was tested using a multivariate ANOVA (MANOVA),[216] 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 versus death sentence) were regressed upon race of defendant and victim, explicit and implicit biases, and the two-way interactions between these variables.[217] Here, we begin by presenting preliminary results, and then turn to our hypotheses.

1. White Jurors Were More Racially Biased than Non-White Jurors

White jurors displayed higher levels of implicit racial bias than non-White jurors, as measured by both the stereotype IAT (White juror $M = .48$; non-White juror $M = .34$) ($F(1,311) = 15.11$, $p < .001$, $\eta_p^2 = .05$), and the Value of Life IAT (White juror $M = .38$; non-White juror $M = .15$) ($F(1,311) = 4.50$, $p = .035$, $\eta_p^2 = .01$).[218] White jurors also displayed higher levels of explicit racial bias ($M = 2.49$), as mea-

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[215] A one-sample t-test tests whether a single population differs from a hypothesized value. *See* RONALD CHRISTENSEN, ANALYSIS OF VARIANCE, DESIGN AND REGRESSION: APPLIED STATISTICAL METHODS 37–42 (1996) (explaining one-sample t-tests). In the case of the IAT, the hypothesized value is zero, or no bias. An IAT score that is significantly different from zero would indicate bias in the population. Thus, the one-sample t-test referenced here tested whether the study population's IAT score was significantly different than zero.

[216] Generally ANOVA, or Analysis of Variance, is a series of statistical techniques that segment the observed variance in a dataset into the sources of variance, allowing for the comparison of the means between two or more groups. For example, is the variance in a sample (e.g., measured height) attributable to differences between two groups (such as Democrats and Republicans), or is it due to other, unexplained or unmeasured variation within the group (such as how much coffee they had this morning)? MANOVA is a special case of ANOVA that allows for 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. *See* BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS 322–23 (4th ed. 2001) (describing the uses and advantages of MANOVA).

[217] The regression controlled for the race and gender of the participant.

[218] IAT effects, or D' scores, were computed according to the guidelines set forth in Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197, 213–15 (2003) (responding to initial criticism regarding IAT scoring).

sured by the Modern Racism Scale, than non-White jurors (M = 2.04) ($F(1,311) = 12.97$, $p < .001$, $\eta_p^2 = .04$).[219]

2. *Male and Female Jurors Were 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) ($F(1,311) = 2.91$, $p = .09$, $\eta_p^2 = .01$).[220] 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, respectively) (all $p > .05$).

3. *Male Jurors Were More Likely to Sentence to Death*

Overall, 30.9% (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 only death-qualified jurors (Male = 34.1%, Female = 24.0%) ($\chi^2 = 3.84$, $p = .05$).[221] White participants were not significantly more likely to impose the death penalty (32.2%) than non-White participants (24.7%) ($\chi^2 = 1.67$, $p = .20$), although the percentages do trend in that direction.

4. *Women and Non-White Jurors Were Less Likely to Be Death-Qualified*[222]

Female jurors were significantly more likely to be excluded for failing to be death-qualified, with 24% of female jurors indicating 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.

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[219] We ran a MANOVA on all of the bias dependent variables (DVs), and the multivariate significance is $F(3,309) = 7.86$, $p < .001$, $\eta_p^2 = .07$. The results presented are for death-qualified jurors.

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

[221] The chi-square (χ^2) test of independence tests whether or not categorical variables are independent of each other. A. ARON & E. N. ARON, STATISTICS FOR PSYCHOLOGY 517 (2003). For example, in this case the chi-square test investigates if there is a relationship between gender and willingness to consider imposing the death penalty.

[222] Due to our limited sample size, we combine jurors who would be excluded because they either could not vote to convict (traditionally called "nullifiers") or could not vote for death (traditionally called "*Witherspoon* excludables"). *See* Witherspoon v. Illinois, 391 U.S. 510, 520 (1968) (holding that jurors may be permissibly excluded for being unwilling to ever vote for a death sentence).

