



County of San Benito
District Attorney's Office
Candice Hooper, District Attorney

August 26, 2021

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Ms. Leonida:

Pursuant to your Public Records Act, dated July 23, 2021, please see responses below:

Request No. 1: Written policies, memoranda or guidance regarding items (a) - (l):

Response to No. 1: The County does not have written policies, memoranda nor guidance on any of these subject matters.

Request No. 2: Policies regarding training as well as any training materials, recorded trainings or related materials on items (a) through (e).

Response to No. 2: Training and materials: The County may have responsive records with respect to Response No. 2, specifically from the New Prosecutor Academy and any MCLE courses that have been attended by attorneys in the Office. The County will produce these documents no later than September 15, 2021 in electronic format.

Request No. 3: Records concerning the Racial Justice Act, as set forth in (a)-(c)

Response to Request No. 3: San Benito County District Attorney's office is in the process of formulating and implementing a process to be in compliance with the Racial Justice Act. However, there are no documents, including draft policies, to provide at this time.

Request No. 4: Documents related to all investigations into Batson-Wheeler motions, including, but not limited to, items set forth in (a) to (d).

Response to Request No. 4: There have been no Batson-Wheeler motions filed in San Benito County, and there are no documents responsive to this request.

Sincerely,

Candice Hooper
San Benito County District Attorney

Wheeler

Cindy De Silva

Deputy District Attorney
San Joaquin County

Responding to a *Wheeler/Batson* Motion



by Cindy De Silva
Deputy District Attorney, San Joaquin County
(Rev. Ed. May 2018)

1

The Motion



I CONSIDER TRIAL BY JURY AS THE
ONLY ANCHOR YET IMAGINED BY MAN,
BY WHICH A GOVERNMENT CAN BE HELD
TO THE PRINCIPLES OF ITS CONSTITUTION.
- THOMAS JEFFERSON.

2

What is "Group Bias?"

- "Group Bias": The presumption "that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]" (*People v. Wheeler* (1978) 22 Cal.3d 258, 276.)

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The Framework

- *People v. Wheeler* (1978) 22 Cal. 3d 258

- *Batson v. Kentucky* (1986) 476 U.S. 79

- *Johnson v. California* (2005) 545 U.S. 162



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People v. Wheeler

- Article 1, Section 16 of the California Constitution contains a “right to trial by a jury drawn from a representative cross-section of the community” (*Wheeler, supra*, at 276-77.)

- Using peremptory challenges to kick jurors based solely on “group bias” violates that right. (*Id.*)

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Public Policy Underpinnings

- Allow juries to reflect diverse beliefs to avoid tyranny of the majority
- Combat governmental oppression
- Promote perception of courts as legitimate
- Encourage citizen participation in gov't
- Stem the tide of minority stigmatization



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Batson v. Kentucky

- 14th Amendment's Equal Protection Clause requires that jurors not be peremptorily challenged solely based on race (or protected classification) or due to assumption of group bias (*id.* at 89)
- Promulgated Three-Part Inquiry for Trial Court to use in monitoring a *Batson*-type challenge

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Three-Part Inquiry



- PRONG 1: Opponent must make prima facie case that *totality of circumstances* raises an *inference* of discriminatory kick
- PRONG 2: Burden shifts to proponent to give permissible reasons
- PRONG 3: Trial Court decides whether opponent has proven discriminatory purpose

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Prong 1: *Johnson v. California* (2005) 545 U.S. 162

- Prong 1 of the original *Wheeler* test required opponent to show "strong likelihood" that jurors being kicked due to group bias
- *Johnson* held that standard too high; CA should be using mere "inference" language of *Batson* (totality of the circumstances)



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So...What Makes a Good "Prima Facie Case"? (Or...What Should D Be Doing?)

- *People v. Fuentes* (1991) 54 Cal.3d 707, 714—The moving party should:
 - 1. "[M]ake as complete a record as possible;"
 - 2. "[E]stablish that the persons excluded are members of a cognizable group;" and
 - 3. [S]how [by totality of the circumstances] that the persons are being excluded because of group association.
 - (Opinion says "strong likelihood; that part was overruled by *Johnson v. California* in 2005)

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So...What Makes a Good "Prima Facie Case"? (Or...What Should D/P Point Out?)

- *People v. Scott* (2015) 61 Cal. 4th 363, 384, lists the following "particularly relevant" evidence:
 - That the "party has struck most or all of the members of the identified group";
 - The "party has used a disproportionate number of strikes against the group";
 - The party has not engaged in significant questioning of those jurors;
 - D is a member of the identified group; and
 - V is a member of the group of the majority of the remaining jurors

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Tip for Prong 1, Prima Facie Case: Don't Skip First Step!

- Make Trial Court put on the record whether it's finding a Prima Facie Case
- If Court doesn't expressly so find, and you jump to giving your reasons, Prong 1 will be deemed MOOT on appeal
 - (But see *P. v. Scott* (2015) 61 Cal. 4th 363 (if TC expressly finds no PF case, but allows P to give reasons just in case, NOT moot; appellate court to first consider whether PF case made)

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What if No Prima Facie Case Found Against You?

- If Trial Court finds no prima facie case...
- Ask to put your classification-neutral reasons on the record for purposes of appeal
 - If says no, file them in a written declaration
 - This way, you won't forget your reasons later

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Tip for Prong 2, Analysis Prong: Enunciation of Neutral Reasons

- Calmly remember and state your reasons
- Put your evidence on the record (*see infra* re: Comparative Analysis, etc.)
- List *all* your reasons, for *each* juror you're accused of kicking unfairly

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Prong 2: What If You Forget Why You Kicked the Jurors?

- If you absolutely can't remember your reasons...see *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202:
- Which found that while not forgetting is preferable, a TC can still credit as neutral a reason not stated b/c attorney can't remember the reason for the kick when other factors showed the attorney to be non-discriminatory, such as:
 - (a) remembering neutral reasons for kicking others in the class;
 - (b) not kicking many in the class; and
 - (c) having others in the class remain on the panel

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Prong 3: Weighing the Scales



- Third prong is a credibility determination
- It "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the proffered race-neutral reason
(People v. Hall (1983) 35 Cal. 3d 161, 167)

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Who Can Make the Motion?

- Either the prosecution or the defense can bring a *Batson* motion. (*Georgia v. McCollum* (1992) 505 U.S. 42.)
- Doesn't matter if D and the challenged juror share the same classification or not. (*Powers v. Ohio* (1991) 499 U.S. 400.)



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Mechanics of the Objection

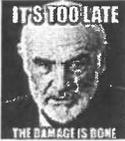
- Best: make motion at bench (consider limine)
- Hearing: out of jury's presence
- Reasons: not ex parte! See *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254; but see *Davis v. Ayala* (2015) 576 U.S. __, 135 S. Ct. 2187 (assumed true Cal Sup's holding that it was error, but agreeing that it was harmless in that case)



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Timing: When Is it Too Late to Object?

- Too late to *Wheeler* if jury AND alternates sworn
 - (*People v. Ortega* (1984) 156 Cal.App.3d 63, 70)
- But can still *Wheeler* as to entire panel if alternates not yet sworn!
 - (*People v. Gore* (1993) 18 Cal.App.4th 692, 703)



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If at First They Don't Succeed... Can They Try, Try Again?

- *People v. Avila* (2006) 38 Cal.4th 491, 548-552:
 - Where TC found no Prima Facie case as to Black Juror S.A.
 - But did find Prima Facie case as to Black Juror V.J.
 - Held: TC *not* required to go back and ask for P's reasons for excusing S.A.
 - *But....*

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Try, Try Again (Cont'd)

"Although we hold that the court has no sua sponte duty to revisit earlier *Batson/Wheeler* challenges that it had previously denied, upon request it may appropriately do so when the prosecutor's subsequent challenge to a juror of a protected class casts the prosecutor's earlier challenges of the jurors of that same protected class in a new light, such that it gives rise to a prima facie showing of group bias as to those earlier jurors. But the burden is on the party making the later motion to so clarify, for that party ultimately has the burden of proof." (*Avila* at 552.)

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What is a "Cognizable Group"?



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ALERT: **New Law Change!**

- CCP 231.5 has for years defined in CA the classifications for which peremptory challenges may not be used due to a "group bias" stereotype.
- A 2015 amendment changed it (fairly radically in three instances) in 2016.

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CCP 231.5: Pre-2016 Version

- Race, Color, National Origin
- Religion (note that this is different from kicking someone who, due to religious views, can't sit in judgment)
- Sex (and, per case law, sex in combination with race/ethnicity/etc.)
- Sexual Orientation
- "Similar Grounds"

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Pre-2016 Non-Cognizable Group Examples

- The Young (see, e.g., *People v. Estrada* (1979) 93 Cal.App.3d 76, 93)
- The Old (see, e.g., *People v. McCoy* (1995) 40 Cal.App.4th 778, 783)

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CCP 231.5: 2016 Version (The 2015 Amendment)

- Took away the “simple” laundry list and gave us...
- “[A] characteristic listed or defined in Section 11135 of the Government Code, or similar grounds.”
- (GC § 11135 outlaws govt discrim./equal access re: benefits)

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Gov’t Code § 11135 (amended 2015 and again 2016)

- | | |
|-------------------------------|---|
| ▪ Race | ▪ Age |
| ▪ Color | ▪ Marital Status |
| ▪ Ancestry | ▪ Mental Disability |
| ▪ National Origin | ▪ Physical Disability |
| ▪ Ethnic Group Identification | ▪ Genetic Information (per Government Code § 12926 [§(g) defines it as: genetic test info of the person or their family, a disease/disorder manifesting within the family]) |
| ▪ Religion | |
| ▪ Sex | |
| ▪ Sexual Orientation | |
| ▪ Medical Condition | |

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Point to Consider re: Mental/ Physical Disability (etc.)

- CCP § 231.5 (emph. added) prohibits using peremptories “on the basis of *an assumption that the...juror is biased merely because of the characteristic in question*”
- If kicking because disability will prevent effective service (e.g., blind and can't see important details in crime photos), perhaps ok.
 - (see, e.g., *United States v. Harris* (7th Cir. 1999) 197 F.3d 870 (rational basis test applied; kick of MS patient ok'd b/c med's cause drowsiness)) ²⁸

Mental Disability Tips & Strategies

- If the potential juror seems mentally unbalanced...
- And you peremptorily challenge her/him due to this...
- Flesh out in your stated reasons how their imbalance is problematic, and not your assumption of group bias.
- E.g., possible difficulties interacting with other jurors, etc. ²⁶

Still-Valid Case Law Examples of Non-Cognizable Groups

- People newly residing in the community (see *Adams v. Superior Court* (1974) 12 Cal.3d 55, 60)
- "People of Color" as a combined group (see *People v. Davis* (2009) 46 Cal.4th 539; *People v. Neuman* (2009) 176 Cal.App.4th 571)
- Less-educated (only 12th grade or less) people and "blue collar workers" (see *People v. Estrada* (1979) 93 Cal.App.3d 76 (grand jury exclusion)) ³⁰

Religion: *People v. Jones*
(2011) 51 Cal. 4th 346

- Where P excused black juror partly b/c she attended the 1st A.M.E. Church, which P called a "controversial" organization, and said he didn't want anyone "controversial". . .
- Cal Sup's said P "did not excuse her because of her religious views but because he believed she belonged to a controversial organization." (*Id.* at 368.)

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Bilinguals #1: *Hernandez v. New York*
(1991) 500 U.S. 352

****PLURALITY OPINION****

- 4-justice opinion stated the Trial Court did not commit clear error in believing DA's claim that he kicked the Spanish-speaking jurors because they gave him reason to think they would reject the interpreter's version in favor of their own, and not because he wanted Latinos off the jury
- BUT: "[A] policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us." (*Id.* at 371-72.)

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Bilinguals #2: *People v. Cardenas*
(2007) 155 Cal. App. 4th 1468

- Recognized the U.S. Supreme Court's plurality in *Hernandez*
- Upheld the TC's decision that "the prosecutor had put forth a valid, race-neutral reason for excluding" the Spanish-speaking jurors on grounds DA thought they'd reject the official translation, and not as a pretext for racial kick

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Bilinguals #3: *P. v. Gonzales* (2008) 165 Cal. App. 4th 620

- BUT SEE *People v. Gonzales*, where DDA stated several reasons to kick the juror, including his fear the juror would reject the official interpreter's version...
- But the record did not support that fear and also didn't support the other stated reasons, so appellate court found TC erred in accepting DDA's stated reasons
- As the appellate court said, "the stated basis is strongly suspicious of being a ruse for excusing those persons who may be perceived as more closely identifying with their national origin and/or their Hispanic ethnicity, i.e., those who still speak Spanish." (*Id.* at 631.)

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Moving on...What are "similar grounds"?

- Hard to find a case law definition that's cited with regularity

(see *People v. Garcia* (2000) 77 Cal. App. 4th 1269, 1275-76 (drawing upon a Cal. Sup. plurality opinion's definition in the absence of something with more authority)

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"Similar Grounds": Federal

- Here's a pre-*Batson* definition in grand jury context: whether "the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."

(*Castaneda v. Partida* (1977) 430 U.S. 482, 494; see *Garcia, supra*, at 1273 (noting that this is likely the US Supreme's standard b/c they cited this case in *Batson*)

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“Similar Grounds”: State

- CCP 231.5 was meant “to codify the decision in” *Garcia*.
(CAL. CODE CIV. PROC 231.5 (2000 Note).)
- *Garcia* recites plurality language in *Rubio v. Superior Court*, (1979) 24 Cal. 3d 93, suggesting the following as the first prong of a two-prong definition:
- Groups whose members “share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely *because* they are members of that group.”
(*Garcia, supra*, at 1276 (quoting *Rubio* (lead op.), *supra*, at 98).)

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“Similar Grounds”: State (cont’d)



- *Garcia* notes the *Rubio* court gave a two-prong test, but only the first part seemed to have majority support
- Still, *Garcia* also used the second prong in its analysis (“that no other members of the community are capable of adequately representing the perspective of the group” in question) (*Id.* at 1278 (quoting *Rubio, supra*, at 98))

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Statistics, Comparative Analysis, and Disparate Questioning

New Forms of Evidence to Prove
or Disprove Discriminatory Intent

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Miller-EI v. Dretke (2005)
545 U.S. 231

The Majority Used the Following
Methods to Find the Stated Race-
Neutral Reasons to be Pretextual

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Miller-EI (cont'd)

Statistics

P struck 91% of black potential jurors, but
only 12% of non-black potential jurors



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Miller-EI (cont'd):
Disparate Questioning

"The Graphic Script"

Trick Questions

- P pressed black potential jurors harder in questioning



- Also, asked trick questions of them more often



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Miller-EI
(cont'd)



Evidence of Past DA's Office
Policy of Jury Selection
Discrimination

Testimony of former prosecutors of office
climate of race-based voir dire

Prosecutor-written manual discussing
types of people not to choose (written
1968, circulated through 1976, at least one had
access to it during trial)

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Miller-EI (cont'd)

Notation of Race on Jury
Selection Cards

P annotated race on cards; but trial was
before *Batson*, so Ct. not impressed with
excuse of annotating to avoid *Batson* error

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Miller-EI (cont'd)

Comparative Analysis

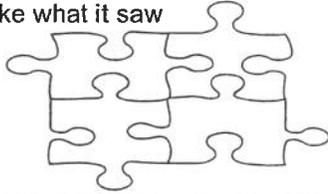
Compared P's stated reasons for striking black
potential jurors

If same quality applied to non-black potential jurors
whom P didn't strike, evidence of discrimination

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Miller-EI (cont'd)
**Cumulative Weight of
All-of-the-Above**

Court put all the puzzle pieces together and
didn't like what it saw



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***Miller-EI's* Progeny**

Fleshing Out the New
Evidence Rules

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Williams v. Runnels (9th Cir. 2006)
432 F.3d 1102

**Bare Statistics OK to
Establish Prong 1's Prima
Facie Case**

(But note: how to overcome the
"inference" thereof at the Prong 1
Level rather than the Prong 2-3
Levels—risky, but can be done)

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Statistics in *Williams v. Runnels*

- D pointed out P used 3 of first 4 kicks against blacks, and only 4 of first 49 potential jurors were black (*id.* at 1107)
- Found "these bare facts present a statistical disparity" (*id.*)
- Noted line of other cases where PF case shown based on using 5 of first 6 peremptories against blacks, where 4 of 7 Hispanics and 2 blacks kicked, etc. (*id.*)

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Prima Facie Case: Weighing Bare Statistics Against Other Facts in Record in Prong 1

- How much can TC look to other circumstances to see if the inference raised by the bare statistics actually has a patent neutral explanation without proceeding to Prong 2?
- *Williams v. Runnels*: "[T]o rebut an inference of discriminatory purpose based on statistical disparity, the 'other relevant circumstances' must do more than indicate that the record would support race-neutral reasons for the questioned challenges." (*Williams* at 1108.)

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People v. Sanchez (2016) 63 Cal.4th 411: Bare Statistics Refutation in Prong 1

- *Williams v. Runnels*: It's possible to refute the statistical inference at Prong 1 stage, but not on facts of that case; TC can't just presume what was in challenger's head, because the issue is the challenger's TRUE reason, not some POSSIBLE reason.
- *Sanchez* (at 434): In Prong 1, "[a] court may...consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record." (Citation omitted.)

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Another Lesson from *Williams v. Runnels*: Make Your Record!

- TC found no Prima Facie case
- P tried to put reasons on record, just in case, for appeal
- TC said no thanks
- 9th Circuit said it was P's responsibility to make record, b/c prima facie case was shown
- Guess what? P no longer remembered why.

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***Snyder v. Louisiana* (2008) 552 U.S. 472: Ask Follow-Up Q's**

- Court suggests P should have followed up with more Q's when black potential juror's hardship request was denied after school said service ok
- P said kicked b/c thought juror would still worry; but no follow-up Q's, so Ct. disbelieved P
- Further, others whose hardships were denied were not stricken by P...and they were white

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***People v. Lenix* (2008)
44 Cal. 4th 602**

- Cal Sup's Recognize Comparative Analysis Required for First Time on Appeal
- So long as record contains enough information to so engage

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Lenix: Make Your Record

- Cal Sup's prefer we make our own record and do our own Comparative Analysis at trial
- So that "defendant can make an inclusive record, [and] the prosecutor can respond to the alleged similarities"
(*Id.* at 624.)



Lenix: Don't Cut Off Voir Dire Time

Lenix recognizes TC's CCP 223 power to limit voir dire time, but said this:

"If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions." (*Id.* at 625.)



*Amended Law Alert: AB 1541 (2017) Amending CCP 223

Prior to AB 1541

- "The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party[.]"

Eff. January 2018

- "The trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire."
- "As voir dire proceeds, the trial judge shall permit supplemental time...based on individual responses or conduct[.]"