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

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 worthlessness.[223]

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 would be unwilling to convict or unwilling to sentence a defendant to death ($M = 2.03$) ($F(1,390) = 14.35$, $p < .001$, $\eta_p^2 = .04$).[224]

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 would be unwilling to convict or unwilling to sentence a defendant to death ($M = .36$) ($F(1,390) = 3.87$, $p = .05$, $\eta_p^2 = .01$). 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 ($M = .25$) ($F(1,390) = 4.46$, $p = .035$, $\eta_p^2 = .01$).

8. *The Death Qualification Implicit and Explicit Bias Differential Was Driven by Exclusion of Non-White Jurors*

We next investigated whether the exclusion of non-White individuals through death qualification 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 possibility, three separate mediation models were run on each of the three measures of bias using the *z*Mediation method.[225] The mediation results for the Value of Life IAT suggest that the race of a juror fully mediates the relationship

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

[224] We conducted a MANOVA on all of the bias DVs ($F(4,387) = 4.14$, $p = .003$, $\eta_p^2 = .04$).

[225] *See* Dawn Iacobucci, *Mediation Analysis and Categorical Variables: The Final Frontier*, 22 J. CONSUMER PSYCHOL. 582, 589–93 (2012) (describing the use, advantages, and limitations of the *z*Mediation method). We also used the distribution of the product to create confidence intervals for mediation effects. Those numbers are not reported here, but support the results of our *z*Mediation analysis.

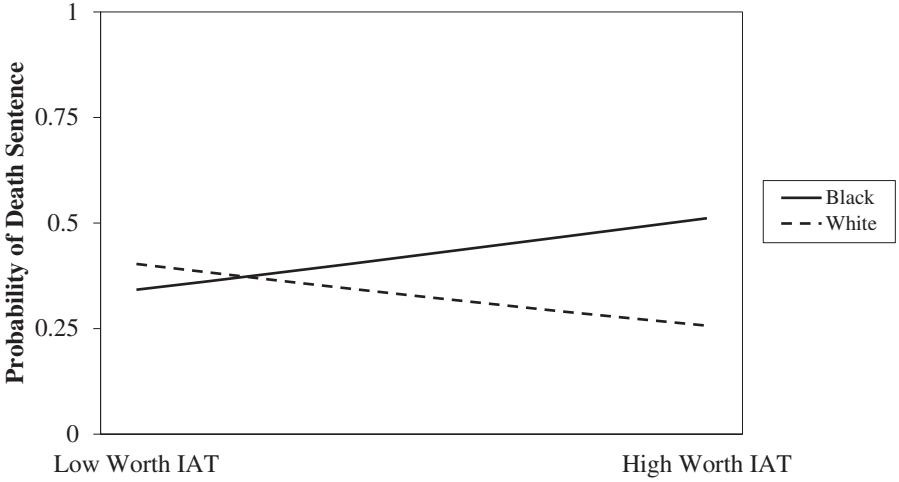
between death qualification and implicit worth.[226] This suggests that the difference between White and non-White jurors' implicit value of life bias completely mediates the differences between death-qualified jurors and non-death-qualified jurors (zMediation = -2.69, $p < .05$). Similarly, the mediation results for implicit bias as measured by the stereotype IAT mirror those of the Value of Life IAT.[227] The difference between White and non-White jurors' implicit stereotype bias completely mediates the differences between death-qualified jurors and non-death-qualified jurors (zMediation = -2.12, $p < .05$). Finally, the mediation results for explicit racial bias, as measured by the MRS, suggest that the race of a juror partially mediates the relationship between death qualification and explicit bias.[228] 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 (zMediation = -2.60, $p < .05$).

[226] 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 the race of the individual (White/non-White) was significant ($B = -1.01$, $SE = .29$, $p < .001$), as was the relationship between race of the individual and value of life bias ($B = .22$, $SE = .05$, $p < .001$). Including the race of the individual in the model reduced the effect of death qualification to non-significance ($B = .06$, $SE = .05$, $p = .18$).