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**Lenix and Green v. Lamarque:
Notations on Juror Cards**

- *Lenix*: Dicta re: *Miller-El*'s disapproval of race notations on juror cards:
- "We emphasize, however, that post-*Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge." (*Id.* at 617 n.12.)
- BUT SEE *Green v. Lamarque* (9th Cir. 2008) 532 F.3d 1028, 1033, finding a *Batson* violation because, inter alia, P "had noted the race of each venire member he struck from the jury pool; when the trial judge asked him who he struck and why, the prosecutor was able to read off a list," then cited *Miller-El*'s note of that.

****New(ish) Case Alert: *Foster v. Chatman* (2016) 136 S.Ct. 1737**

- 1986 facts and 1987 trial
- D, a black man in Georgia, confessed to beating, raping, strangling & killing a 79-year-old widow
- Convicted & death penalty imposed
- 29 years later, U.S. Sup's remanded to Georgia's Sup. Ct. their decision not to let D continue to appeal his *Batson* claim

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***Foster*: "New Evidence" of
Notes on Jury Cards**

- Trial occurred just months after *Batson* decided; *Batson* objection denied after 4 black jurors removed by P
- During appeals process, D filed Georgia Open Records Act Request for P's file
- Found notations seeming to suggest jurors were kicked b/c black, and not b/c of the race-neutral reasons given by P

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Foster and “New Evidence”: An Extension of *Miller-El*

- Holding based on:
 - Comparative Analysis of similarly situated white jurors who were kept
 - Record Belied some of P’s stated reasons
 - New Evidence of Notes in P’s File indicated race consciousness (“B” by black jurors’ names, “No Black Church,” etc.)

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Notations to “Help” with *Batson* Objections?

- Noted P’s argument that they notated the juror cards b/c “*Batson*, after all, had come down only months before *Foster*’s trial. The prosecutors, according to the State, were uncertain what sort of showing might be demanded of them and wanted to be prepared.”
- Rejected argument b/c the notes showed preoccupation w/keeping blacks off jury

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Justice Thomas’s Lone Dissent in *Foster*

- “The notion that this ‘newly discovered evidence’ [of P’s file notes] could warrant relitigation of a *Batson* claim is flabbergasting.” (Thomas, J., dissenting, at 1766.)
- The issue should be whether TC had good reason to credit P’s stated reasons, which often rests on a credibility determination. (*Id.* at 1766-67.)

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Thomas's Dissent: A Warning Shot

- “[T]he Court today invites state prisoners to go searching for new ‘evidence’ by demanding the files of the prosecutors who long ago convicted them. If those prisoners succeed, then apparently this Court’s doors are open to conduct the credibility determination anew.” (*Id.* at 1767.)
- “New evidence should not justify the relitigation of *Batson* claims.” (*Id.*)

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So Where Does THIS Leave Us for App. Ct. Credibility Rulings in Hindsight?

- We’ve come a long way since the case discussed on the next slide...
- But it’s still on the books, so maybe it can still help us...
- (*Rice v. Collins*, unanimous overturning of 9th Circuit’s credibility rehash)

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Comparative Analysis Shield: *Rice v. Collins* (2006) 546 U.S. 333

- US Supremes *unanimously* overturned 9th Circuit for going too far in second-guessing TC’s 3rd prong credibility determination where P kicked due to:
 - eye-roll not seen by court, and
 - P’s “wariness of the young and the rootless” (*id.* at 341)
 - (*There was a reason 9th didn’t like P—we’ll address it in a few slides!*)
- US Sup’s Used **Comp. Analysis** as a Shield rather than a Sword 
- Noted P struck similarly situated young/rootless white potential juror (challenge on appeal was to strike of black potential juror)

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Tips on Comparative Analysis: List of Attributes

- Keep a list of the attributes leading you to kick 
- If you kept someone with that attribute, have a list of juror # and why you didn't kick them (why they were distinguishable)
- Perform your own Comparative/Distinguishing Analysis proactively!

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Tips on Comparative Analysis Make Your Own Record!

- Don't wait for D; make your own Comp. Analysis argument, or App. Ct. will draw judgment on an artificially short record
- Shield rather than a Sword—point out when you kicked others w/same attribute



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Tips on Comparative Analysis: Final Composition

- If a *Wheeler/Batson* objection was made against you and overruled...
 - (Deputy Attorneys General are starting to ask us to do this for appellate record purposes.)
- Consider noting for the record the final racial composition of the jury that was seated 

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Tips on Statistics and Follow-Up Questions: Make Your Record!

- Ask follow-up Q's—or point out that Trial Court kept strict timetable and you didn't have time



- Bring a calculator to do statistics



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More on *Rice v. Collins*: Mixing a Bad Reason w/a Good One

- **A second issue in *Collins*:**
- Prosecutor gave MULTIPLE reasons for kick
 - Demeanor Reason (eye roll)
 - Youth and Lack of Community Ties
 - To "achiev[e] gender balance on the jury" (*id.* at 340)
- TC "disallowed any reliance on that ground" but allowed the demeanor kick even though didn't see the demeanor, based on giving P benefit of doubt (*id.* at 336)
- Sup. Ct. (tacitly?) approved this approach

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**New Case Alert: Mixing Bad Motive w/ Good and the *Douglas* Rehearing

- *People v. Douglas* 2018 WL 2057237 (5/3/18 3rd DCA), which overturned *People v. Douglas* (2017) 10 Cal.App.5th 834 after Reh'g (facts taken from both cases)
- D-Douglas's ex-bf Andrade, a male prostitute, told him V "had shorted him money" after a trick
- Douglas and roommate co-D Sharpe hunted V down and shot him
- At first, V lied to cops about circumstances of the events
- Voir Dire: P asked a lot of Q's about how venire felt about homosexuality

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Douglas Facts (cont'd): Mixed Motives

- P kicked "two openly gay jurors" for multiple reasons:
 - Juror "J" had close PD friend who didn't like DA's
 - Juror "L" had positive body language toward def. counsel, and negative toward P
 - Then gave the fateful 3rd reason: in a case wherein the victim was "not out of the closet and actually was untruthful with the police about the extent of his relationship with a male prostitute," that he believed an "openly gay" juror might be biased against the testimony of that victim.

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Douglas: the Trial Court's "Ruling" & Douglas #2's Finding

- TC found kicking J due to PD friend justified
- TC found kicking L due to demeanor reasons justified
- But TC apparently never bothered to rule on the 3rd proffered reason

- *Douglas #2* found P's 3rd reason to have been discriminatory on sexual orientation grounds, as it was based on "his *assumption* that the only two openly gay veniremen would look askance at the victim's lifestyle simply because they were openly gay and he was not." (at WL/Cal.Rptr.*312-13.)

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Jurisdictional Split on Mixed Motives and CA's Rule

- *Douglas #1* noted JX split, unresolved by CA & US, re: "how to evaluate a *Batson/Wheeler* challenge when a party gives both permissible and impermissible reasons"
- Some States: "per se rule of unconstitutionality" (one bad reason spoils the bunch)
- Other Jx's, esp. Federal: "mixed-motive approach" allows kicker to show would have kicked even w/o the bad motive existing
- 9th Circuit: "substantial motivating factor approach" to see if kicker substantially motivated by the bad reason
- And the winner (per *Douglas #2*) is...

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The *Douglas #2* Rule on Mixed Motives in CA

- **Winner: The Per Se Unconstitutional Approach!**
- Whereas *Douglas #1* had accepted the "mixed motive" approach and rejected the "per se" approach, based on *Rice v. Collins* ("[h]ad the per se approach applied, the Supreme Court would have found the improper gender justification controlling ... It did not."), and had rejected 9th Circuit's substantial factor test, disagreeing w/its reading of other case law...
- *Douglas #2* on reh'g rejected the "mixed motive" approach "which arose in employment discrimination cases[,] unlike jury selection situations, "which should be free of any bias." (at WL/Cal.Rptr.*307.)

76

Douglas #2 (3rd DCA) versus *Rice v. Collins* (SCOTUS)

- Does *Douglas #2*, a 3rd DCA opinion, conflict with the possible tacit finding of the U.S. Supreme Court in *Rice v. Collins*?
- Perhaps, someday, we shall see!
- For now at least, *Douglas #2* is the law in California.

77

Side Note in *Douglas #2*: "Prosecutorial Misconduct"?

- Footnote 6: "We use the term 'prosecutorial error' rather than the at times misleading term 'prosecutorial misconduct,' because we are not concerned with the prosecutor's culpable mental state, but with the lawfulness of the reasons given for exercising the peremptory challenges."

78

Demeanor Strikes and the Cold Appellate Record

So what happens when you kick because of the juror's demeanor, but that demeanor is not reflected in the record?



79

Demeanor Strikes Without Record Support



- *People v. Silva* (2001) 25 Cal. 4th 345 (guilt-phase jury hung on death; 2nd death jury's death penalty verdict reversed when P's non-demeanor reasons belied by record, and demeanor reason not supported by it)
- *Snyder v. Louisiana, supra* (reversed where P gave 2 reasons, 1 of which belied by Comp. Analysis and 1 was demeanor not in record; TC didn't state which it credited)

80

Vague Demeanor Reasons Unsupported by Record

- *People v. Allen* (2004) 115 Cal. App. 4th 542, 546
(reversed where P gave demeanor reason of "her very response to your answers, and her demeanor, and not only dress but how she took her seat" being indicative of an independent thinker; App. Ct. had no idea what P was talking about)





A Ray of Hope... But Don't Forget *Habeas*

- *People v. Reynoso* (2003) 31 Cal. 4th 903
(accepted TC's non-detailed credibility ruling when P's demeanor reason not in record but P's other reason not belied by it)
- NOTE: *Reynoso* can be a helpful decision, but the better practice is to make a demeanor record and have TC give a detailed ruling. Leave no stone unturned.

87

Another Ray of Hope—From the Supremes! *Thaler v. Haynes*

- Sup's upheld TC's crediting of P's race-neutral demeanor reason even when the TC wasn't the judge who was present for voir dire, and therefore couldn't have seen the complained-of demeanor.
- "[T]he best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." (*Id.* (2010) 559 U.S. 43, 49.)

83

Thaler v. Haynes (cont'd)

- While "the trial judge's 'first hand observations' are of great importance[.]" *Batson* does not "hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor." *Id.* at 48-49.
- But Note: *Haynes* involved no evidence in the record that would have undermined the prosecutor's stated reasons.

84



Demeanor-Based Tips & Strategies

- Weave your observations into voir dire record

-*"I realized you were smiling at D. I'm curious as to why?"*
 -*"You seem a little upset with me. Have we met before?"*
 -*"So I noticed you looking around during questioning. Is there something else on your mind besides these proceedings?"*

85

Demeanor-Based Tips & Strategies



- During 2nd Prong, specifically ask TC to tell you whether she/he saw the same thing you did

-*"Did the Court also see that Juror A kept coming in late after the breaks?"*
 -*"Does the Court agree with my observation that Juror A rolled his eyes when the bailiff asked him to take his hat off?"*

86

Demeanor-Based Tips & Strategies

- App. Ct.'s won't consider a reason that you didn't give (and TC can't, either)
 (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083)
- So make sure you give all your reasons
 - But "per se rule of unconstitutionality" per *Douglas* in CA if one of your reasons ends up being judged bad
- Make TC specify its findings—which reasons accepting, and which rejecting
 - To avoid unnecessary remand and clarify record

87



Demeanor-Based Tips & Strategies

- Consider turning chair around and watching panel from minute they walk in until the first 12 are seated in the box

-It might look weird, but panel will think you're conscientious and care who is selected

-You won't miss anything—who is snoozing, who won't let others squeeze past them, who didn't take hat off until admonished, etc.

28

Demeanor-Based Tips & Strategies

- Keep ALL your jury notes—for retained jurors as well as kicked jurors
- BUT NOTE: This shouldn't be needed if you ask to make your record anyway
- If remanded to do Prong 2, you can't rebut prima facie case if you can't remember your reasons (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692)
- AND NOTE: *Foster v. Chatman (supra)*



29

Remedies

(Yes, we're almost done!)



30



The Good, Old-Fashioned Remedies

- *Wheeler*: Dismiss entire panel and start over with new panel
- *Batson*: US Supremes remanded to allow TC to engage in 3-Part Inquiry
- Because opponent "is entitled to a random draw from an entire venire—not one that has been partially or totally stripped of members of a cognizable group" (*Wheeler, supra*, at 282.)
- EXPLICITLY LEFT OPEN possible remedies of:
 - Discharging entire panel and starting over
 - Re-seating the offended juror

31

Wheeler Gone Wild: *People v. Willis* (2002) 27 Cal. 4th 811



But what if the opponent doesn't
want to dismiss the panel?
Opponent holds all the cards...

32

Willis: Wheeler Gone Wild

- Defense attorney purposely violated *Wheeler* b/c didn't like mostly white panel
- Rather than reward defense w/ new panel, TC fined defense attorney \$1500 as an alternate remedy
- (To the chagrin of the higher courts, TC later vacated the sanction order)



33

**Willis: Cal Sup's Expand
Wheeler's Remedies**

- Cal Sup's affirmed use of \$\$ sanctions
- Gave nod to re-seating offended juror
- Hinted ok to give opponent extra peremptories instead of re-seating, if offended juror already gone (dicta)
- THE CATCH: the opponent has to AGREE to the alternative remedy. OPPONENT HOLDS THE CARDS.



**(Incidentally...Here's the Law
on "Pre-Wheeler" Motions...)**

- Where defense complains that the venire is not a representative cross-section of the community and thus moves to challenge it:
- See *People v. Bell* (1989) 49 Cal. 3d 502 (relying extensively on *Duren v. Missouri* (1979) 439 U.S. 357).

95

**Potential State Bar Reporting
Requirements**



96

State Bar Reporting: At Trial

- BP 6086.7(a)(3): TC must report if monetarily sanctions you for \$1000 or more
- BP 6068(o)(3): You must report self w/in 30 days if TC monetarily sanctions you for \$1000 or more

87

State Bar Reporting: On Appeal

- BP 6086.7(a)(2): TC must report if judgment reversed "in whole or in part" b/c of attorney misconduct
- BP 6068(o)(7): You must report self w/in 30 days if judgment reversed "in whole or in part" b/c of misconduct

88

State Bar Reporting: On Appeal cont'd

- Coleman thinks *Wheeler* error means attorney made Jury Trial unfair--and if pretext finding, deceptive; thinks reporting duty.
(JERRY P. COLEMAN, MR. *WHEELER* GOES TO WASHINGTON--THE FULL FEDERALIZATION OF JURY CHALLENGE PRACTICE IN CALIFORNIA 43 (2006))

89

THE END

- DDA Cindy De Silva, San Joaquin County,
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100

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9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN JOAQUIN

11 THE PEOPLE OF THE STATE OF CALIFORNIA,) Case No.: 12-3-456789-1
12)
13 Plaintiff,) PEOPLE'S TRIAL BRIEF:
14) *WHEELER/BATSON* OBJECTIONS
15 vs.)
16 DEFENDANT(S))
17 Defendant(s))

18 POINTS AND AUTHORITIES

19 I. "GROUP BIAS" CHALLENGES AND THE THREE-PART INQUIRY

20
21 In the context of jury selection, "group bias" is the presumption "that certain jurors are biased
22 merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or
23 similar grounds[.]" (*People v. Wheeler*, (1978) 22 Cal.3d 258, 276, *overruled on other grounds by*
24 *Johnson v. California* (2005) 545 U.S. 162.) When trial counsel utilizes a peremptory challenge to
25 excuse a potential juror from the panel based on a pre-conceived notion of "group bias," the trial
26 court will entertain opposing counsel's objection thereto by utilizing a three-part inquiry established
27

1 by *People v. Wheeler*, (1978) 22 Cal.3d 258, and refined in *Batson v. Kentucky*, (1986) 476 U.S. 79,
2 and *Johnson v. California*, (2005) 545 U.S. 162.

3 The first portion of the inquiry consists of the opponent making a prima facie case by showing
4 that the totality of the circumstances raises an inference that counsel’s challenge was unlawfully
5 discriminatory. (*Johnson, supra*, at 168.) If the prima facie case has been made, the court will
6 proceed to the second part of the inquiry, wherein the burden shifts to the challenging party to justify
7 the challenge, showing legally neutral grounds for the attempted exclusion. (*Id.*) Finally, if the
8 challenging party gives an ostensibly neutral justification, “the trial court must then decide...whether
9 the opponent of the strike has proved purposeful racial [or other impermissible] discrimination.” (*Id.*
10 (internal quotation marks and citation omitted).)

11 12 II. THE MAKING OF THE PRIMA FACIE CASE

13
14 The question often arises in the first prong whether the opposing party has made the requisite
15 prima facie case. In establishing “a prima facie case, the moving party should...make as complete a
16 record as possible;” “establish that the persons excluded are members of a cognizable group;
17 and...show [by a totality of the circumstances] that the persons are being excluded because of group
18 association.” (*People v. Fuentes* (1991) 54 Cal.3d 707, 714.) The case of *People v. Scott*, (2015) 61
19 Cal.4th 363, gives a number of factors opposing counsel may point out and a trial court may consider
20 in ruling on whether an appropriate prima facie case has been made:

- 21 -That the “party has struck most or all of the members of the identified group”;
- 22 -That the “party has used a disproportionate number of strikes against the group”;
- 23 -That the party has not engaged in significant questioning of those jurors;
- 24 -“[T]hat the defendant is a member of the identified group”; and
- 25 -That the victim is a member of the group of the majority of the remaining jurors.

26 (*Id.* at 384.) This list is neither exclusive nor mandatory—for example, the case of *Powers v. Ohio*,
27 (1991) 499 U.S. 400, makes clear that the defendant and challenged juror need not share the same

1 classification—but it provides a list of “particularly relevant” evidence that may aid the court in
2 coming to a conclusion on the prima facie case element. (*Scott, supra*, at 384.)

3 Further, the undersigned knows of no published California decision or United States Supreme
4 Court decision declaring that a single peremptory challenge to a single member of a particular racial
5 or other cognizable group, without more, constitutes a valid prima facie case. The Ninth Circuit case
6 of *Williams v. Runnels*, (9th Cir. 2006) 432 F.3d 1102, found a prima facie case was made based on
7 statistics when the prosecutor exercised “three of his first four peremptory challenges to remove
8 African-Americans from the jury[.]” and the record did not sufficiently dispel the inference raised by
9 the statistical disparity (*id.* at 1107-09); however, “three of his first four” is not the same as a single
10 peremptory used to strike a single member. *Williams* provides a list of Ninth Circuit cases finding
11 “that a defendant can make a prima facie showing based on a statistical disparity alone[.]” as a single
12 illegally discriminatory strike would be unconstitutional, but those cases listed most certainly did not
13 find a prima facie case based solely on a single strike. (*Id.* at 1107; *see id.*) Rather, they included
14 finding “an inference of bias where the prosecutor had used five out of six peremptory challenges to
15 strike African-Americans[;...] where four of seven Hispanics and two African-Americans were
16 excused by the prosecutor[;... and] where the prosecutor exercised peremptory challenges to exclude
17 five out of a possible nine African-Americans.” (*Id.* (citations omitted).)

18 Furthermore, the recent California Supreme Court case of *People v. Sanchez*, (2016) 63
19 Cal.4th 411, found no prima facie case was made when “the prosecution had used two of its first eight
20 peremptory challenges to excuse two of the five Hispanic jurors then available for challenge[.]” (*Id.*
21 at 435.) Indeed, the Court stated:

22
23 Exercising two of eight peremptory challenges to excuse two of the five
24 Hispanic prospective jurors then subject to challenge did not itself
25 provide an inference of discriminatory purpose. The prosecution had not
26 excused most or all of the group and did not use a significantly

1 IV. WHAT CONSTITUTES A “COGNIZABLE GROUP”

2
3 California Code of Civil Procedure 231.5, along with California Government Code section
4 11135, propounds the list of classifications upon which a *Wheeler/Batson* challenge may be
5 premised. This list includes classifications such as race, religion, sex, sexual orientation, and age,
6 among other categories. Notably, however, it does not outlaw excluding members who have the trait
7 in question; it simply outlaws prohibiting peremptorily challenging such potential jurors “on the basis
8 of an assumption that the prospective juror is *biased merely because of*” the characteristic in
9 question. (CAL. CODE CIV. PROC. § 231.5 (emphasis added).)

10 Furthermore, the courts have determined that several classifications do not constitute
11 cognizable groups for *Wheeler/Batson* prima facie case purposes, including, as notable examples,
12 people newly residing in the community (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60), and
13 “people of color” as a combined group (*see People v. Davis* (2009) 46 Cal.4th 539; *People v. Neuman*
14 (2009) 176 Cal.App.4th 571). With regard to the latter, an opposing attorney may not simply object
15 based on the fact or the argument that the challenging attorney has attempted to excuse “people of
16 color” or a few individuals of different and varying ethnic or racial backgrounds, and have the trial
17 court rule that such has satisfied the prima facie case element; such does not a prima facie case make.

18
19 V. GIVING THE TRIAL ATTORNEYS SUFFICIENT TIME TO CONDUCT VOIR DIRE

20
21 Of course, a trial court judge has the ability to restrict attorney-conducted voir dire time in its
22 goal of facilitating an orderly trial, as witnessed in California Code of Civil Procedure section 223
23 (*see id.* (allowing the trial judge to set “reasonable limits” on attorney-conducted voir dire, so long as
24 such limits are otherwise consistent with that code section). However, because one of the factors a
25 court may consider in terms of determining whether a peremptory challenge was exercised based on
26 unlawful discrimination is the extent to which the challenging attorney engaged in meaningful
27 questioning of the potential juror (*see, e.g., Snyder v. Louisiana* (2008) 552 U.S. 472, 481 (noting, in

1 eventually finding a discriminatory purpose, that “the prosecution did not choose to question [the
2 challenged juror] more deeply about this matter” that the prosecution later claimed caused it
3 concern)), the trial attorneys should be given adequate time in order to engage in such questioning.

4 This truism has been highlighted by both the California Supreme Court as well as a recent
5 amendment to the California Code of Civil Procedure by the Legislature. On January 1, 2018, an
6 amendment to section 223 went into effect based on 2017’s AB 1541, and the law now specifies that
7 “[t]he trial judge shall not impose specific unreasonable or arbitrary time limits or establish an
8 inflexible time limit policy for voir dire.” It further clarifies, “[a]s voir dire proceeds, the trial judge
9 shall permit supplemental time for questioning based on individual responses or conduct of jurors
10 that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the
11 particular case.” (CAL. CODE CIV. PROC. § 223). This amendment ultimately followed in time the plea
12 by the California Supreme Court in the case of *People v. Lenix* to trial courts: “If the trial court
13 truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn
14 based on the advocate’s perceived failure to follow up or ask sufficient questions.” (*People v. Lenix*
15 (2008) 44 Cal.4th 602, 625.)

16 Therefore, the People respectfully request some latitude with regard to time to conduct voir
17 dire, consistent with *Lenix* and the 2018 amendment to section 223 of the California Code of Civil
18 Procedure, especially when a situation appears to be developing wherein the established time limits,
19 if any, do not seem to be giving enough time for follow-up questioning based on answers or conduct
20 that call for more dialogue.

21
22 Dated: _____

Respectfully Submitted,

23 TORI VERBER SALAZAR, DISTRICT ATTORNEY
24 COUNTY OF SAN JOAQUIN, STATE OF
CALIFORNIA

25 By:

26
27 _____
Cynthia A. De Silva
Deputy District Attorney

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"The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin."



SAY NO EVIL
Gang Prosecution &
The Racial Justice Act

Sophia Roach & Sherry Thompson-Taylor

1

Take out your phone!
TEXT
"TACCOUNT100"
TO 37607

2

Racial Justice Act Violations

- PC 745(a)(1) EXHIBITION OF BIAS
 - By CJ player involved in case
 - DUE TO RENO
- PC 745(a)(2) DISCRIMINATORY LANGUAGE OR EXHIBITION OF BIAS
 - During trial, in court & during proceedings
 - By CJ player involved in case
 - Used racially discriminatory language about RENO of D (Exceptions ID and quotes)
 - Exhibited bias or animus due to race purposeful or not
- PC 745(a)(3-5) DISPARATE CHARGES OR SENTENCE BASED ON RENO
 - Compares those similarly situated of different RENOS
 - Requires more serious charges or more severe or longer sentence

PROVIDES FOR REMEDIES
FOR CONSCIOUS OR UNCONSCIOUS BIAS

3



<p>Race Any one of the groups that humans are often divided into based on physical traits regarded as common among people of shared ancestry.</p>
<p>Ethnicity The fact or state of belonging to a social group that has a common national or cultural tradition.</p>
<p>National Origin Birthplace, Ethnicity, Culture & Ancestry.</p>

4

Biology recognizes one race: Human
Race is a social construct we use to define perceived heritage or culture



Asian *48

Black *54

White *44

5

Hispanic: a person of Latin American (all of the Americas south of the US) descent and especially of Cuban, Mexican, or Puerto Rican origin living in the U.S. or a person from Spain or of Spanish descent.

Latino/a/x: a native or inhabitant of Latin America or a person of Latin American origin living in the U.S.

Chicano/a/x: an American of Mexican descent.

Mexican: a native or inhabitant of Mexico or of Mexican descent.



Ethnicity

6

Racial Justice Act

PC 745(a)(1)

The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's RENO.

7

BIAS

A natural inclination for or against an idea, object, group, or individual.

Categorization of and preference for people based on "identity" is a fundamental and automatic process of the brain.

8

Prosecutorial Bias

•The Bad News

- We continue to see multiple observational studies that show disparities in issuing and sentencing based on race.
- We are not bias free.
- Our own biases are compounded by biases of witnesses, victims, & officers before we issue a case.
- After issuance, biases of defense counsel, judges, and jurors compound the problem further.

•The Good News

- U of A study indicates prosecutors not a substantial source of bias in a controlled study on case issuance and disposition.
- We can work against bias.

9

Avoiding Bias in Case Issuance

- **Case Issuing**
 - Use guidelines and/or consistent factors
- **Make a clear written record**
 - Detail rationale for any deviations
 - Watch your language: RENO, gender, poverty, joblessness, status etc...
 - Don't include race unless necessary to ID or elements
 - Don't editorialize, write as if your notes are discoverable

10

Avoiding Bias in Settlement

- Be aware of office disposition policies
- Make a clear written record of offers that deviate from guidelines
 - Use sentencing factors
 - Detail rationale for any deviations
- Chambers/Video Conferences
 - Do not refer to RENO unless relevant: ELEMENTS, ID, MOTIVE
 - Casual, even unintentional remarks can lead to RJA violations
 - Do not make fun of people's names
 - Beware of and report concerning judicial or defense conduct to supervisors
 - Alert co-workers to possible unintentional violations
 - Let's protect each other and put down our defenses!

11

Choose your written words wisely!

- **Motions and Other Documentation**
 - Don't include RENO unless necessary
- Two BMAs attempt to rob business claiming to have a gun.
 - Defendants attempt to rob business claiming to have a gun.
- D is dirtbag, residing in a parolee, dirtbag motel.
 - D is serial offender. (If relevant: residing at the Relax Inn on ECB.)
- Co-D has previously been identified as his "bottom bitch" and his "enforcer."
 - Co-D identified by V's as assisting D in recruitment, advertising and enforcement of other prostitutes working under her.
- BP Agent followed van driving in suspicious manner and in his experience was possibly transporting illegals.
 - BP Agent followed van driving in suspicious manner and in his experience possibly transporting unauthorized immigrants.

12

Avoiding Bias in Trial: Voir Dire

- **Employ a Presumption of Fitness**
- **Rethink the goal of voir dire: All about TRUST**
- **The problem with your GUT!**
 - It is often code for bias
 - Will not save you from RJA, 3070, Wheeler or Juror Mis!rust!
 - There are legal mechanisms for dealing with rogue jurors
- **Why practice inclusivity?**
 - Jurors like a fair DA, change the dynamics of exclusion
 - It's the law
- Distinguish your use of gang names from neighborhoods
- Practical Concern: documenting RENO



13

Avoiding Bias in Trial: Opening & Exam

- RJA prohibits certain language, some physical descriptions and non-essential references to race (More on this later!)
- Watch out for questionable THEMES.
- Moderate your tone. Be a provider of fact and evidence and avoid getting overly emotional or using inflammatory language or a highly accusatory tone.
 - Most gang cases are serious! The facts will speak for themselves.
 - Accusatory tone is out of place in a non-serious case and can disadvantage you with jurors.
- Try not to take things personally with hostile witnesses, your professionalism will pay off.

14

Avoiding Bias in Trial: Closing Argument

- Lean into your RELEVANT facts!
- Avoid prohibited language.
- Only refer to RENO if relevant to Elements, ID, Motive.
- Do not use themes or quotes unless completely neutral.
- Learn to use PEOPLE FIRST language:
 - Person with a conviction vs Felon
 - Young man in a gang vs gangster
 - Neighborhood affected by crime vs crime ridden neighborhood
- Don't dehumanize, use names.
- Save the anger!

15

Sentencing

- Remember: While we have a duty to ensure victim rights, we have a constitutional mandate to apply equal protection under the law.
- Make sure that YOU are not the problem...
 - Just because a case is yours does not mean that it needs to be sentenced more harshly. This could lead to unintentional, yet harmful, disparities between cases.
- GANG prosecutors should be aware of what is going on in general unit prosecutions to make sure that disparities can be attributed to:
 - specific conduct allegations: priors, gang, hate crime, and drug weight allegations
 - special victim allegations: age, capacity, employment
- Use the sentencing factors, they are race neutral!
- Watch for language and tone.

16

ANIMUS

Strong dislike, ill will, or enmity that tends to display itself in action.

Belief that people of another race are not like you, cannot be trusted, and do not deserve what you deserve.

17

REAL LIFE: Exhibition of Bias/Animus

- Gang Det. writes police report where RENO of suspects is referenced four times in the summary.
- Drafts search warrant where RENO of suspects is unnecessarily referenced in the body.
- Presents case, they tell you it's an "NHI" case.
- Testifies the defendant is a member of MS-13 which they describe as a particularly violent due to the corrupt and violent countries from which members hail.

18

PROHIBITED LANGUAGE

Racially charged or coded language:

Super Predator, Predator, Thug, Urban, Ghetto, Welfare Mom, Trap Queen, Spade, Gypped, Svengali, Shyster, Macho, Illegal*, etc...

Animals:

Gorilla Pimp, Bottom Bitch, Coyote, Snake, Dog, Hood Rat, etc...

Avoid us-them-they language

Different World, Street Justice, Local Woman, Outsiders, Foreigner, Those People, Quiet Community, Not From Here

Avoid descriptors demeaning entire communities

Inner City, Crime Ridden, Gang Infested, Jungle, Ghetto, Barrio*, Hood, Wrong Side of Town, High Crime, Low Income

22

Stay Away From Animal Attributes

Animal, ape, barbaric, beast, bellow, brute, claw, collar, crawl, crouch, feral, flush, hairy, howl, hunt, husky, jungle, monster, net, pack, pounce, predator, prey, prowl, savage, scamper, scratch, slaughter, spring, stalk, stampede, swarm, tail, tame, trap and wild.

23

The Gang Name Trap

Beware of using common terms that are not actually used by the gang itself or if considered pejorative, think about asking about the name one with the expert then using a common acronym to avoid repeating the concerning term.

Italian Mafia	Cosa Nostra or Our Thing
Mexican Mafia	Eme
Aryan Brotherhood	AB, The Brand
Oriental Killer Boys	OKB

24

RJA and Gang Experts

- Discuss renaming LE/DA gang teams
 - Numeric vs Racial Assignment
 - I am assigned to Gang Team 1 or South Eastern Division Gang Team vs Hispanic gangs, Black gangs, White gangs...
 - I am responsible for investigating Asian Gangs vs. I am responsible for investigating the following gangs/area ...
- Talk about Operation names! (*People v Vue*)
- Discuss all potential RENO dynamics in case.
- Consider if relevant and necessary, and then how to discuss in compliance with the RJA.
- Caution against casual conversation that could be interpreted as violative of the RJA.

25

REAL LIFE Racially Discriminatory Language

- V describes suspect as wearing "Cholo pants" in BWC interview.
- V recants at trial, DDA redacts unnecessary term "Cholo pants" from BWC statement to avoid RJA.
- Judge says he doesn't care about RJA and ordered DDA to include "Cholo pants."

26

What are the possible RJA violations or exceptions?

27

Racially Neutral Identification

•Language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, language that references the defendant's physical appearance, culture, ethnicity, or national origin.

Exceptions

- Repeating relevant descriptions of others
- Relevant racially neutral and unbiased physical description

28

Why do we use race anyway?

Shortcut for: Skin tone, hair/eye color, features, ethnicity, national origin, ancestry.

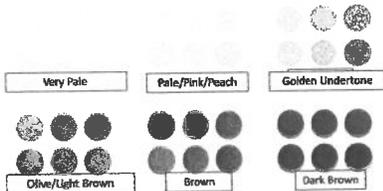
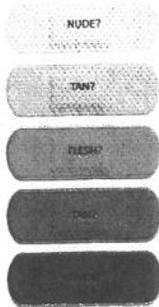


Usually, we are guessing.

29

Trial: Identification

SKIN TONES



30

Tips for Race Neutral ID

- Talk to the officer/expert witnesses before trial!
 - Use photos or in court ID
- Never compare to "normal" or "usual"
- Can you describe the person you saw?
 - NO: Black with nappy* hair
 - YES: Dark brown skin and short tightly curled black hair
 - NO: Greasy looking Hispanic male
 - YES: Male with light brown skin and dark, oily hair

31

**REAL LIFE
Racially Neutral Identification**

In a SW affidavit and at trial, an officer provides the following description of the suspects:

Witness said that Jones had random individuals, who he described as "gang looking people", coming and going from the house at all hours of the night. Witness said last night, they observed two Black "thug" looking males enter the house and meet with Jones. Witness was asked to clarify what was meant by "gang" and "thug" looking and explained the two males were wearing baggy dark clothing.

32

Explain how this SW affidavit or trial testimony by the officer complies with or violates the RJA?

33

Take Aways

- NO RENO unless relevant to Elements, ID, or motive.
- We can and should reduce unnecessary references to RENO in SW affidavits, so long as it does not affect PC.
- We should not introduce prohibited language unless necessary and permitted by a defined exception.
- We should talk to LE ahead of testimony to discuss the best way to approach a racially neutral ID
- We should train LE to:
 - Understand and comply with the RJA
 - Ask individuals to define their own RENO for documentation.
 - Use "apparently" when not self defined
 - Clarify what is meant when witnesses use prohibited language and designate with quotes

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Questions?

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AB 3070 – New Jury Voir Dire & Wheeler-Batson Rules

Effective January 1, 2022

AB 3070 is new jury selection (*voir dire*) legislation that goes into effect in 2022. It codifies some *Wheeler-Batson*¹ precedent, but also goes much further by eliminating the *prima facie* showing, creating a new objective standard that incorporates implicit bias, abolishing the requirement for purposeful discrimination, creating a list of presumptively invalid reasons, and instituting a “clear and convincing” standard to overcome the presumption. The legislation is based on a recently enacted Washington State court rule, but goes much farther.

The goal of the legislation is laudable: “to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.” AB 3070 contains the following “intent of the Legislature” language:

- Peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, etc.
- Current framework disproportionately harms African Americans, Latinos, and other people of color, and has failed to eliminate discrimination.
- Requiring proof of intentional bias renders the current procedure ineffective as many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes or otherwise based on unlawful discrimination.

AB 3070 includes the following significant elements and changes from existing law/practice:

- Eliminates the first prong of *Wheeler-Batson* precedent by no longer requiring a *prima facie* showing.
 - “Upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge **shall** state the reasons the peremptory challenge has been exercised.” (CCP § 231.7(c), emphasis added.)
- Expressly states that the court need not find purposeful discrimination, upending decades of decisional law to the contrary.
 - Creates a new standard where an “objectively reasonable person” would view race, etc. as a “factor” in the peremptory challenge [“If the court determines there is a **substantial likelihood** that an objectively reasonable

¹ *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79

person would view race [etc.] as a factor in the use of the peremptory challenge, then the objection shall be sustained.”] (CCP § 231.7((d)(1), emphasis added.)

- “Substantial likelihood” means more than a mere possibility but less than a standard of more likely than not. This would permit a court to find a challenge improper even when the judge determines it is more likely than not that there was no discrimination.
 - Defines “objectively reasonable person” as someone who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors. Unconscious bias includes implicit & institutional bias
- Creates a list of presumptively invalid reasons, including many common sense reasons that seem legitimate on their face (expressing a distrust of or having a negative experience with law enforcement, having a close relationship with a criminal, dress/attire/appearance, employment in certain fields, etc.).
 - Requires the court to verify juror physical behavior (inattentive, failing to make eye contact, etc.) if that is a stated reason; unless corroborated by the judge, it is presumptively an invalid reason.
 - Establishes a burden of “clear and convincing evidence” to overcome the presumption referenced above.
 - Prevents a court from considering its own observations or reasons not articulated by the prosecutor (“The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications.”)
 - Codifies comparative analysis and disparate questioning as tools that the court should use when ruling on an objection (this is essentially already law in California, at least for appellate review).
 - Allows for an objection after jeopardy has attached [“The objection shall be made before the jury is sworn, *unless information becomes known that could not have reasonably been known before the jury was impaneled.*”] (CCP § 231.7(b).)



Assembly Bill No. 3070

CHAPTER 318

An act to add, repeal, and add Section 231.7 of the Code of Civil Procedure, relating to juries.

[Approved by Governor September 30, 2020. Filed with Secretary of State September 30, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3070, Weber. Juries: peremptory challenges.

Existing law provides for the exclusion of a prospective juror from a trial jury by peremptory challenge. Existing law prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of the sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation of the prospective juror, or on similar grounds.