[227] 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/non-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 ($B = .08$, $SE = .05$, $p = .15$).

[228] 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/non-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 ($B = .31$, $SE = .10$, $p = .002$).

FIGURE 1. IMPLICIT RACIAL BIAS AND PROBABILITY OF DEATH BASED ON RACE OF DEFENDANT

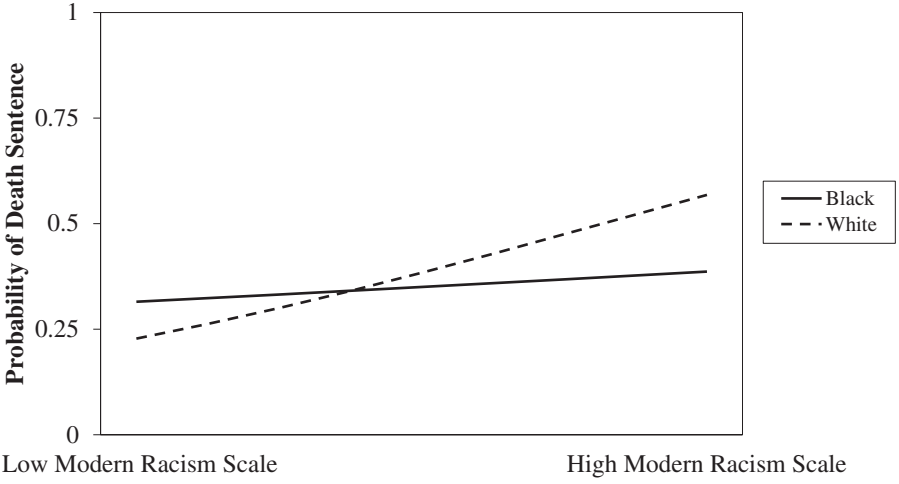


9. There Were No Main Effects for Race of Defendant or Race of Victim

Although studies on actual court decisions have revealed consistent effects across jurisdictions over the past thirty years, particularly in regard to the race of victim, the results of our study did not replicate this result. Neither race of defendant ($\beta = .20$, $p = .62$) or race of victim ($\beta = .26$, $p = .67$), nor their interaction ($\beta = -.59$, $p = .55$), predicted an increased probability that a juror would sentence a defendant to death.[229]

[229] *See infra* Table 3 (listing the regression results).

FIGURE 2.
SELF-REPORTED BIAS AND PROBABILITY OF DEATH BASED ON RACE OF VICTIM



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

Logistic regression analysis on the life/death decision partially supported our hypothesis that biases would interact with race of defendant and victim to increase the likelihood that the jurors would support the death penalty for a convicted defendant.[230] 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 score on the "value of life" IAT (signifying an 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 victim, nor did the stereotype IAT significantly increase the odds of a death penalty decision (all $p > .05$).

The explicit measure of racial bias interacted with the race of victim. Specifically, the MRS interacted with the race of 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 defendant.

[230] *See supra* Figures 1 & 2 (illustrating the regression results).

TABLE 1.
REGRESSION RESULTS

	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

*$p < .05$

IV
SUMMARY OF RESULTS AND IMPLICATIONS

The study we conducted (1) helps build a model of implicit bias in the law, (2) provides corroborating evidence for spatial and cultural understandings of death penalty usage, (3) supports critiques of both procedural and substantive safeguards that supposedly add fairness to the capital process, and (4) raises questions with implications for a broad range of issues relating to the constitutionality of capital punishment. We address each of these 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 suggest 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 confirms 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,[231] this alone raises concerns regarding the role of racial bias, not only in life-and-death decisions, but in all criminal proceedings.