This bill would, for all jury trials in which jury selection begins on or after January 1, 2022, prohibit a party from using a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups. The bill would allow a party, or the trial court on its own motion, to object to the use of a peremptory challenge based on these criteria. Upon objection, the bill would require the party exercising the challenge to state the reasons the peremptory challenge has been exercised. The bill would require the court to evaluate the reasons given, as specified, and, if the court grants the objection, would authorize the court to take certain actions, including, but not limited to, starting a new jury selection, declaring a mistrial at the request of the objecting party, seating the challenged juror, or providing another remedy as the court deems appropriate. The bill would subject the denial of an objection to de novo review by an appellate court, as specified. The bill would, until January 1, 2026, specify that its provisions do not apply to civil cases.

The people of the State of California do enact as follows:

SECTION 1. (a) It is the intent of the Legislature to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national

origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.

(b) The Legislature finds that peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination. In particular, the Legislature finds that requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.

(c) It is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.

SEC. 2. Section 231.7 is added to the Code of Civil Procedure, to read:

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d) (1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court

need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2) (A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a “substantial likelihood” means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, “unconscious bias” includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated

to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g) (1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) This section shall not apply to civil cases.

(l) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(m) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(n) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.

SEC. 3. Section 231.7 is added to the Code of Civil Procedure, to read:

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d) (1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2) (A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a "substantial likelihood" means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, "unconscious bias" includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious

affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g) (1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(l) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(m) This section shall become operative January 1, 2026.

Code of Civil Procedure

C.C.P. 197
(Amended)
(Ch. 230) (SB 592)
(Effective 1/1/2021)

Expands the list of potential trial jurors beyond the Dep't of Motor Vehicles (DMV) and voter registration databases, to also include the list of resident state tax filers. Requires the Franchise Tax Board to annually furnish the jury commissioner of each county with a list of resident state tax filers for that county, starting on November 1, 2021. Defines "list of resident state tax filers" as a list that includes the name, date of birth, principal residence address, and county of principal residence of persons who are 18 years of age or older and have filed a California resident income tax return for the preceding taxable year. Provides that beginning January 1, 2022, the list of resident state tax filers, the list of registered voters, and the DMV list of licensed drivers and identification cardholders shall be considered inclusive of a representative cross section of the population

According to the legislative history, the purpose of the bill is to expand jury pools so that they are more representative of the community. The legislative history claims that "California's justice system consistently fails ... to produce potential jury pools that are truly representative of the community" and claims that obtaining jurors only from DMV and voter databases tends to produce jurors who "appear to be more affluent and whiter than the general population of California."

[This bill also creates new Revenue & Taxation Code 19548.4 and 19585 to require the Franchise Tax Board to furnish each jury commissioner with that county's list of resident state tax filers, and to revise the California resident income tax return to include a space for the taxpayer's principal residence address and county of principal residence.]

C.C.P. 231.7
(New)
(Ch. 318) (AB 3070)
(Effective 1/1/2021)
(Operative 1/1/2022)

Overview

Adds new provisions changing the system for claims of bias in the exercise of peremptory challenges, by creating a list of reasons that are presumptively invalid, by eliminating the requirement that objecting counsel make a prima facie case of discrimination, and by providing that the court need not find purposeful discrimination in order to find a peremptory challenge improper. These changes apply to all jury trials in criminal cases in which jury selection begins on or after

continued

January 1, 2022. Provides that the new rules will apply to civil cases beginning January 1, 2026.

This bill makes major changes to peremptory challenge procedures that have long been in place pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, *People v. Wheeler* (1978) 22 Cal.3d 258, and their progeny.

Prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of the juror's race, ethnicity, gender, gender identity, sexual orientation, nation origin, religious affiliation, or the perceived membership of the prospective juror in any of these groups.

[Existing C.C.P. 231.5 prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of an assumption that the juror is biased merely because of a characteristic listed in Gov't Code 11135 (sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation).]

Who May Object to a Peremptory Challenge

Permits a party, or the trial court on its own motion, to object to the improper use of a peremptory challenge.

Timing

Requires that an objection to a peremptory challenge be made before the jury is sworn, *unless* "information becomes known that could not have reasonably been known before the jury was impaneled."

[This is contrary to long-standing California Supreme Court precedent. Existing law requires that an objection to a peremptory challenge be made *before* the jury is sworn. (*People v. Cunningham* (2015) 61 Cal.4th 609, 662, citing *People v. Howard* (1992) 1 Cal.4th 1132, 1154 and *People v. Thompson* (1990) 50 Cal.3d 134, 179.)]

Making the Objection and Stating Reasons For a Challenge

Provides that when an objection is made to a peremptory challenge, the party exercising the challenge must state the reasons the challenge was exercised. Does **not** require the

continued

objector to make a prima facie case of discrimination. The objection itself triggers the requirement to state the reasons for the peremptory challenge.

[Existing law requires the objector to make a prima facie case of discrimination, and if successful, the burden then shifts to opposing counsel to explain why the challenge is not discriminatory.]

Evaluating an Objection to a Peremptory Challenge

Requires the trial court to evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. Requires the court to consider only the reasons actually given and prohibits the court from speculating on, or assuming the existence of, other possible justifications.

If the court determines there is a substantial likelihood that an “objectively reasonable person” would view race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or perceived membership in any of these groups as a factor in the peremptory challenge, the objection must be sustained, **even if** the court does not find purposeful discrimination. Specifically provides that, “The court need not find purposeful discrimination to sustain the objection.”

Requires the court to explain the reasons for its ruling on the record.

Provides that an “objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.”

Provides that “unconscious bias” includes implicit and institutional biases.

Defines “substantial likelihood” as “more than a mere possibility but less than a standard of more likely than not.” [This low standard permits the innocent exercise of a peremptory challenge that is **not** discriminatory to be found improper, because it permits a court to find a challenge improper even when the judge determines it is more likely than not that there was **no** discrimination.]

continued

Circumstances the Court May Consider

Provides that the court may consider a number of factors in determining whether a peremptory challenge is discriminatory, including, but not limited to:

1. Whether any of the following circumstances exist:
 - (a) The objecting party is a member of the same perceived cognizable group as the challenged juror.
 - (b) the alleged victim is not a member of that perceived cognizable group
 - (c) witnesses or the parties are not members of that perceived cognizable group.
2. Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.
3. The number and types of questions posed to the prospective juror, including, but not limited to, any of the following:
 - (a) Consideration of whether the party exercising the peremptory challenge failed to question the juror about the concerns later stated as a reason for the challenge.
 - (b) Whether the party exercising the challenge engaged in cursory questioning of the challenged juror.
 - (c) Whether the party exercising the challenge asked different questions of the challenged juror in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic, or whether the party phrased those questions differently.
4. Whether other prospective jurors, who are not members of the same cognizable group as the challenged juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

continued

5. Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or perceived membership in any of those groups.
6. Whether the reason given by the party exercising the challenge was contrary to or unsupported by the record.
7. Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, C.C.P. 231.5, or this new section.

[Note that pursuant to the first part of this circumstance, the mere exercise of the challenge in the past could be considered, even if there was nothing improper or discriminatory about it. And no definition of "disproportionate" is provided.]

Reasons For Peremptory Challenges That Will Be Presumed to Be Invalid

Lists a number of reasons for peremptory challenges that will be presumed to be invalid, unless the party exercising the challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as **unrelated** to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, nation origin, religious affiliation, or perceived membership in any of these groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case. A list of the 13 reasons that will be presumed invalid:

1. Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.
2. Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
3. Having a close relationship with people who have been stopped, arrested, or convicted of a crime.
4. A prospective juror's neighborhood.
5. Having a child outside of marriage.

continued

6. Receiving state benefits.
7. Not being a native English speaker.
8. The ability to speak another language.
9. Dress, attire, or personal appearance.
10. Employment in a field that is disproportionately occupied by members listed in any of the cognizable groups or that serves a population disproportionately comprised of members of a cognizable group.
11. Lack of employment or underemployment of the prospective juror or prospective juror's family member.
12. A prospective juror's apparent friendliness with another prospective juror of the same cognizable group.
13. Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror in order for a peremptory challenge relying on this justification to be considered presumptively invalid.

[Note how one-sided these presumptively invalid reasons are. The challenge by a prosecutor of a juror who has had a negative experience with, or distrusts, law enforcement is presumptively invalid, but this rule does not apply to a defense attorney who exercises a peremptory challenge against a juror who has had a positive experience with, or trusts, law enforcement.]

Defines "clear and convincing," which is the standard for overcoming a presumption that a reason for a peremptory challenge is not valid:

Clear and convincing refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

continued

Additional Presumptively Invalid Reasons for Peremptory Challenges That Have Historically Been Associated With Improper Discrimination in Jury Selection and That Must Be Observed By the Court or Objecting Counsel

Lists the following reasons for peremptory challenges that have historically been associated with improper discrimination:

1. The prospective juror was inattentive, or staring, or failing to make eye contact.
2. The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
3. The prospective juror provided unintelligent or confused answers.

Provides that these three reasons are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or on the observations of counsel for the objecting party (i.e., the attorney who is objecting to the exercise of the peremptory challenge.) Even if the behavior is confirmed, the attorney offering one of these reasons for a challenge must "explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions *matters to the case to be tried.*" (Emphasis added.)

Remedies

Provides that when a judge finds that a peremptory challenge was exercised improperly, the court shall do one or more of the following:

1. Quash the jury venire and start jury selection anew. (Requires that this remedy be provided if requested by the objecting party.)
2. If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.
3. Seat the challenged juror.
4. Provide the objecting party additional challenges.
5. Provide another remedy as the court deems appropriate.

Appellate Review

Sets forth how the denial of an objection to a peremptory challenge shall be reviewed by an appellate court by providing that review shall be de novo, with the trial court's

continued

express factual findings reviewed for substantial evidence. Prohibits the appellate court from imputing to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. Requires the appellate court to consider only reasons actually given for a peremptory challenge and prohibits the court from speculating as to, or considering, reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who were not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. *Provides that if the appellate court determines that the objection was erroneously denied, the error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.*

Opponents of this bill pointed out a number of things, including these:

1. The bill is premature. The California Supreme Court Chief Justice appointed members of a working group in early 2020 to undertake a thoughtful and inclusive study of how jury selection operates in practice in California. This group has not yet finished its work or made public any findings.
2. The bill infers ill intent, and mandates evidentiary presumptions, without any basis or evidence.
3. The bill may be unconstitutional by creating a list of challenges that are intentionally and clearly tailored to make it difficult for the prosecution to excuse jurors, but not the defense. Skewing challenges in this way destroys the balance needed for a fair trial as required by due process and by Section 29 of Article One of the California Constitution, which provides that in a criminal case, "the people of the State of California have the right to due process of law and to a speedy and public trial."

C.C.P. 340.16
(Amended)
(Ch. 246) (AB 3092)
(Effective 1/1/2021)

Revives time-barred claims for damages resulting from sexual assault that was committed between January 1, 1983 and January 1, 2019 by a physician employed by or associated with the University of California at Los Angeles (UCLA). Even if the statute of limitations has expired, a civil suit is permitted to be brought for sexual assault or other inappropriate contact, communication, or activity of a sexual

continued



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

Surviving *Wheeler* A Live Demonstration

Cindy DeSilva
Deputy District Attorney
San Joaquin County

WHEELER/BATSON: A SUMMARY

By Cindy De Silva
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County of San Joaquin
December 2019

1

What Is a “Wheeler/Batson” Objection Based On?

- **“Group Bias”**: The presumption “that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]”
– (*People v. Wheeler* (1978) 22 Cal.3d 258, 276.)

2

The Tripod and the Three-Part Inquiry



- *People v. Wheeler* (1978) 22 Cal.3d 258
- *Batson v. Kentucky* (1986) 476 U.S. 79
- *Johnson v. California* (2005) 545 U.S. 162
- **Prong 1**: Opponent must make prima facie case that totality of circumstances raises an inference of discriminatory kick
- **Prong 2**: Burden shifts to proponent to give permissible reasons
- **Prong 3**: Trial Court decides whether opponent has proven discriminatory purpose

3

Prong 1: What Makes a Good "Prima Facie Case"?

- *People v. Scott* (2015) 61 Cal. 4th 363, 384, lists the following "particularly relevant" evidence:
 - That the "party has struck most or all of the members of the identified group";
 - The "party has used a disproportionate number of strikes against the group";
 - The party has not engaged in significant questioning of those jurors;
 - D is a member of the identified group; and
 - V is a member of the group of the majority of the remaining jurors
- See also *P v. Fuentes* (1991) 54 Cal.3d 707 (but overturned re: "strong likelihood" language)

4

Prong 1: Cognizable Groups

- **UPDATED 2016 CCP 231.5/GC 11135:** Race, color, ancestry, national origin, ethnic group identification, religion, sex, sexual orientation, medical condition, age, marital status, mental disability, physical disability, genetic information (GC 12926)
- **NOT People Newly Residing** in the community (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60)
- **NOT "People of Color"** as a combined group (*People v. Davis* (2009) 46 Cal.4th 539, *People v. Neuman* (2009) 176 Cal.App.4th 571)

5

Prong 2: Reasons, Comparative Analysis, Statistics, Etc.

- *Miller-El v. Dretke* (2005) 545 U.S. 231:
 - Statistics
 - Disparate Questioning
 - Comparative Analysis
 - Notations on Post-Its
 - Past DA's Office Practice
 - Cumulative Weight of All-of-the-Above

6

Prong 3: "Sincere and Reasoned Attempt"

- *People v. Hall* (1983) 35 Cal.3d 161, 167
- Third Prong is a credibility determination
- It "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the proffered race-neutral reason (*id.* at 167)

7

Prong 3: "Demeanor" Reasons and How They Figure Into Credibility

- When otherwise belied by the record and demeanor not in record, we tend to lose. (See, e.g., *People v. Silva* (2001) 25 Cal.4th 345; *Snyder v. Louisiana* (2008) 552 U.S. 472)
- When demeanor reason vague & non-sensical, we lose. (See, e.g., *People v. Allen* (2004) 115 Cal.App.4th 542, 546)
- When demeanor not in record or not seen by judge but nothing belies us, we can win. (See, e.g., *People v. Reynoso* (2003) 31 Cal.4th 903; *Thaler v. Haynes* (2010) 559 U.S. 43)

8

Mechanics of the Motion



- Consider Limine/Trial Brief (see materials)
- Best Practice: "Objection, may we approach?"
- Hearing: outside jury's presence
- Either P or D can make motion (*Georgia v. McCollum* (1992) 505 U.S. 42)
- D need not share same classification as kicked juror(s) (*Powers v. Ohio* (1991) 499 U.S. 400)
- Reasons: NEVER ex parte! (See *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254; *Davis v. Ayala* (2015) 576 U.S. ___, 135 S.Ct. 2187)

9

Remedies at Voir Dire Level

- **Traditional Wheeler:** dismiss entire panel and start over fresh
- **Batson:** simply remanded for TC to conduct 3-Part inquiry, but specifically left open the possibility of:
 - Traditional Wheeler
 - Re-seating offended juror
- **People v. Willis (2002) 27 Cal.4th 811:** If opponent agrees...
 - Monetary sanctions
 - Re-seat offended juror (dicta)
 - Give opponent extra peremptories (dicta)

10

Potential State Bar Reporting

- | | |
|--|--|
| <p><u>At Trial</u></p> <ul style="list-style-type: none">■ If monetarily sanctioned \$1000 or more:■ BP 6086.7(a)(3): TC must report you■ BP 6068(o)(3): You must report yourself within 30 days | <p><u>After Losing on Appeal</u></p> <ul style="list-style-type: none">■ If judgment reversed "in whole or in part" b/c of attorney misconduct:■ BP 6086.7(a)(2): TC must report you■ BP 6068(o)(7): You must report yourself within 30 days |
|--|--|

11

But...is Wheeler/Batson violation "attorney misconduct"???

- Retired SFDDA Jerry Coleman thinks so!
- But...did a recent case in a different Wheeler context foreshadow something?
- "We use the term 'prosecutorial error' rather than the at times misleading term 'prosecutorial misconduct,' because we are not concerned with the prosecutor's culpable mental state, but with the lawfulness of the reasons given for exercising the peremptory challenges." (*People v. Douglas* (2018) 22 Cal.App.5th 1162, n.6 at 1176)
- Be on the safe side: report self until we know for sure.

12

Thank you!

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Skit #1: Basic Scenario, Done Poorly

(Skipping Prong 1, Prima

Facie Case)

NARRATOR (TBD): *This is a felony VC 10851 case wherein the defendant is black and the victim is white. The prospective panel includes 100 potential jurors, and both sides get 10 peremptories. The defense has kicked off 5 potential jurors, including 4 whites and 1 Asian-American. The prosecution has kicked off 3 potential jurors, including 1 Latina, 1 white, and 1 black. The black potential juror is the one upon whom the defense is objecting. The audience appears to contain 4 more black potential jurors, and 30 more potential jurors of backgrounds other than strictly white or black. The rest appear to be white.*

DEFENSE (TBD): Objection!

JUDGE (PAT): Juror #3, please don't leave yet; I'd like to have all potential jurors go out into the hallway while I handle a matter in here with counsel. [brief pause] Ok counsel; I presume this is a *Wheeler/Batson* objection?

DEFENSE (TBD): Yes.

JUDGE (PAT): Ms. De Silva, what do you have to say about this?

PROSECUTOR (Cindy): Judge, I did not kick Juror #3 because he's black. I kicked him because he didn't seem interested in this case; he looked to me like he was falling asleep!

Pat (as Technical Coordinator): *What was done well in this scene, and what was done poorly?*

- Done well: objection without saying "*Wheeler/Batson*"
- Done well: clearing the courtroom of jurors before proceeding
- Done poorly: defense not making a prima facie case
- Done poorly: judge not asking defense to make a prima facie case
- Done poorly: prosecutor not asking judge to make defense make prima facie case, jumping straight into her defense and therefore waiving Prong 1 for appellate purposes

Skit #2: Basic Scenario, Done Well

(Prosecutor Insisting on

Prong 1, Prima

Facie Case)

NARRATOR (TBD): *This is a felony VC 10851 case wherein the defendant is black and the victim is white. The prospective panel includes 100 potential jurors, and both sides get 10 peremptories. The defense has kicked off 5 potential jurors, including 4 whites and 1 Asian-American. The prosecution has kicked off 3 potential jurors, including 1 Latina, 1 white, and 1 black. The black potential juror is the one upon whom the defense is objecting. The audience appears to contain 4 more black potential jurors, and 30 more potential jurors of backgrounds other than strictly white or black. The rest appear to be white.*

DEFENSE (TBD): Objection!

JUDGE (PAT): Juror #3, please don't leave yet. All prospective jurors, we're going to have you go into the hallway while I handle a matter with the attorneys in here, ok? Thank you. [brief pause] Counsel, I take it this is a *Wheeler/Batson* objection?

DEFENSE (TBD): Yes.

JUDGE (PAT): Ms. De Silva? Your response?

PROSECUTOR (Cindy): Judge, I don't believe the defense has made a prima facie case.

JUDGE (PAT): Yes he has. Juror #3 is black.