Other results heighten these concerns. Specifically, in addition to confirming the existence of more established racial stereotypes such as aggression and laziness, we also found that jury-eligible citizens hold specific biases related to race and 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 hard to fathom (because of the disturbing moral implications of this association). This result suggests not only that people still hold age-old stereotypes of Black Americans, such as aggression and laziness, but that they implicitly value them less as humans than they value their White American counterparts.[232] 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 it is of heightened concern in capital trials because human life is actually at stake.

Unfortunately, as our study shows, the impact of these implicit biases is actually exacerbated by the exclusion of less biased Americans through the death qualification process. Specifically, a process designed to ensure fairness in the implementation of the law creates a situation in which the chances of injustice become magnified. But what kind of injustice? Our results show that, indeed, implicit bias has the potential to implicate race-based decisionmaking, as illustrated by our finding that increased implicit bias predicts a higher likelihood of death decisions for Black defendants. We are left to wonder about all the other domains in which implicit racial bias may also 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 mostly 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 courts should devote energy to 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

[231] *See, e.g.*, Rudman & Ashmore, *supra* note 11, at 363 (showing that implicit stereotypes predict negative behaviors such as "verbal slurs and personal and property violations" as well as economic allocations).

[232] *See, e.g.*, Goff et al., *supra* note 166, at 304–05 (finding an implicit association between Black and ape using various methodologies).

admit these biases as readily to judges as they did in an anonymous questionnaire.

B. Spatial and Cultural Explanations of Death Penalty Usage

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 (a tendency to be parochial, with anxiety towards outsiders and hostility to cultural change) attributes. Implicit racial bias helps to explain the psychological dynamics that undergird this sociological phenomenon. For example, previous research on implicit associations between "Black" and "dangerousness," as well as research showing that exposure to a Black face causes a disproportionate response in the area of the brain associated with fear,[233] 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 concepts of "worth" or "value" and Black subjects with the concepts of "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.[234] One of the social groups for which people show the strongest and most consistent preferences is the racial in-group. In the United States, research has found that in-group members, and specifically White Americans, benefit from their group membership in a variety of ways.[235] For example, in-group members display increased empathy towards each other, demonstrate increased performance on desired tasks or tests relative to out-group members, and receive the cognitive benefit of the doubt in a range of other situations, simply by virtue of their group membership. In donut jurisdictions, the disproportionately White residents who occupy these spaces tend to be more

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[233] Matthew D. Lieberman et al., *An fMRI Investigation of Race-Related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCIENCE 720, 722 (2005).

[234] *See generally* Robert J. Smith, Justin D. Levinson & Zoe Robinson, Bias in the Shadows of Criminal Law: The Problem of Implicit White Favoritism 1 (Jan. 25, 2014) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385415 (arguing that "implicit white favoritism" operates throughout the criminal justice system).

[235] *See id.* at 28–43 (reviewing empirical studies in which social scientists have confirmed the vast benefits of in-group membership).

influential.[236] Prosecutors and capital jurors alike tend to be White, and, in donut jurisdictions, tend to live in the ring, not the center.[237] In other words, in many Black-defendant/White-victim cases, the decisionmakers 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 probably 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 greater harm or lost value than the death of a Black citizen. It is true that these same dynamics could exist even in spatially and culturally integrated communities, but the spatial segregation and outsider anxiety associated with donut jurisdictions plausibly facilitates and intensifies the problem.[238]

C. Discretion Points: Prosecutors and Capital Jurors

Our finding that participants more readily associated White with "value" and "worth" suggests that both prosecutors (when deciding whether to proceed with capital charges) and jurors (when deciding whether to return a death sentence) magnify the damage done to White victims while paying too little attention to the redeeming qualities of Black offenders. The decisions that prosecutors and jurors make during plea bargaining and penalty phase deliberation, respectively, turn on conceptions of death-worthiness—is this defendant among the most culpable people who commit murder? Capital defense lawyers introduce evidence that mitigates the culpability of their clients, which tends to suggest that death is not the appropriate punishment. In many cases, the defendant suffers from mental deficiencies, severe mental illness, or has suffered extreme physical abuse.[239] If prosecutors and jurors—most of whom are White—are faster to associate value or worth with a White defendant than a Black

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[236] Liebman & Clarke, *supra* note 85, at 272 (describing as a "donut" jurisdiction a "predominantly white, suburban" community that "encircles the majority African-American" city and arguing that "use of the death penalty in response to perceived threats to influential members of insular communities from cross-boundary crime helps explain . . . high death-sentencing rate[s]").