PROSECUTOR (Cindy): Judge, that's not a prima facie case, and in any event the defense hasn't asserted that as their reason. According to both *Wheeler* and *Batson* as clarified by *Johnson*, the opponent of the strike *must* make a prima facie case that the totality of the circumstances raises an inference of a discriminatory purpose in challenging the juror. The defense has said literally nothing to support their assertion; they've simply said, "Objection."

Furthermore, I'd point out at least two cases that illustrate the types of things the defense should be pointing out to make their prima facie case: *People v. Fuentes* and *People v. Scott*. Those cases run through a number of things the defense should be showing or can show in support of their burden, none of which the defense here has even attempted to show.

In order for this Prong not to be deemed moot on appeal, I would like the defense to be put to their burden.

JUDGE (PAT): Ok, Mr. McGrath, why do you think Ms. De Silva challenged Juror #3 based on an improper reason?

DEFENSE (TBD): Well, Judge, my client is black, and Juror #3 is black. Juror #3 is only the third prospective juror she has kicked off, and the very first black person that came up, she kicked.

JUDGE (PAT): Well, Mr. McGrath, it's a judgment call, but I think I tend to agree...this isn't a prima facie case. I would note that Juror #3 is indeed the very first black person to come up, as no one else currently in the box is black, though there appear to be a few black people in the greater audience...but I just don't find a prima facie case based on these facts.

PROSECUTOR (Cindy): Thank you, Judge. In an abundance of caution, may I please put my reasons for kicking Juror #3 on the record, for appellate purposes?

JUDGE (PAT): Of course.

PROSECUTOR (Cindy). Thank you. For the record, I did not challenge Juror #3 due to his apparent race; I challenged him because he appeared extremely disinterested in the case. I watched him as he walked in earlier, and he was chewing gum and appeared annoyed when the bailiff asked him to throw it away, and he even rolled his eyes when he threw it out. Then, he tried to get a hardship, as the court will recall, but it was denied, and he seemed disappointed; his shoulders hunched over and he kind of made a face, pursing his lips. Then when he got called up in the first batch to be part of the initial 18, he sat down and was closing his eyes through much of voir dire. Did the court notice that too?

JUDGE (PAT): Actually, I did detect a certain boredom from him, but I'm not sure I saw his eyes closed.

PROSECUTOR (Cindy): Ok, well I did, and I just don't want a juror who is going to display a bored attitude throughout the whole case, bringing the other jurors down and making people think the case isn't significant enough to pay attention to. Both sides deserve to be heard.

Pat (as Technical Adviser): *What was done better in this version of the scenario? What could still have been improved upon?*

- Could be improved upon: The prosecutor could have questioned Juror #3 on whether he was tired, or bored, so that his eyes-closing could be on the record, and so that she wouldn't be accused of lacking in follow-up questions to that juror

Skit #3: The People Lose

the *Wheeler/Batson*

Objection

NARRATOR (TBD): *This is a felony 11378 case, and the defense has already launched two unsuccessful Wheeler/Batson objections against the People—both pertaining to Hispanic potential jurors. The defendant appears to be Hispanic but has an Irish surname. 100 potential jurors were called up, and approximately 20 remain, besides the 18 in the box. The People have exercised 7 of their 10 peremptories, and the defense has used 8 of their 10. Now the People have attempted to peremptorily challenge a Hispanic potential juror, a female junior college student who lives at home with her parents and does not have a job.*

DEFENSE (TBD): Objection!

JUDGE (PAT): Juror #6, why don't you stick around while I send your fellow prospective jurors out of the courtroom; actually, it's almost lunch time, so we'll just have you all come back at 1:30, including Juror #6. None of you are excused yet; please remember my advisements not to discuss the case or form any conclusions. [brief pause] Alright counsel, Mr. McGrath, what's the basis for your objection?

DEFENSE (TBD): *Wheeler/Batson*, your honor. It appears to me that Juror #6 has no reason to be found objectionable by the People, other than the fact that she too is Hispanic. Ms. De Silva has tried to kick off multiple Hispanic jurors now, and although this Court has overruled my objection on this front, I think it's snowballing and it's becoming really obvious that she has an ulterior motive with regard to Hispanic jurors. My client is Hispanic, and I think all the Hispanic jurors she has kicked off, including Juror #6, were all just fine.

JUDGE (PAT): Well, Ms. De Silva, although I didn't find a prima facie case in either of the other two, I have to agree that based on the statistics at this point, I'm starting to wonder. I do find a prima facie case. Do you care to give me your reasons for challenging Juror #6?

PROSECUTOR (Cindy): Judge, I didn't kick her off because she was Hispanic. I kicked her off because she was young! I think young people these days have a more carefree attitude when it comes to drugs, so I want a more mature jury.

DEFENSE (TBD): Judge, that's a clear violation of the law.

PROSECUTOR (Cindy): No it's not. It's been the law since the 1979 *Estrada* case that we can kick off young people. We do it all the time!

DEFENSE (TBD): Until 2016 when the statute changed! It's not my fault Ms. De Silva hasn't read her Code of Civil Procedure in the past two years.

JUDGE (PAT): Counsel, counsel! Stop. Stop arguing. [brief pause] Unfortunately Ms. De Silva, Mr. McGrath is right; the statute changed a few years ago, so you've squarely admitted an idea of group bias emanating from young people, and I have no choice but to find that *Wheeler/Batson* has been violated.

Pat (as Technical Adviser): *Question #1: What could the prosecutor have done to have kept from violating Wheeler/Batson here, or how could she have defended herself better?*

- A. She should have kept up to date on the change in the law
- B. If she knew about the change in the law, but still wanted to kick this young juror, she could have better-questioned that juror and better-articulated WHY she kicked her—rather than saying “because she’s young and I have certain ideas about how young people think,” she could have asked that juror follow-up questions pertaining to her opinions on drug crimes, drug sellers, etc., and then used those answers to either dispel her concerns, or articulate to the judge how this specific juror’s views earned her an appropriate kick by the People

Question #2: Now that the judge has, likely appropriately, found a Wheeler/Batson objection, how should the Remedy portion be addressed?

- A. The judge can get rid of the entire jury panel and start all over again, as is the traditional *Wheeler* remedy
- B. Or, the judge can ask the defense, as the opponent of the strike, what the defense would prefer, pursuant to the *Willis* case...to start over, to re-seat the offended juror, monetary sanctions, or extra peremptories

Question #3: Does the Prosecutor need to report herself to the State Bar?

- A. Likely, no. We see no authority requiring a self-report or a report by the judge when the *Wheeler/Batson* objection is sustained at the trial court level. It's not until a case gets overturned on appeal based on *Wheeler/Batson* that the attorney MIGHT have a duty to report herself.

Skit #4: The People Make the Motion!

NARRATOR (TBD): *This case is a felony 29800 case, and the defendant is white. There are 100 prospective jurors, and the defense has peremptorily challenged two so far—both white. The People have peremptorily challenged two as well—also, both white. It's now the defense's turn to peremptorily challenge again, and the defense attempts to kick an Asian juror—the only Asian juror in the box, and the only apparent Asian juror in the entire panel.*

DEFENSE (TBD): The Defense would like to thank and excuse Juror #11.

PROSECUTOR (Cindy): Objection!

JUDGE (PAT): What?

PROSECUTOR (Cindy): Objection, Judge.

JUDGE (PAT): Oh. Ok. Juror #11, don't go anywhere yet—ladies and gentlemen of the jury, I'm going to let you take a brief break to stretch your legs...don't go too far, but please wait out in the hallway until the bailiff tells you to come back in. [brief pause] Ok counsel, what's the nature of your objection?

PROSECUTOR (Cindy): Judge, Mr. McGrath just attempted to thank and excuse Juror #11, an Asian-American whose conduct and answers raised literally zero red flags—he appeared to me to be a fine juror for either side. He expressed no bias either way, had no weird temperament issues, and is just one of those people that naturally kind of gets chosen because they seem normal and fair. For the life of me, I can't think of why Mr. McGrath kicked him...other than his race. It is an idea held by some that Asian-Americans are somehow more pro-prosecution and law-abiding than other community members, so under these circumstances, I have no choice but to conclude, under a totality of the circumstances, that this is the reason Mr. McGrath kicked him. The juror did not say anything particularly pro-prosecution, nor did Mr. McGrath question him regarding his views in that regard. Simply put, the only reason I can see here is race.

DEFENSE (TBD): That's offensive!

JUDGE (PAT): Counsel, stop. Well, I agree that Juror #11 seemed pretty plain; I can't really figure out why you kicked him either. So I'm going to find a prima facie case. Would you like to explain your reasons?

DEFENSE (TBD): Umm, uh, Judge, let me look at my notes. I mean, confer with my client. Hang on. Umm...I kicked that potential juror because he didn't seem like he was paying attention, and my client deserves someone who's paying attention!

JUDGE (PAT): Mr. McGrath, he answered your questions in full and there were no pauses in his ability to answer; he didn't ask you to repeat yourself; how did you come to the conclusion that he wasn't paying attention?

DEFENSE (TBD): Just...uh, just that he seemed to be kind of bored with the whole thing.

JUDGE (PAT): Well, why didn't you ask him if he was bored? Or engage in any questioning on that subject at all?

DEFENSE (TBD): I don't know. I didn't think about it.

JUDGE (PAT): Ok. I'm going to find a *Wheeler/Batson* violation at this point.

Pat (as Technical Adviser): *how should Ms. De Silva handle this, now that the judge has ruled against the defense?*

A: If she also doesn't like Juror #11 for her own reasons that aren't unlawful, she should request, pursuant to *People v. Willis*, for a whole new panel, monetary sanctions against the defense, or, perhaps most reasonably, an additional peremptory challenge.

B. If the judge instead says that since Juror #11 is still present in the hallway, he should simply be re-seated, but Ms. De Silva doesn't want him re-seated, she should remind the court that *Willis* allows the opponent of the strike to agree to the departure from the traditional *Wheeler* remedy, and in this case, she is requesting something other than re-seating.

C. If Ms. De Silva is fine with Juror #11, she can request re-seating pursuant to *Willis*, or any of the other remedies available.

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9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN JOAQUIN

11 THE PEOPLE OF THE STATE OF CALIFORNIA,) Case No.: 12-3-456789-1
12 Plaintiff,)
13 vs.) PEOPLE'S TRIAL BRIEF:
14 DEFENDANT(S)) *WHEELER/BATSON* OBJECTIONS
15 Defendant(s))

16
17 **POINTS AND AUTHORITIES**

18
19 I. "GROUP BIAS" CHALLENGES AND THE THREE-PART INQUIRY

20
21 In the context of jury selection, "group bias" is the presumption "that certain jurors are biased
22 merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or
23 similar grounds[.]" (*People v. Wheeler*, (1978) 22 Cal.3d 258, 276, *overruled on other grounds by*
24 *Johnson v. California* (2005) 545 U.S. 162.) When trial counsel utilizes a peremptory challenge to
25 excuse a potential juror from the panel based on a pre-conceived notion of "group bias," the trial
26 court will entertain opposing counsel's objection thereto by utilizing a three-part inquiry established
27

1 by *People v. Wheeler*, (1978) 22 Cal.3d 258, and refined in *Batson v. Kentucky*, (1986) 476 U.S. 79,
2 and *Johnson v. California*, (2005) 545 U.S. 162.

3 The first portion of the inquiry consists of the opponent making a prima facie case by showing
4 that the totality of the circumstances raises an inference that counsel’s challenge was unlawfully
5 discriminatory. (*Johnson, supra*, at 168.) If the prima facie case has been made, the court will
6 proceed to the second part of the inquiry, wherein the burden shifts to the challenging party to justify
7 the challenge, showing legally neutral grounds for the attempted exclusion. (*Id.*) Finally, if the
8 challenging party gives an ostensibly neutral justification, “the trial court must then decide...whether
9 the opponent of the strike has proved purposeful racial [or other impermissible] discrimination.” (*Id.*
10 (internal quotation marks and citation omitted).)

11 12 II. THE MAKING OF THE PRIMA FACIE CASE

13
14 The question often arises in the first prong whether the opposing party has made the requisite
15 prima facie case. In establishing “a prima facie case, the moving party should...make as complete a
16 record as possible;” “establish that the persons excluded are members of a cognizable group;
17 and...show [by a totality of the circumstances] that the persons are being excluded because of group
18 association.” (*People v. Fuentes* (1991) 54 Cal.3d 707, 714.) The case of *People v. Scott*, (2015) 61
19 Cal.4th 363, gives a number of factors opposing counsel may point out and a trial court may consider
20 in ruling on whether an appropriate prima facie case has been made:

- 21 -That the “party has struck most or all of the members of the identified group”;
- 22 -That the “party has used a disproportionate number of strikes against the group”;
- 23 -That the party has not engaged in significant questioning of those jurors;
- 24 -“[T]hat the defendant is a member of the identified group”; and
- 25 -That the victim is a member of the group of the majority of the remaining jurors.

26 (*Id.* at 384.) This list is neither exclusive nor mandatory—for example, the case of *Powers v. Ohio*,
27 (1991) 499 U.S. 400, makes clear that the defendant and challenged juror need not share the same

1 classification—but it provides a list of “particularly relevant” evidence that may aid the court in
2 coming to a conclusion on the prima facie case element. (*Scott, supra*, at 384.)

3 Further, the undersigned knows of no published California decision or United States Supreme
4 Court decision declaring that a single peremptory challenge to a single member of a particular racial
5 or other cognizable group, without more, constitutes a valid prima facie case. The Ninth Circuit case
6 of *Williams v. Runnels*, (9th Cir. 2006) 432 F.3d 1102, found a prima facie case was made based on
7 statistics when the prosecutor exercised “three of his first four peremptory challenges to remove
8 African-Americans from the jury[.]” and the record did not sufficiently dispel the inference raised by
9 the statistical disparity (*id.* at 1107-09); however, “three of his first four” is not the same as a single
10 peremptory used to strike a single member. *Williams* provides a list of Ninth Circuit cases finding
11 “that a defendant can make a prima facie showing based on a statistical disparity alone[.]” as a single
12 illegally discriminatory strike would be unconstitutional, but those cases listed most certainly did not
13 find a prima facie case based solely on a single strike. (*Id.* at 1107; *see id.*) Rather, they included
14 finding “an inference of bias where the prosecutor had used five out of six peremptory challenges to
15 strike African-Americans[;...] where four of seven Hispanics and two African-Americans were
16 excused by the prosecutor[;... and] where the prosecutor exercised peremptory challenges to exclude
17 five out of a possible nine African-Americans.” (*Id.* (citations omitted).)

18 Furthermore, the recent California Supreme Court case of *People v. Sanchez*, (2016) 63
19 Cal.4th 411, found no prima facie case was made when “the prosecution had used two of its first eight
20 peremptory challenges to excuse two of the five Hispanic jurors then available for challenge[.]” (*Id.*
21 at 435.) Indeed, the Court stated:

22
23 Exercising two of eight peremptory challenges to excuse two of the five
24 Hispanic prospective jurors then subject to challenge did not itself
25 provide an inference of discriminatory purpose. The prosecution had not
26 excused most or all of the group and did not use a significantly

1 IV. WHAT CONSTITUTES A “COGNIZABLE GROUP”

2
3 California Code of Civil Procedure 231.5, along with California Government Code section
4 11135, propounds the list of classifications upon which a *Wheeler/Batson* challenge may be
5 premised. This list includes classifications such as race, religion, sex, sexual orientation, and age,
6 among other categories. Notably, however, it does not outlaw excluding members who have the trait
7 in question; it simply outlaws prohibiting peremptorily challenging such potential jurors “on the basis
8 of an assumption that the prospective juror is *biased merely because of*” the characteristic in
9 question. (CAL. CODE CIV. PROC. § 231.5 (emphasis added).)

10 Furthermore, the courts have determined that several classifications do not constitute
11 cognizable groups for *Wheeler/Batson* prima facie case purposes, including, as notable examples,
12 people newly residing in the community (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60), and
13 “people of color” as a combined group (*see People v. Davis* (2009) 46 Cal.4th 539; *People v. Neuman*
14 (2009) 176 Cal.App.4th 571). With regard to the latter, an opposing attorney may not simply object
15 based on the fact or the argument that the challenging attorney has attempted to excuse “people of
16 color” or a few individuals of different and varying ethnic or racial backgrounds, and have the trial
17 court rule that such has satisfied the prima facie case element; such does not a prima facie case make.

18
19 V. GIVING THE TRIAL ATTORNEYS SUFFICIENT TIME TO CONDUCT VOIR DIRE

20
21 Of course, a trial court judge has the ability to restrict attorney-conducted voir dire time in its
22 goal of facilitating an orderly trial, as witnessed in California Code of Civil Procedure section 223
23 (*see id.* (allowing the trial judge to set “reasonable limits” on attorney-conducted voir dire, so long as
24 such limits are otherwise consistent with that code section). However, because one of the factors a
25 court may consider in terms of determining whether a peremptory challenge was exercised based on
26 unlawful discrimination is the extent to which the challenging attorney engaged in meaningful
27 questioning of the potential juror (*see, e.g., Snyder v. Louisiana* (2008) 552 U.S. 472, 481 (noting, in

1 eventually finding a discriminatory purpose, that “the prosecution did not choose to question [the
2 challenged juror] more deeply about this matter” that the prosecution later claimed caused it
3 concern)), the trial attorneys should be given adequate time in order to engage in such questioning.

4 This truism has been highlighted by both the California Supreme Court as well as a recent
5 amendment to the California Code of Civil Procedure by the Legislature. On January 1, 2018, an
6 amendment to section 223 went into effect based on 2017’s AB 1541, and the law now specifies that
7 “[t]he trial judge shall not impose specific unreasonable or arbitrary time limits or establish an
8 inflexible time limit policy for voir dire.” It further clarifies, “[a]s voir dire proceeds, the trial judge
9 shall permit supplemental time for questioning based on individual responses or conduct of jurors
10 that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the
11 particular case.” (CAL. CODE CIV. PROC. § 223). This amendment ultimately followed in time the plea
12 by the California Supreme Court in the case of *People v. Lenix* to trial courts: “If the trial court
13 truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn
14 based on the advocate’s perceived failure to follow up or ask sufficient questions.” (*People v. Lenix*
15 (2008) 44 Cal.4th 602, 625.)

16 Therefore, the People respectfully request some latitude with regard to time to conduct voir
17 dire, consistent with *Lenix* and the 2018 amendment to section 223 of the California Code of Civil
18 Procedure, especially when a situation appears to be developing wherein the established time limits,
19 if any, do not seem to be giving enough time for follow-up questioning based on answers or conduct
20 that call for more dialogue.

21 Dated: _____

Respectfully Submitted,

23 TORI VERBER SALAZAR, DISTRICT ATTORNEY
24 COUNTY OF SAN JOAQUIN, STATE OF
CALIFORNIA

25 By:

26
27 _____
Cynthia A. De Silva
Deputy District Attorney

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BIAS BASED POLICING: REMAINING FAIR AND IMPARTIAL, and IMPLICIT BIAS

Josef Levy, President, Embassy Consulting Services, LLC

California District Attorneys Association
Officer Involved Shooting Summit
Bias-Based Policing, Remaining Fair and Impartial

Implicit Bias

Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases encompass both favorable and unfavorable assessments

Origins of Implicit Bias

They are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal. Implicit biases are not accessible through introspection.