[237] *See* Cohen & Smith, *supra* note 6, at 454–57 (noting that, in many death-penalty prone jurisdictions, suburbs tend to be far whiter than the cities they encircle).

[238] We did not track whether study participants lived within a "donut jurisdiction"; our point here is that our findings are conceptually consistent with the spatial and cultural explanation. Further research is needed to test the proposition empirically.

[239] *See* Smith et al., *supra* note 133 (manuscript at 36) (examining the mitigation histories of the one hundred most recently executed offenders and finding that the vast majority suffered from significant intellectual or psychological deficits or else suffered from severe childhood trauma).

defendant, then race-of-defendant effects might be attributable to an unintentional decrease in receptivity to mitigation evidence proffered by a Black defendant.

D. The Partial Racial 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 help explain why real capital juries impose death sentences more regularly when the victim is White: At least at an implicit level, we value White lives more than Black lives, and we thus seek to punish those individuals who have destroyed those whom we value more.[240] Next, our finding that explicit racial bias predicts life-and-death decisions based on the race of victim also offers support for the idea that we demand more retribution when the life of a White person is lost. Finally, our findings demonstrate that a stronger implicit association between White and worth and Black and worthlessness 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 who has taken a life himself. Considered together, our findings strengthen the notion that the relationship between race and retribution continues to contribute to the same disparities in capital punishment that it did in the context of extralegal lynching. Importantly, our findings suggest that the race-retribution link is not simply historically inextricable, but might also be culturally programmed into the minds of citizens who serve on death-qualified juries.

2. Death Qualification

Although the operation of implicit racial bias in the criminal justice system has been considered 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

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

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 who are more racially biased, both implicitly and explicitly, 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.[241] In other words, those citizens who refuse to consider voting to impose a death sentence are the same jurors who are more likely on the margins to vote not guilty during the guilt phase of the trial. By 1986, when the Supreme Court heard arguments in *Lockhart v. McCree*[242] 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[,]"[243] a variety of empirical studies provided support for the contention that death-qualified juries are comparatively more conviction prone than ordinary juries.[244] The defendant relied upon these studies to argue that a conviction-prone jury is a partial jury and that the Sixth Amendment prohibits partial juries.[245] 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.[246]

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241 *See, e.g.*, Cowan et al., *supra* note 16, at 74–75 (finding that death-qualified jurors are more likely to vote guilty both on initial ballots and after one hour of twelve-person jury deliberations); Samuel R. Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 LAW & HUM. BEHAV. 7 (1984) (detailing the early academic and judicial critiques of death-qualified juries as conviction prone).

242 476 U.S. 162 (1986).

243 *Id.* at 165.

244 *See id.* at 168–70 (noting that McCree supplied fifteen studies, of which the Court found six to be relevant to the question of whether death-qualified jurors are more conviction prone). One such study cited by the Court was conducted by Cowan, Thompson, and Ellsworth. *Id.* at 169 n.4 (citing Cowan et al., *supra* note 16). 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, 784–85 (2006) (using data collected from 1201 real capital jurors from more than 350 actual trials to conclude that death-qualified jurors hold "disproportionately punitive orientations toward crime and criminal justice [and] are more likely to be conviction-prone" (quoting BENJAMIN FLEURY-STEINER, JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY 24–25 (2004))). Rozelle also notes that the findings of the Capital Jury Project eliminate any "nullifier effect" by using actual jurors who survived the process of death qualification and thus by definition are not nullifiers. *Id.* at 784.