Development of Implicit Bias

The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. They develop over our lifetime through exposure to direct and indirect messages. The media and news programming are often-cited origins of implicit associations

What to do about it?

- **Surround yourself with people that demonstrate your goals**
- **Invest effort into learning the stigmatized/stereotypic group**
- **Use decision support tools and slow down your decision making**
- **Seek feedback from others and articulate your reasoning**

Embassy Consulting Services, LLC

"Creating Safe Communities"

www.embassyconsultingservices.com

OIS: THE ENTIRE
SPECTRUM MANAGING
BIAS BACKLASH TO
PROSECUTING COP
KILLERS

Jennifer Joyce, Vera Causa Group, LLC

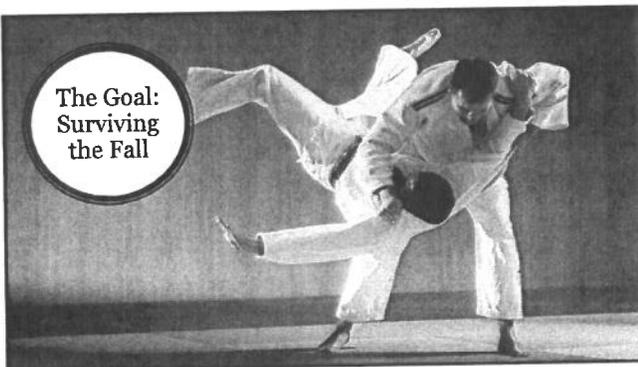


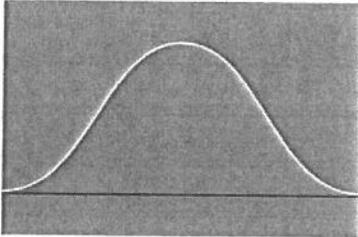
Your Defining Moment:
Communication in
Officer-Involved Shootings

Jennifer M. Joyce
Vera Causa Group, LLC
California District Attorneys Association
October 2019



Ground Zero
Officer-Involved Shootings
St. Louis, Missouri





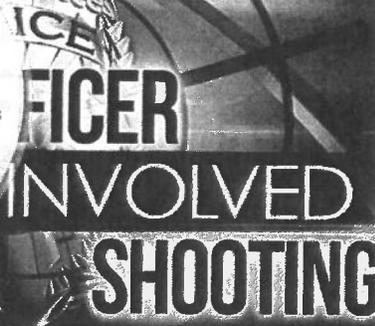
Regardless of the outcome, you acted with

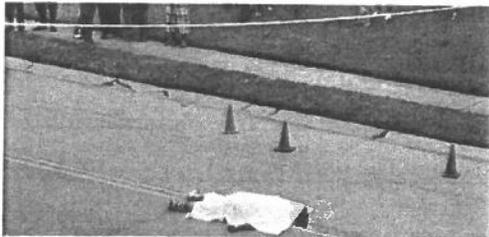
- Integrity
- Skill
- Accountability

Communication Goal: Reach Reasonable People

Today's Talk

- Where we are
- Before the shooting
- When the incident occurs
- During the investigation
- Announcing the decision
- Aftermath

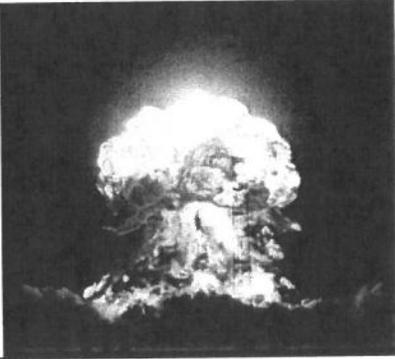


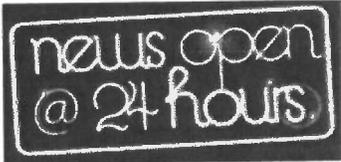


Where We Are

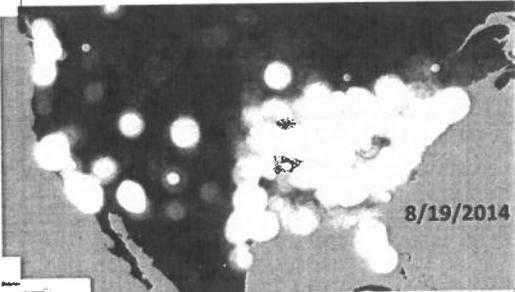
OIS
+ Social Media

BOOM!

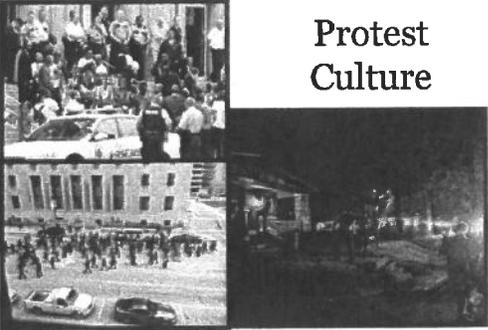




24-Hour News and
Infinite Number of Reporters



8/19/2014



Protest Culture



BLACK LIVES MATTER

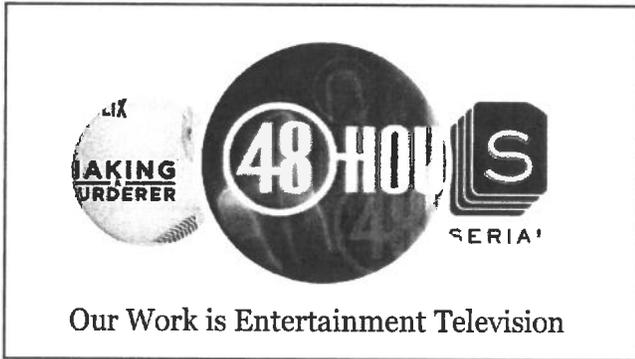
POLICE LIVES MATTER

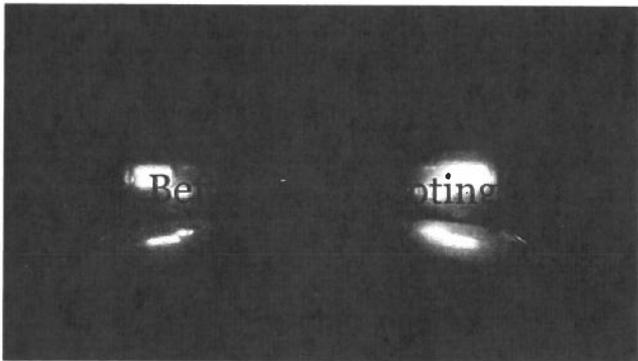


Police are the Root of all Evil.

No Wait...

Prosecutors are the Root of all Evil.







Preparation...
Groundwork for Police and Prosecutors

- In the community and with local leaders
- In your office
- With other law enforcement officials

**In the Community for
Police and Prosecutors**

- Make sure local leaders understand your thoughts and ideas about OIS
- Share your OIS protocol and process with local elected officials
- Help the community understand how seriously you take OIS
- Define the roles of police and prosecutors in OIS investigations



**In the Community for
Police and Prosecutors**

- Share internal police training practices for de-escalation of dangerous situations and for dealing with mental health issues
- Have processes set up for release of video tape
- Develop internal and external "points of contact" list



**In Your office:
Police**

- Establish formal protocol among agencies and local law enforcement
- Align with state law and other LE agencies
 - Feds, AG, Hwy Patrol
- Create OIS Alert System
- Ensure internal investigations are objective, transparent and fair



In Your Office: Prosecutors

Approach Options

- Independent investigation and/or police investigation
- Parallel investigation or hand over from police
- Designate prosecutor/ investigator or assign to team
- Send team to OIS scene or not
- Grand Jury or Prosecutor Discretion
- Develop special prosecutor criteria





In Your Office: Prosecutors

- Establish a unit or team of prosecutors to investigate
- Ensure you have processes and resources to properly conduct an investigation
- Assign point of contacts with law enforcement partners (FBI, Feds, Hwy Patrol)



In Your Office: Prosecutors

- Expect (and encourage) differencing perspectives among prosecutors
- Seek alignment with internal staff on approach to investigation
- Create a wall between OIS prosecutors and general prosecutorial staff

When the Incident Occurs



A black and white photograph of a person in a uniform holding a handgun, looking directly at the camera.

Relationships are Essential in Reducing Community Strife

- Family
- Local elected and civic leaders
- Clergy
- NAACP
- Police Union



A black and white photograph showing two hands reaching towards each other in a gesture of connection or support.

Be Proactive in OIS Communications Police

- Focus on the process not facts
- Don't get defensive too early
- Don't disparage the person shot
- Help temper messaging from police union



A black and white photograph of a large crowd of people, possibly at a protest or public gathering.

Be Proactive in OIS
Communications
Prosecutors

- Public expects transparency
- Set proper expectations
- Clarify your role
 - Independent of police
 - Narrow under the law
 - Addressing police policies, tactics, training, behavior
 - Awful but lawful





During the Investigation

Police Communications

- Talk about process
- Sympathy for victim
- Treat both sides with dignity
- The police should not have any public communication other than that





- Know the agitators are
- Early on - process more important than facts
- Create proactive communications plan
- Correct false information

Prosecutor Communications

Continue Communicating

- The "no new information" press conference
- Emphasize process
- Encourage witness cooperation
- Re-emphasize your commitment to a full and fair investigation
- Not in charge of police policies or procedures



Challenges



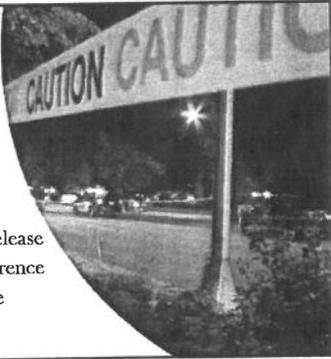
1. The investigation is taking too long
2. The victim's family
3. The victim's family lawyer
4. Police union
5. Religious community
6. Media/public pressure
7. Political pressure
8. Al Sharpton comes to town



Announcing Your Decision

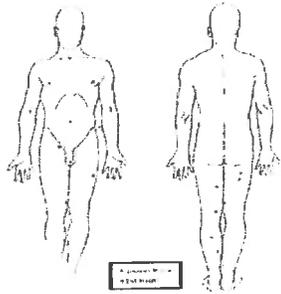
Announcing the Decision

- Media strategy
- Set the tone
- Get out first
- Select specific media contacts
- Embargo
- Exclusive release
- Press conference
- One-on-one interviews



Preparing Materials

- Executive summary
- Report
- Evidence
- Photos
- Witness statements
- Diagrams
- Video tape
- Legal analysis
- Press release
- Citizen panel



Correcting False Statements

5. ANALYSIS OF PUBLIC STATEMENTS

Statements Made Public	Evidence
Myers did not have a gun. He had a sandwich.	Ballistic evidence shows that there were two different firearms. Witness 1 attests to seeing muzzle flashes coming from two opposing directions. A number of witnesses confirm there was gunfire from two separate guns. One of Myers' acquaintances confirms that the officer was ducking after shooting. Witnesses claim Myers stole the Smith and Wesson used in this incident prior to the altercation with this officer.

Prosecutor's Position: Justice Rules

- Objective
- Focused on facts, evidence, law
- Analytical
- Thorough
- Compassionate
- Unemotional (no outrage)
- Independent
- Presidential*



Case Studies



- Bob McCulloch and Scarlett Wilson
- LaQuan McDonald and Phlando Castile

Ferguson



November 24, 2014
Grand Jury Decision
Officer Darren Wilson

Charleston



April 4, 2015 death of
Walter Scott
by Officer Michael
Slager

LaQuan McDonald



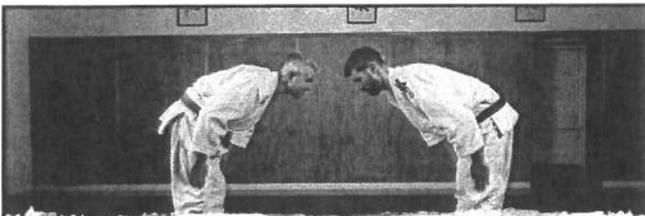
Phlando Castile



If Your OIS Case Goes to Trial

- Assign staff to monitor media
- If necessary, request gag order
- Messaging during trial
- Don't use social media
- Be prepared for ambush interviews
- Be prepared for request of all trial documentation
- Staff and office safety
- Must bring in resources to help with media



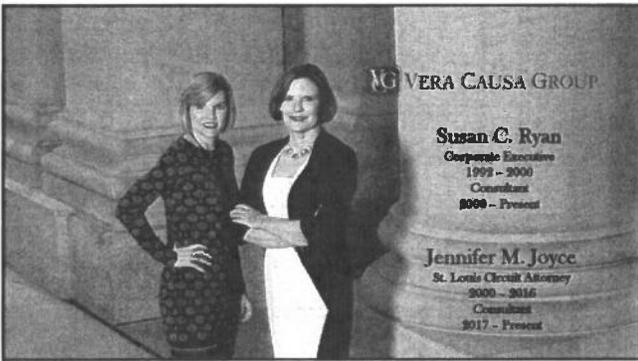


The Aftermath

- Continue to speak publicly about the process and your role
- Review what worked and what didn't
- Our time is now

Are You Ready for Your OIS?





- Presentation developed by Vera Causa Group, LLC
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"Had WE just listened,
the outcome would
have been different!"

Jason Lehman, Founder/President, Why'd You Stop Me? (WYSM)
501(c)3 Corporation, Long Beach (CA) Police Officer



CP21

Community Policing in the 21st Century to Reduce Conflict

A California POST Certified Plan V Procedural Justice 8-Hour Course
(POST ID #20701-1368)

Description:

To provide officers with tools to respond safely and effectively to the community's needs by implementing the strategies (or tenants) of "Procedural Justice," and "De-escalation" before, during, and after contacting members of the community they serve.

Course Objectives:



- Analyze the "Tenants" of Procedural Justice
- Demonstrate how community partnerships improve officer safety
- Recognize the importance of "Event + Reaction = Outcome (E+R=O)"
- Explain how to utilize De-escalation techniques without jeopardizing safety
- Dissect WYSM's 12 engagement strategies - 120 seconds to build trust
- Improve upon "Best Practice" Tactical Communication techniques
- Research positive and negative impacts social media
- Discuss how to empower youth to act as a force multiplier in your community

Cost: POST PLAN V Course – NO COST TO AGENCY

Free to all officers employed by California POST-reimbursable agencies

Join us as a police officer, a pastor, and an ex-felon **team up** to share their unique perspective on 21st Century policing.

Dates and Locations: To be determined



Jason Lehman, WYSM Founder and Long Beach Police Sergeant

Testimonials:

- "CP21 was one of the best multi-agency training programs we have ever hosted & one of the best programs I have experienced in my career."
-Charles Celano, Police Chief, Tustin PD (August 2017)
- "Great course! I love the idea behind WYSM. I see this program only going in positive directions."
-James Chavez, Police Officer, South Gate PD (July 2017)
- "Every law enforcement agency needs CP21."
-Roger Mayberry, President, California Fraternal Order of Police (June 2018)
- "This course is the only 21st Century Policing Course widely accepted by the rank and file."
- John Perez, Police Chief, Pasadena PD (June 2019)

WYSM 501(c)3 Corp.
111 W. Ocean Blvd., Suite #400
Long Beach, CA 90802
INFO@WYSM.ORG



*Our mission is to reduce acts of violence
between the police and the public*

Had we just listened, the outcome would have been different!

Reducing Police Use of Force and Building Trust by Increasing Community Engagement

by Jason Lehman

Founder, WYSM 501(c)3 Corporation
Sergeant, Long Beach Police Department
213-842-2890

There are many ways to build trust on a day-to-day basis **without** being soft on crime, jeopardizing officer safety, or harming the morale of the successful street cop or of any leader within the criminal justice system.

Implementing the following trust-building tools has proven to help answer the “Why” in the resistant communicator’s mind when it comes to the importance of cooperation. In as little as 120 seconds, and by utilizing the tenants of Procedural Justice, we can improve transparency, increase legitimacy, and build stronger “buy-in” with those we serve **and** those we partner with to serve.

Please use and share this list for both face-to-face and digital/social media contacts with your community. We will all benefit greatly from mastering these trust-building tools. Teaching others about the importance of listening and learning has true value.

12 Tools for Engagement:

- 1) Buy in to the “Contact Theory.” – *Dr. Lorie Fridell (FIP)*
- 2) Ask questions of your community
- 3) Get social media content and share it
- 4) Keep a positive outlook
- 5) Adapt to community needs
- 6) Welcome your services
- 7) Stand in front of your “table”
- 8) Embrace curiosity before getting angry
- 9) Engage children
- 10) Self-Check
- 11) Answer questions before they are asked
- 12) Be kind and rethink things

Page 1 of 2

WYSM is a 501(c)3 Corporation
111 W. Ocean Boulevard, Suite 400, Long Beach, CA 90802

www.wysm.org
info@wysm.org



*Our mission is to reduce acts of violence
between the police and the public*

By utilizing these tools during today's contacts, you and your partners **will be** safer tomorrow. Every job becomes safer, easier, and less emotionally draining when those who we serve better understand how to cooperate with us.

By educating we **will** reduce fear of the "unknown."

By reducing fear of the unknown, we **will** improve trust and cooperation.

By improving trust and cooperation, we **will** reduce police and community violence and improve legitimacy.

We thank you for taking a "Growth Mindset" with you and for committing to getting 2% better every day within your profession.

Please continue to utilize our **E+R=O** decision making/problem solving model and commit to **Reacting** positively to **Events** in order to ensure positive **Outcomes**.

We would be honored to bring our P.O.S.T certified **CP21 (Community Policing in the 21st Century to Reduce Conflict) Procedural Justice and Advanced Tactical Communication** 8-hour training to any police agency in California or abroad. In California, it's absolutely free (see attached flier)

We have teams of Master Trainers and Community Champions ready to do their part to train your organization and the police organizations you partner with. We will go anywhere because it matters everywhere.

Email info@wysm.org or call Sergeant Jason Lehman directly at 213-842-2890.

First Impressions

Sherry Thompson-Taylor & Sophia Roach

INDEX OF MATERIALS AND REFERENCE ARTICLES

Page 1 ABA JOINT STATEMENT ON ELIMINATING BIAS IN THE CRIMINAL JUSTICE SYSTEM

This three page statement recognizes the threat that implicit bias poses to the administration of justice and proposes:

1. The collection of data on law enforcement contacts with civilians;
2. The collection and publication of race/charging/sentencing data by prosecutors;
3. Enlistment of experts to assist prosecution offices in creating protocols and practices to address disparities borne out by data;
4. Implicit bias training for all justice partners;
5. Swift action to address misconduct by prosecutors;
6. Diversification of offices through hiring from represented communities;
7. Increased public communication with community stakeholders and openness to alternative approaches to traditional justice issues;
8. Education regarding the role of prosecutors;
9. Transparency in OIS incidents and BWC footage;
10. Expulsion of repeat bad actors;
11. Increased attention to the collateral consequences of convictions.

Page 8 THE ABA's "CONSCIOUS PROSECUTOR" TOOLKIT

This two page tool kit includes several links to speakers, articles, and videos related to understanding and protecting against implicit bias.

Page 11 PROSECUTOR'S CHEAT SHEET ON INTERRUPTION OF HARMFUL BIASES

This five page document includes basic research on the prevalence and impact of bias and where prosecutors can improve use of discretionary decision making powers. The cheat sheet also provides guidance on being an ally and overcoming one's own implicit biases. These include:

1. Conscious stereotype replacement;
2. Counter stereotypic visualization to re-train the brain automatic categorizations;
3. Focusing on individual characteristics rather than group characteristics;
4. Conscious consideration of "other" perspectives;
5. Increasing contact with "other" communities and individuals.

Page 16 ABA DIVERSITY AND INCLUSION 360 COMMISSION TOOLKIT INTRODUCTION

This seven page guide is the result of the ABA's efforts to help judges, prosecutors and public defenders address implicit bias by providing numerous links to online resources that:

1. Explain the social science term implicit bias;
2. Provide some examples of where implicit biases live and thrive;
3. Explain how they exist;
4. Raise consciousness about the power of these unknown "mind bugs," as some have called them, and their ability to negatively impact decision-making;

5. Help you identify some of your own implicit biases;
6. Examine how implicit biases might show up in the performance of your job;
7. Provide some tools to help you catch and correct snap decision-making that may be linked to harmful implicit biases; and
8. Provide you with the knowledge that will allow you to help others catch decision-making that might be based on implicit biases.

Page 23 HOW TO THINK ABOUT IMPLICIT BIAS, Scientific American March 2018

This 9 page article provides information regarding the utility and veracity of data imputed from Implicit Association Tests, which show that almost all people harbor implicit biases and that there is a relationship between those biases and discriminatory behavior.

Page 32 TRANSFORMING PERCEPTION; BLACK MEN AND BOYS, AN EXECUTIVE SUMMARY

This 24 page Executive Summary provides an extremely well researched and resourced summary of information pertaining to the perception of black males, a description of commonly held biases against them, and ways to alter perceptions and reduce bias. This guide also includes information on successful interventions in police departments and schools. Of particular interest is summarized information regarding the interrelation of racial anxiety, the perception that you will “appear racist” and increased use of excessive force.

Page 54 THE IMPACT OF IMPLICIT RACIAL BIAS ON THE EXERCISE OF PROSECUTORIAL DISCRETION
By: Robert J. Smith & Justin D. Levinson, Seattle University Law Review Vol 35:795

This 52 page law review article was published in 2008, but contains significant research on the disproportionate impact that implicit bias appears to have on people of color in the criminal justice system, particularly how it relates to prosecutorial discretion. Among the concerns addressed are:

1. Priming: a cognitive phenomenon that describes the impact of frequent exposure to negative stereotypes, culminating in automatic classifications, that can only be overcome through conscious de-biased thought;
2. The history and legacy of implicit association testing, with predictive analysis of how results in other areas of expertise, such as medicine, indicate a strong likelihood that implicit biases held by prosecutors may be the cause of some disparities in treatment among people of color;
3. A discussion of the potential areas where bias can impact prosecution work including the decision to charge, what to charge, bail or custody, discovery, plea bargaining, jury selection, argument, and sentencing; and
4. A summation of ideas designed to reduce implicit bias.

Page 86 IMPROVING PROSECUTORIAL DECISION MAKING: SOME LESSONS OF COGNITIVE SCIENCE
Alafair S. Burke, William and Mary Law Review March, 2006

This 30 page law review article details the available science pertaining to cognitive bias in decision making, using illustrative studies to highlight areas of concern for implicit bias in prosecutorial decisions. The article provides concrete recommendations designed to reduce or eliminate bias including increased transparency and review of charging and conviction data, adherence to issuing standards, pre-trial discovery, judicial involvement in plea bargaining, switching sides, peer and

committee review, involvement in conviction review, and diversification of the relationships among prosecutors. With regard to decision making bias, the article explores four areas of significant concern:

1. Confirmation bias, which describes the tendency of people to disregard evidence that negates a previously held theory;
2. Selective information processing, which describes the practice of isolating or overvaluing information from a larger body of facts in order to justify a desired outcome;
3. Belief perseverance which refers to people adherence to a theory even after it has been contested; and
4. The intolerance for cognitive dissonance, which leads people to avoid confronting stereotypes and perceptions, because it is simply easier to rely on previously held standards or beliefs.



JOINT STATEMENT ON ELIMINATING BIAS IN THE CRIMINAL JUSTICE SYSTEM

July 2015

The American Bar Association and the NAACP Legal Defense and Educational Fund, Inc., have long and proud traditions of fighting for civil rights, human rights and equal justice. Although, over the years, we have celebrated much progress in these arenas, we are now confronted by a troubling and destabilizing loss of public confidence in the American criminal justice system. The growing skepticism about the integrity of the criminal justice system is driven by real and perceived evidence of racial bias among some representatives of that system. This crisis of confidence must be addressed, and the time to act is now.

While we believe that the overwhelming percentage of law enforcement officers, prosecutors and judges are not racist, explicit bias remains a real factor in our country – and criminal justice system – and implicit or unconscious bias affects even those who may believe themselves to be fair. Indeed, as Supreme Court Justice Anthony Kennedy once observed (in the 2001 case of *Board of Trustees v. Garrett*), prejudice may arise from not just overt “malice or hostile animus alone,” but also “insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in respects from ourselves.”

One would have to have been outside of the United States and cut off from media to be unaware of the recent spate of killings of unarmed African American men and women at the hands of white law enforcement officers. Several of these killings, like those of Walter Scott in South Carolina, 12-year-old Tamir Rice in Ohio and Eric Garner in New York, have been captured by citizen video and viewed nationwide. More recently, the in-custody death of Freddie Gray sparked days of unrest in Baltimore, which ended only when the officers (who were of multiple races) were charged by the local prosecutor.

Given the history of implicit and explicit racial bias and discrimination in this country, there has long been a strained relationship between the African-American community and law enforcement. But with video cameras and extensive news coverage bringing images and stories of violent encounters between (mostly white) law enforcement officers and (almost exclusively African-American and Latino) unarmed individuals into American homes, it is not surprising that the absence of criminal charges in many of these cases has caused so many people to doubt the ability of the criminal justice system to treat individuals fairly, impartially and without regard to their race.

That impression is reinforced by the statistics on race in our criminal justice system. With approximately 5 percent of the world's population, the United States has approximately 25 percent of the world's jail and prison population. Some two-thirds of those incarcerated are persons of color. While crime rates may vary by neighborhood and class, it is difficult to believe that racial disparities in arrest, prosecution, conviction and incarceration rates are unaffected by attitudes and biases regarding race.

And, to the extent that doubts remain, the U.S. Department of Justice's recent investigation of law enforcement practices in Ferguson, Missouri, should put them to rest. In Ferguson, the Justice Department found that the dramatically different rates at which African-American and white individuals in Ferguson were stopped, searched, cited, arrested and subjected to the use of force could not be explained by chance or differences in the rates at which African-American and white individuals violated the law. These disparities can be explained at least in part by taking into account racial bias.

Given these realities, it is not only time for a careful look at what caused the current crisis, but also time to initiate an affirmative effort to eradicate implied or perceived racial bias – in all of its forms – from the criminal justice system.

As lawyers, we have a very special role to play. As the Preamble to the American Bar Association Model Rules of Professional Conduct states,

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

What must we do? The answer lies in making both macro and micro changes in our criminal justice system.

At the macro level, Congress and state legislatures must look at the vast array of laws that criminalize behaviors that pose little, if any, danger to society. We have over-criminalized conduct throughout the United States and have come inappropriately to rely on the criminal justice system to address problems of mental health and poverty. We have adopted unnecessary zero-tolerance policies in schools that inappropriately require police officers to take the place of teachers and principals and become behavioral judges. We need fewer criminal laws, and fewer circumstances in which police, prosecutors and judges are called upon to deal with social, as opposed to criminal, issues.

Overcriminalization is such a significant problem that virtually every careful observer of criminal justice in America, conservative or liberal, recognizes it. This consensus presents a unique opportunity to unflinchingly confront the need to improve our justice system.

Decriminalization is, however, not a short-term solution to the current crisis of confidence. Every day, law enforcement officers, prosecutors and judges are making discretionary decisions in a country where, literally, any person could be arrested for something if government officials focused sufficient time and energy on him or her.

We must therefore take immediate action at the micro level to begin the process of rebuilding trust and confidence in the criminal justice system and fulfilling the promise of equal justice.

Prosecutors play an important and vital role within the criminal justice system and should be leaders in this effort. We have begun what we anticipate will be a series of conversations focused on identifying ways in which prosecutors can play a more powerful role in addressing the problem of racial bias our justice system. Our organizations arranged an off-the-record discussion that included prosecutors and other participants in the criminal justice system committed to equal justice. We emerged from our discussion with a commitment to advancing the reforms listed below. We regard these reforms as necessary investments that are essential to strengthening public confidence in the rule of law and the legitimacy of our justice system.

1. We need better data on the variety of interactions between law enforcement and citizens. Earlier this year FBI Director James Comey – himself a former federal prosecutor – acknowledged that gathering better and more reliable data about encounters between the police and citizens is “the first step to understanding what is really going on in our communities and our country.” Data related to violent encounters is particularly important. As Director Comey remarked, “It’s ridiculous that I can’t know how many people were shot by police.” Police departments should be encouraged to make and keep reports on the racial identities of individuals stopped and frisked, arrested, ticketed or warned for automobile and other infractions. Police departments should report incidents in which serious or deadly force is used by officers and include the race of the officer(s) and that of the civilian(s). This will certainly require investment of funds, but that investment is key to a better future. We cannot understand what we cannot measure, and we cannot change what we cannot understand.

2. Prosecutors should collect and publicly disclose more data about their work that can enable the public to obtain a better understanding of the extent to which racial disparities arise from the exercise of prosecutorial discretion. While this data collection will also require investment of funds, it is essential to achieving the goal of eliminating racial bias in the criminal justice system.

3. Prosecutors and police should seek assistance from organizations with expertise in conducting objective analyses to identify and localize unexplained racial disparities. These and similar organizations can provide evidence-based analyses and propose protocols to address any identified racial disparities.

4. Prosecutors' offices, defense counsel and judges should seek expert assistance to implement training on implicit bias for their employees. An understanding of the science of implicit bias will pave the way for law enforcement officers, prosecutors and judges to address it in their individual work. There should also be post-training evaluations to determine the effectiveness of the training.

5. Prosecutors' offices must move quickly, aggressively, unequivocally – and yet deliberately – to address misconduct that reflects explicit racial bias. We must make clear that such conduct is fundamentally incompatible with our shared values and that it has an outsized impact on the public's perception of the fairness of the system.

6. Prosecutors' offices and law enforcement agencies should make efforts to hire and retain lawyers and officers who live in and reflect the communities they serve. Prosecutors and police should be encouraged to engage with the community by participating in community forums, civic group meetings and neighborhood events. Prosecutors' offices should build relationships with African-American and minority communities to improve their understanding about how and why these communities may view events differently from prosecutors.

7. There should be a dialogue among all the stakeholders in each jurisdiction about race and how it affects criminal justice decision-making. In 2004, the ABA Justice Kennedy Commission recommended the formation of Racial Justice Task Forces – which would consist of representatives of the judiciary, law enforcement and prosecutors, defenders and defense counsel, probation and parole officers and community organizations – to examine the racial impact that policing priorities and prosecutorial and judicial decisions might produce and whether alternative approaches that do not produce racial disparities might be implemented without compromising public safety. There is little cost associated with the assembly of such task forces, and they can develop solutions that could be applicable to a variety of jurisdictions provided that the various stakeholders are willing to do the hard work of talking honestly and candidly about race.

8. As surprising as it might seem, many people do not understand what prosecutors do. Hence, prosecutors' offices, with the help of local and state bar associations, should seek out opportunities to explain their function and the kinds of decisions they are routinely called upon to make. Local and state bar associations and other community organizations should help to educate the public that the decision *not* to prosecute is often as important as the decision *to* prosecute; that prosecutors today should not be judged solely by conviction rates but, instead, by the fairness and judgment reflected in their decisions and by their success in making communities safer for all their members; and that some of the most innovative alternatives to traditional prosecution and punishment – like diversion and re-entry programs, drug and veteran courts and drug treatment – have been instigated, developed and supported by prosecutors.

9. To ensure accountability, the public should have access to evidence explaining why grand juries issued “no true bills” and why prosecutors declined to prosecute police

officers involved in fatal shootings of unarmed civilians. The release of grand jury evidence, as in Ferguson, is one way to promote the needed accountability.

10. Accountability can also be promoted by greater use of body and vehicle cameras to create an actual record of police-citizen encounters. With the proliferation of powerful firearms in our communities, law enforcement departments reasonably seek equipment that enable them to protect themselves and their communities when called upon to confront armed and dangerous individuals seeking to engage in criminal or terrorist acts. However, while it is appropriate to arm our police and train them in the use of ever-more powerful weapons, it is equally important to train our law enforcement officers in techniques designed to de-escalate tense situations, make accurate judgments about when use of force is essential and properly determine the appropriate amount of force required in each situation.

11. We must recognize that not every lawyer has the judgment and personal qualities to be a successful prosecutor, administer justice and be willing to acknowledge the possibility of implicit bias. Prosecutors who routinely engage in conduct or make decisions that call into question the fairness or integrity of their offices should be removed from office if they cannot be trained to meet the high standards expected of public officers. At the same time, the terms “prosecutorial misconduct” and “police misconduct” should be used with greater care. Even the best prosecutors will make mistakes, much like the best defense lawyers and judges do. There is good reason to limit the characterization of “misconduct” to intentional acts that violate legal or ethical rules.

12. Prosecutors, judges and defense counsel must pay more attention to the collateral consequences of convictions. In many jurisdictions, after an individual is convicted of an offense and completes his or her sentence (by serving time, paying a fine or completing probation or parole), the individual nevertheless faces a life sentence of disqualification and deprivation of educational, employment, housing and other opportunities. This runs counter to the interests we all share in rehabilitation of the offender and positive re-integration into and engagement with the communities in which they live. In many cases, prosecutions can be structured to limit some of the most pernicious of these consequences, provided that the lawyers and the courts take the time and care to examine alternative disposition options. Prosecutors, judges and defense counsel should join together to urge legislatures and administrative agencies to reconsider the laws and regulations that impose these collateral consequences and determine whether they can be modified to provide more opportunities for former offenders without compromising public safety.

The American criminal justice is unquestionably at a moment of crisis. But there are many steps we, as members of the bar, can and should take quickly to begin to turn the ship of justice around and ensure that the system delivers the blind justice that it promises. If we commit ourselves to confronting and eliminating the racial biases that now exist, we can restore the much-needed public confidence in our criminal justice system. As Supreme Court Justice Thurgood Marshall once exhorted in accepting the Liberty Medal Award in

1992, “America can do better.” Indeed, “America has no choice but to do better.”

Both the American Bar Association and the Legal Defense Fund will continue to convene meetings with prosecutors and other law enforcement groups to support the reforms we have identified. We also will work to support and advance a robust dialogue among prosecutors and leaders in the profession about how best to eliminate racial bias from our justice system.

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The following individuals participated in the discussion that led to this joint statement:

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THE CONSCIOUS PROSECUTOR

Implicit Bias Toolkit for Prosecutors

As we know, prosecutors must be fact-based and fair in the pursuit of justice. Prosecutors cannot base their judgments on whim, bias or hunches. Studies have shown that all people have implicit biases that could influence their decisions. Training can help prosecutors to understand this issue and provide strategies for assuring that prosecutorial decisions are based on the facts and not predisposed by irrelevant implicit biases.

This interactive tool kit, compiled by Prosecutors' Center for Excellence, in collaboration with the National Black Prosecutors Association and the American Bar Association Criminal Justice's Prosecution Function Committee, offers information about the trainings recommended by various prosecutor offices, as well as links to websites, videos of presentations and research on the issue of implicit bias.

Speakers on Implicit Bias (in alphabetical order) Prosecutor Trainings 2016 - 2017

Speaker: Mahzarin Banaji

Website: [Link to Mahzarin Banaji website](#)

You Tube: [See a presentation](#)

Where: Manhattan DA's office, New York

Speaker: Kimberly Burke, Center for Policing Equity. Phil Goff, Co-Founder and President

Website: [Link to Center for Policing Equity website](#)

Where: DC US Attorney's Office, Washington DC

Speaker: Lorie Fridell

Website: [Link to Fair and Impartial Policing website](#)

You Tube: [See a presentation](#)

Where: Statewide anti-gun violence program in New York State for police and prosecutors.

Speaker: Rachel Godsil

Website: [Link to Perception Institute website](#)

You Tube: [See a presentation](#)

Where: NYC Law Department, New York (the Law Department does mostly civil cases for New York City, but they have a Family Court prosecution unit.)

Speaker: Dan Harris, University of Pittsburgh Law School and Wayne Mackenzie, General Counsel, New York City Department of Probation

You Tube: [See ABA panel discussion on The Conscious Prosecutor](#)

Where: ABA Panel on the Conscious Prosecutor and the Miami Dade State Attorney's Office, Florida

Speaker: Mark Katrikh of the Museum of Tolerance in LA

Website: [Link to Museum of Tolerance website](#)

Where: Yolo County DA's Office, California

Speaker: Prof. Kim Norwood, Washington University in St. Louis

Prosecutor's Cheat Sheet: [Read](#)

You Tube: [See a presentation](#)

Speaker: Kimberly Papillion

Website: [Link to The Better Mind website](#)

You Tube: [See a presentation](#)

Where: San Francisco DA's Office, California

Speaker: Khatib Waheed

Website: [Link to Khatib Waheed website](#)

You Tube: [See a presentation](#)

Where: St. Louis Circuit Attorney's Office, Missouri

Other Resources and Materials

ABA Implicit Bias Toolkit and Articles:

The ABA created an implicit bias toolkit of training for judges, defense attorneys and prosecutors. They have various materials and training videos on their site.

- ABA Toolkit: [Link to ABA Implicit Bias Video and Toolkit Portal](#)
- ABA PowerPoint: [Implicit Bias & Prosecutors – ABA PowerPoint](#). [Read](#)
- ABA Article: [3 Techniques to Address Your Implicit Bias \(11/2016\)](#)

Prosecutors' Encyclopedia (PE):

PE is a wiki for prosecutors that contains an extensive case law library, expert information and transcripts, training materials and a policy library curated by Prosecutors' Center for Excellence (PCE). Current prosecutors have access by requesting an account at [MyProsecutor.com](#).