245 *Lockhart*, 476 U.S. at 167.

246 *See id.* at 171–72 (criticizing the studies for not using actual jurors, not simulating jury deliberations, not estimating the impact that including *Witherspoon* excludables would

A notable example of this type of wholesale disqualification of these studies 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.[247]

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 yet still held that the Constitution would "not prohibit the States from 'death qualifying' juries in capital cases."[248] The Court reasoned that jurors who are excluded due to death qualification are not a "distinct group" in the same way that Blacks or women are distinct groups.[249] Furthermore, the Court noted that the jurors excluded by death qualification are not historically disadvantaged, unlike groups such as Black Americans that are traditionally covered under the Sixth Amendment's fair cross-section requirement.[250] Instead, they are eliminated based on their conscious choices—in this case, 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 IATs—and explicit racial biases than jury-eligible citizens generally. We also found that stronger implicit bias on the Value of Life IAT predicts the higher likelihood that death-qualified jurors will vote to impose a death sentence when the defendant is Black, and explicit bias scores predict the higher likelihood that death-qualified jurors will 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.

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have on the outcome of cases, and not accounting for the presence of nullifiers in the sample).

247 *Id.* at 171. 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, e.g.*, Butler, *supra* note 159, at 864–65 (finding that death-qualified jurors display higher levels of sexism (using the Modern Sexism Scale) and racism (using the Modern Racism Scale)); Butler & Wasserman, *supra* note 158, at 1745–46 (summarizing research finding a variety of demographic and ideological differences between death-qualified and non-death-qualified jurors).

248 *Lockhart*, 476 U.S. at 173.

249 *See id.* at 175–76 (arguing that death qualification excludes jurors based on a characteristic within individual control, in contrast to excluding a disfavored demographic group).

250 *Id.* at 175.

These findings, then, not only shine light on where in the capital punishment structure racial bias operates, but also suggest a deeper structural concern: The procedures that regulate capital punishment may 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.[251] 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, 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 by a concern for jury legitimacy.[252] These findings suggest that the Court substantially underestimated the influence that death qualification has on the racial composition of the cross section of citizens who hear and decide capital cases. Therefore, 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 a distinct group loses much of its power.

Finally, our findings also lend credence to the notion that death qualification impedes accurate assessment of community standards.[253] The Eighth Amendment's Cruel and Unusual Punishment Clause draws meaning from "the evolving standards of decency that mark the progress of a maturing society."[254] In order to assess whether modern decency prohibits a particular sentencing practice, courts look to sev-

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[251] *See* Levinson, *Forgotten Racial Equality*, *supra* note 160, at 398–406 (finding that mock jurors' memories functioned differently based upon the race of defendant); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010) (finding that people implicitly associate Black with "Guilty"); Levinson & Young, *supra* note 166, at 337–39 (finding that evidence of guilt was evaluated differently based upon the skin tone of the defendant).

[252] *See Lockhart*, 476 U.S. at 184 ("But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial . . . .").

[253] *See, e.g.*, Cohen & Smith, *supra* note 157, at 99 n.54 ("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 . . . [is] like assessing the impact of global warming by taking the temperature in a room with its air-conditioning on.").

[254] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

eral "objective indicia," including the behavior of juries.[255] 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."[256] Eliminating jurors who refuse to impose a particular punishment—here, the death penalty—has the effect of eliminating the voice of a discrete segment of the community, 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—suggest 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 an accurate methodology. 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 scores between death-qualified jurors and those jury-eligible citizens who 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 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 concerns, including racial discrimination.[257] 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. Evidence exists that the implicit biases that operate in the minds of death-qualified jurors serve to propagate racialized sentencing into the capital punishment

[255] *See* Gregg v. Georgia, 428 U.S. 153, 181 (1976) (plurality opinion) ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.").

[256] Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (internal quotation marks omitted).

[257] *See Gregg*, 428 U.S. at 195 (plurality opinion) ("[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.").

regulatory structure. This implicit bias is more difficult to eradicate through well-crafted procedural rules than conscious bias, which can be minimized through rigid procedural regulations. If this is true, the Court should address head-on whether there is a constitutionally intolerable risk of arbitrariness when states inflict the death penalty. 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.[258] If the seeds of that arbitrariness live within death-qualified jurors, and if we continue to see race-of-victim or race-of-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.[259]

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 considered the findings of the Baldus study, 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.[260] 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-victim effects in a county (or a state) could stem, at least in part, from ideas harbored in broad swaths of the population (and especially by death-qualified jurors). Thus, implicit racial bias evidence contributes to the broader literature on race and the death penalty 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

[258] *See id.* at 204–05 (describing the review of death sentences by the Georgia Supreme Court in an attempt to ensure that they are not being applied arbitrarily).

[259] *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (arguing that no procedural or substantive safeguards could suffice to make the administration of the death penalty constitutional).

[260] *See* McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987) ("[McCleskey] offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.").

primary complaint lobbied at the Baldus study).[261] Furthermore, implicit bias evidence is not hostage to the claim that any racially 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 study, and it powerfully illustrates that the seeds of discriminatory decisionmaking in the capital context are not dead and gone; instead, they live within us.

Conclusion

This Article presents 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 central findings are that jury-eligible citizens implicitly associate Whites with "worth" and Blacks with "worthless," that death-qualified jurors hold stronger implicit and self-reported biases than do jury-eligible citizens generally, that the exclusion of non-White jurors accounts for the differing levels of implicit racial bias between death-qualified and non-death-qualified jurors, and that implicit racial bias predicts race-of-defendant effects and explicit racial bias predicts race-of-victim effects. These findings 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 is worth exploring through the lens of implicit social cognition. Future researchers might want to directly explore the relationship between race and retribution by testing, for example, whether implicit racial

[261] *See id.* at 297 (holding that the racial disparities found by the Baldus study are "clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose").

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 pretrial 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 differing seriousness evaluations?

Future research will help isolate when, where, and how race influences the administration of capital punishment. These projects will provide additional context for decisionmakers, regardless of whether they are 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 seek or impose the death penalty in a particular case. Tools such as the methods developed in the field of implicit social cognition provide the mechanisms necessary to glean the answers that decisionmakers need in a way that scholars simply could not have imagined at the time that *Furman* and *Gregg* were decided. We hope that this Article—and the study that anchors it—will be the first of many studies to engage with these questions through the implicit social cognition lens.

Appendix A: Figures

Figure 1
Implicit Racial Bias and Probability of Death Based on Race of Defendant

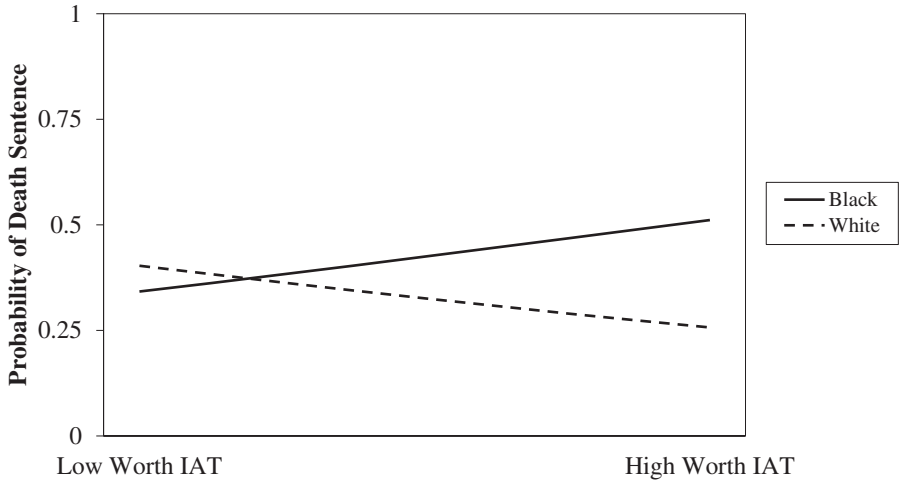

Figure 2
Self-Reported Bias and Probability of Death Based on Race of Victim

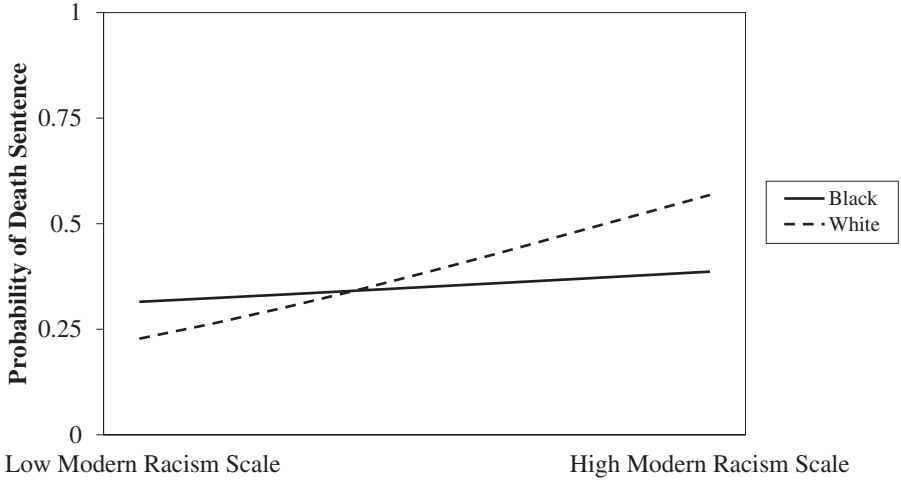

TABLE 3
REGRESSION RESULTS

	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

*$p < .05$

Appendix B: Victim Impact Testimony

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 were 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 C: Photos from Evidence Slideshow

Photo 1

PHOTO 2

PHOTO 3

PHOTO 4 (WHITE VICTIM)

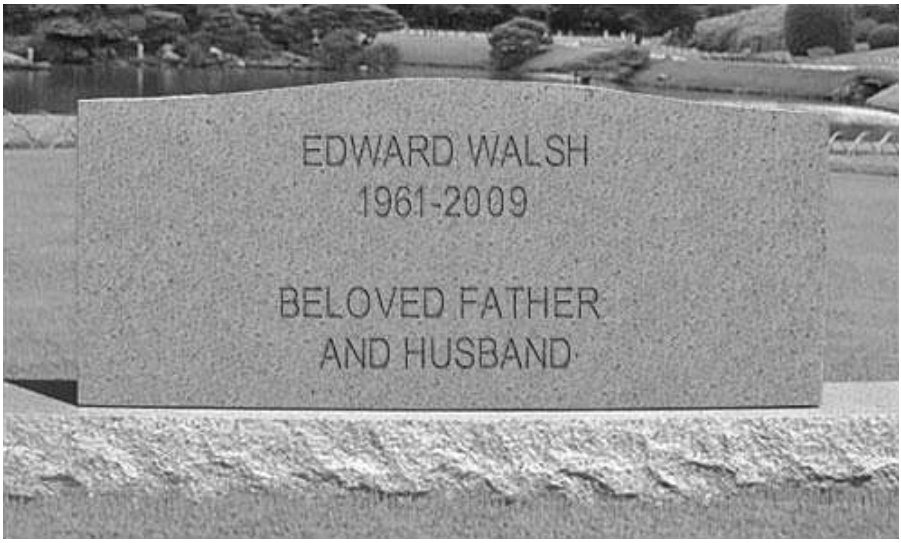

PHOTO 5 (BLACK VICTIM)