- **Articles and Research:** A collection of articles, studies and other materials related to implicit bias can be found in the PCE Policy Library. [Link to articles](#)
- **Implicit Bias Experts.** [Link to expert pages](#)

Project Implicit – Harvard: Project Implicit sponsors the Implicit Bias Test. [Link to Project Implicit website](#). The Implicit Bias Test (IAT) measures the strength of association between concepts and evaluations. [Take the test](#)

Videos Demonstrating Various Implicit Bias Scenarios: [See videos](#)

Other Websites:

Kirwan Institute for the Study of Race and Ethnicity. Established in May of 2003, the Institute does interdisciplinary research at Ohio State University. It publishes an annual implicit bias review and provides implicit bias trainings: [Link to Kirwan Institute website](#)

Nextions. Nextions is a consulting firm that does implicit bias training and research. [Link to Nextions website](#). Director Arin Reeves lectures on implicit bias. [See a presentation](#)

The Kaleidoscope Group. The Group is a Chicago-based consulting firm that does implicit bias training. [Link to The Kaleidoscope Group website](#). CEO Doug Harris lectures on implicit bias. [See a presentation](#)

Implicit Bias 101:

Prosecutor's CHEAT SHEET on conscious raising and interruption of harmful biases

- 1) Take several IATs ("Implicit Association Test"): <https://implicit.harvard.edu/implicit/takeatest.html>.
- 2) **Research:** Just like any other thing you want to learn more about, do your homework on implicit bias. I have put together a 17 page "Resource List." This list is used by the American Bar Association Diversity and Inclusion 360 Commission. I have divided into books, websites, general readings and readings specific for groups like prosecutors. Check it out.
- 3) Notice biased messages as they are portrayed in society. I showed you many examples during our workshop. These examples represent the many ways in which smog (implicit harmful biases) sneak into the air we breathe. Remember the GOOGLE slide I shared: googling black teens resulted in completely different images than googling the term "white teens." There was a controversy on 6/27/16 with a Red Cross pool safety campaign poster that portrayed darker skinned children as not following pool safety rules and white children following pool safety rules. Great large message on being safe at pools. But imagery contained subtle, unconscious messages that will automatically plant in your mind and unconsciously retain the images of who follows the rules and who does not. See 'Racist' Pool Safety Poster Brings Red Cross Apology, at <http://www.msn.com/en-us/news/us/racist-pool-safety-poster-brings-red-cross-apology/ar-AAhByGH?ocid=spartanntp>.
- 4) **See something, say something.** When you see unjust situations, or similar situations that are treated completely differently, push back. Do not be a bystander. Speak up; speak out. This does not mean being confrontational but it does mean not standing in silence. Consider the Stanford rape case. Judge stated that jail would "be bad" for the defendant. Why? What makes him different? Consider sentence differences—one gets 6 months, another 30+ years, for identical crime. Consider the differences in how some Americans are talking about the treatment of Muslims generally because one American born Muslim committed a mass murder. We do not have similar discussion of surveillance and banning when American born Christians commit mass murder.

Remember the prosecutor I discussed from Florida. Are there others you know who think like he does? He spoke. What about those who think similarly but don't share their views publicly? And are not we right to ask why he felt comfortable sharing his views with co-workers, family and Facebook friends. He freely made offensive statements over and over in an environment where no one challenged what he said. Let's challenge that. Office culture and environment are important. They affect, subconsciously, our own decisions. People are around me know what acceptable language around me consists of and if they do not, they can be sure that I will have some polite conversation with the, about the line crossing. Let's make it uncomfortable for people to cross our lines.

- 5) Consider changes to your environment. Social Scientist Professor Patricia Devine suggests 4 steps:
- a) **Stereotype replacement:** recognizing stereotypic responses within oneself and society, labeling them, and replacing them with non-stereotypic responses (replacing negative images with positive images).
 - b) **Counter-stereotypic imagine:** imaging examples of out-group members who counter popularly held stereotypes (I counter popularly held negative stereotypes about people who look like me. Consider others you know).
 - c) **Individuating:** viewing others according to their personal, rather than stereotypic, characteristics (Google Joshua Bell experiment: Bell is one of the most famous violinist in the world. He played Bach pieces on a \$3.5 million dollar violin outside a Metro stop in DC but because he presented as "homeless," no one bothered to listen to him).
 - d) **Perspective taking:** adopting the perspective in the first person of a member of a stigmatized group. (Using myself as example: imagine how I might feel when I go into Home Depot or Lowes or Macys or, or, or and multiple white folks ask me to help them locate items in the store. This is not uncommon in my life. This simultaneously causes embarrassment and resentment. Imagine my teenage daughter, who is periodically stopped by security at the malls (Chesterfield and West County in particular). She is always with a group of her friends, who are white and they are never questioned. She has never had merchandise she couldn't produce a receipt for. What is her perspective? What message is she being sent?
 - e) **Contact:** INCREASE your exposure to out group members—go to lunch, dinner; work with, find some way to bring more difference into your life. Social groups, places of worship. Consider your children's friends as well.
- 6) In your role as prosecutor, consider:
- a) When you have discretion, how do you decide what situations should be investigated?
 - b) **What crimes** will you/do you focus on? Those that are easy to prove? What about carjacking and drug use vs. bank thefts, corruption). Focus on particular crimes tells a lot about who you will net as your defendants. What about neighborhoods. Consider example of Anacostia in Washington DC for drugs but never Georgetown, which also is no stranger to drugs
 - c) **Are you getting police reports, presentence reports, probation reports etc. that might contain some bias?** Can you compare the language used in those reports to other similar reports you have read? Consider the DOJ report on the St. Louis County Family Court. The DOJ found, among other things, that the reports about black juveniles were written in

completely negative and racially biased ways as compared to those written about white juveniles accused of same crimes. See generally: UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, *Investigation of the St. Louis County Family Court St. Louis, Missouri* (July 31, 2015), *available*

at https://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf. Have you experienced something similar in your practice? Make note.

- d) You have tremendous discretion in what you charge. Will you charge federally? Send to state with different recommendations? Not charge at all? What will you charge? Possession or possession with intent to distribute? Can you do what Judge Missouri did, i.e., go back and look at your record. Are you charging white and blacks who have committed the same crime in the same way?
- e) What deals and/or pleas will you consider? No prosecution? Plead guilty but no jail time, Plead guilty with jail time. Again what is the "color" of the differences here? Socioeconomic differences? Question why society is more lenient and understanding of crimes committed by children who come from upper middle income two parent households but not poor children who did not and do not have education, money, access, etc. Of course this happens with adults also. We are more empathetic and willing to give difference rehabilitation chances to people of means than we are people without means. Why? Many studies show blacks more likely to be recommended jail time for same crime as whites. Look at your own data: what are you doing? Who gets a second chance? Gets to go home? Gets treatment? Is incorrigible? How can we change lives for the greater good?
- f) **Jury Instructions:** seriously consider following Federal District Court Judge Mark Bennett's approach of instructing jurors to be aware of their biases.¹ ABA Diversity and Inclusion 360 Commission also successfully shepherded passing of ABA Resolution to encourage the use of implicit bias instructions with jurors.

¹ U.S. District Court Judge Mark Bennett *1598 expressly tells jurors in his courtroom that they should not rely on implicit biases:

Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

See, e.g., Anna Roberts, (Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias, 44 CONN. L. REV. 827, 859 (2012). Judge Bennett's implicit bias instruction is now mandatory in the state of California.

- g) **Sentence recommendations:** There are huge racial differences. Look at your data. Read the study out of Stanford: darker skin, "blacker" features = longer sentence recommendations. You have great discretion in your sentence recommendations. The Federal Sentencing Guidelines are NOT mandatory. You do not have to go after the greatest level of severity possible. Watch "Burning Bridges," at <https://www.youtube.com/watch?v=tBMEManHoA&feature=youtu.be>. Six youth burn down a covered bridge in Bucks County, PA. Could have faced multiple felonies, 40 plus years in jail. They were given shot at restorative justice. It worked and all are now productive members of our society. See also Adam Foss Ted talk on giving young people chances at life: http://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system?language=en#t-421101.
- h) **Voir Dire:** Batson is really, really easy to get around. Should you? Indeed, might you be determined to NOT take advantage of the fact that you CAN give any explanation to get around Batson? More importantly, consider what you see throughout the country: why are black prospective jurors stricken from juries (in criminal cases especially when defendant is black but *even when defendant is white*). Every time you strike of black prospective juror, ask: is race making a difference here? Would I use same reasons to strike if this person were white? Indeed, are there sitting jurors with identical or virtually identical facts/situations that I did not strike, question or even notice shared the same disfavored characteristic of the person I struck? See *Foster v. Chatman*, 578 U.S. ____ (2016).
- i) **Opening & Closing Statements:** Make race salient. Do not keep at bay as if it doesn't exist. If we have learned nothing else in the last few years, we have learned that it *always* exists even when we try to be blind to it or are totally unconscious that it is operating. Look at social science studies. This is real. Omnipresent. It does exist and it affects decisionmaking in every single context, by lawyers, by judges, by jurors.
- j) **Think about race as you prepare case; call expert witnesses;** constantly challenge yourself on bias of race. Take the race bull by the horns. Don't be colorblind. The data shows huge racial disparities. Being colorblind exacerbates the problem. We know for example, that black males exact fear in minds of MANY, just walking (and many includes blacks! Remember Jessie Jackson's famous revelation in this area back in the 1980s). This affects reasonable fear in self-defense cases for example. It also works against the black victim in cases where he is quickly labeled the aggressor. Recall studies I shared in presentation. Review these studies on your Resource List. Experts can help educate jurors understand social framework evidence about the operation of implicit biases. Studies prove that making race salient can interrupt negative unconscious assumptions. Color conscious and not color blindness is real vehicle to just and fair outcomes.
- k) **Animals:** Do you refer to human beings as animals? How often? Under what circumstances? Studies show that *even after controlling for same crimes*, black criminal defendants are much more likely to be referred to as animals in the media and *by lawyers prosecuting them* than

white defendants. Why? Of course, I don't think we should call any human being an animal but if you are going to do it, we must strive to be consistent.

- l) **Winning/Decisions/Justice:** Prosecutors freely admit the truism that it is incredibly easier to get convictions when defendant is black and victim is white than if both defendant and victim are black. Is that a reason to go after these easier cases with more zeal? Does this perpetuate racial bias in our society? These are the kinds of questions we can challenge ourselves on, constantly. Constantly. And what about other things that go on in your office that you personally do not condone or participate in. Do you, as agent for the United States Government and protector of all people in our nation have some responsibility for the tone in your office? How can you make a difference in the culture and atmosphere of your work place?

- m) **Empathy/understanding/compassion work:** Any chance you can do some relating to people who have less than? Do you drive everywhere? How about taking the bus for a month? Ok, a week. Can you donate some time in a homeless shelter? Food pantry? Can you spend time with children in underperforming public schools? Tutor children in juvenile detention? Finds ways to expose yourself to people who have less than and are living under extreme distress. You will remember their struggles.

7) SLOW DOWN

- 8) Watch the ABA Judge video produced by the ABA Diversity and inclusion 360 Commission: <https://www.dropbox.com/sh/uddq3ep0l94lp1g/AACfh5lhcg7NPdPTKfCEoy9Sa?dl=0&preview=Implicit+Bias+Final+Render+-+Paulette+Intro+-+Credits+-+Logo.mp4> (**DOWNLOAD TO YOUR COMPUTER FIRST!**).

Our prosecutor video will be ready in just a few weeks! Look out for it on the ABA 360 website soon! It will include Power point slides, the Resource list I have already shared with you, a "Dear User" memo, and our video. Stay tuned! It will be an invaluable resource!



ABA Diversity and Inclusion 360 Commission Toolkit Introduction

Dear User,

The information provided in this Toolkit is designed to help you recognize some of the biases that we all have, including, specifically, the implicit biases of judges, prosecutors, and public defenders. The goals of this toolkit are to:

1. Explain the social science term *implicit bias*;
2. Provide some examples of where implicit biases live and thrive;
3. Explain how they exist;
4. Raise consciousness about the power of these unknown "mind bugs," as some have called them, and their ability to negatively impact decision-making;
5. Help you identify some of your own implicit biases;
6. Examine how implicit biases might show up in the performance of your job;
7. Provide some tools to help you catch and correct snap decision-making that may be linked to harmful implicit biases; and
8. Provide you with the knowledge that will allow you to help others catch decision-making that might be based on implicit biases.

We all have biases. Every one of us. This is not a finger-pointing expedition. Rather, we are sharing with you the evidence of this science, offering strategies for you to find the implicit biases hidden within you to help you reduce their harmful effects. As you learn more about how these biases work in society and in your life, you will not only become more mindful and deliberate in your decision-making but also be able to help others in the profession with whom you interact regularly: court personnel, including law clerks, officers of the court, other lawyers, parties to litigation, witnesses, and jurors.

Implicit biases are unwitting and unconscious cognitions that include stereotypes, beliefs, attitudes, intuitions, gut feelings, and related intangibles that we categorize in our brains—without conscious effort—every fraction of a second.¹ For instance, if we think that a particular category of human beings is frail—the IAT (Implicit Association Test) indicates that many of us categorize the elderly in this way²—we will not raise our guard around them. That is a stereotype in action. If we identify someone as having graduated from our beloved alma mater, we will feel more at ease—that is an attitude in action.

Your ever-efficient brain automatically organizes all of the information it receives and places the information into cognitive boxes, shorthands, or schemas, if you will. A more colloquial way to think of a schema is the aforementioned "stereotype," though the two terms are not entirely interchangeable. Consider some of the data collected about what many people think when they see an Asian male. The data shows that many people believe Asians and Asian-Americans are extremely smart, excellent students, excellent in mathematics, and pretty good at some martial art; play, *really well*, some musical instrument; and are also really polite, kind, and shy—in other words, the model minority.³ These labels have

1.) JERRY KANG, NAT'L CTR. FOR STATE COURTS, *IMPLICIT BIAS: A PRIMER FOR COURTS 1* (Aug. 2009), available at <http://jerrykang.net/research/2009-implicit-bias-primer-for-courts/>.

2.) You will learn much, if you have not already, by taking an "implicit association test," or "IAT" as it is commonly known. The IAT is explained in other parts of your Toolkit. One of the IATs deals with how people implicitly view the elderly. The fragile and the elderly are always paired together. For more about this result in particular or the IAT generally, visit <https://implicit.harvard.edu/implicit/>.

3.) <https://www.bing.com/videos/search?q=jerry+kang+ted+talk&view=detail&mid=C199BF5AA2157E6F0C7FBC199BF5AA2157E6F0C7FB&FORM=VIRE>; see also Bernadette Lim, "Model Minority" Seems Like a Compliment, but It Does Great Harm, N.Y. TIMES (Oct. 16, 2015), <http://www.nytimes.com/roomfordebate/2015/10/16/the-effects-of-seeing-asian-americans-as-a-model-minority/model-minority-seems-like-a-compliment-but-it-does-great-harm>.

implicit origins. Based on information that we are fed in society through television, movies, the media, work, and social exposures, our mind quickly creates schemas and puts these associations into one box. These social schemas form based on everything that we've ever consciously and unconsciously seen and heard. So when we see an Asian male, we immediately think of many of the characteristics and adjectives referenced above even though we do not know *that* individual. These judgments, assumptions, and attitudes require no contemplative, deliberate thought. It just happens.

Social scientists categorize our dual ways of thinking into two systems: System 1 and System 2. System 1 is the unconscious mode, which helps us make snap judgments and is where our schemas live. System 2 is our deliberative mind, i.e., the conscious mode that is active in explicit biases. The focus of this Toolkit is to get you more conscious of System 1, that place where, as it turns out, 90 percent of your mind operates.

In a similar vein, we also must think about coded words and microaggressions. Take coded language, for example. It is not uncommon for women to be referred to as aggressive or bossy, characteristics viewed positively with male employees but considered negatively with female employees.⁴ Is the woman "opinionated" or "sassy"? Why? And why are men not ever similarly categorized?⁵ Consider some race-related terms and words. *Inner city* and *urban education* are terms most quickly associated with predominantly black, brown, and poor areas.⁶ *Thugs* is a word almost exclusively used in connection with black men.⁷

Microaggression is another type of behavior the ABA is hopeful that this Toolkit will help reduce and ideally eliminate. Microaggressions are "commonplace daily indignities, whether intentional or unintentional, that communicate racial slights and insults towards [minorities]."⁸ Studies have shown that the recipients of microaggressions experience greater degrees of loneliness, anger, depression, and anxiety.⁹ There are many examples of microaggressions in daily life, some of which include assuming that a black student in an elite school is there because of affirmative action, confusing black attorneys for court staff, telling an LGBT person that s/he does not "look like" an LGBT person, telling a black person that s/he is "articulate," touching someone else's hair without permission, asking people of color where they are from, and assuming that all Asian-Americans are Chinese and/or speak an Asian language.¹⁰ An attempt to be aware of microaggressions and taking a thoughtful approach to language when speaking with minority groups are part of this process of consciousness raising, education, and correction.

This program is designed to help with all of these areas. It includes a PowerPoint presentation that focuses on the aforementioned goals. It includes a video, too—just a short 10 to 12 minutes, designed to allow you to hear from experts and others who perform the very same role that you do in the judicial system. Implicit biases are analyzed in the video; and others, whether judge, prosecutor, or public defender, share their own implicit biases and strategies for how they work to be continually mindful of them in order to interrupt them. Finally, this Toolkit contains a comprehensive bibliography and resource list, including a large category of books, articles, and websites that focus on implicit bias generally for those who want to learn more about this fascinating social science; material specifically addressed to judges; material specifically addressed to prosecutors; and material specifically addressed to defenders.

Whether you are a judge, a prosecutor, or a defender, we hope that you find this Toolkit useful. This is fascinating yet challenging work. It is not rocket science, but because biases are in our DNA, it will require great determination and conscious effort to catch assumptions that are made and applied automatically. The Toolkit will reveal the benefits of deliberation, i.e., slowing down to take a few extra moments to focus on the person in front of you before making decisions that will or might affect that person.

We are confident that you will not only learn about that stranger that lives within you but also actually enjoy the materials contained herein and this journey.

Thank you



4.) See Claire Cain Miller, *Is the Professor Bossy or Brilliant? Much Depends on Gender*, N.Y. TIMES (Feb. 6, 2015), available at <http://www.nytimes.com/2015/02/07/upshot/is-the-professor-bossy-or-brilliant-much-depends-on-gender.html>.

5.) See Caroline Turner, *Women in the Workplace 2015: Is Gender Bias Part of the Story?*, HUFFINGTON POST (Oct. 7, 2015), http://www.huffingtonpost.com/caroline-turner/women-in-the-workplace-20_b_8255008.html.

6.) *Is the System Racially Biased?*, PBS FRONTLINE (2014), available at <http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/bench/race.html>; see also Jenee Desmond-Harris, *8 Sneaky Code Words and Why Politicians Love Them*, ROOT (Mar. 15, 2014), http://www.theroot.com/articles/politics/2014/03/_racial_code_words_8_term_politicians_love.html.

7.) *Id.*

8.) *Microaggressions: Be Careful What You Say*, NATIONAL PUBLIC RADIO (Apr. 4, 2014, 10:23AM), available at <http://www.npr.org/2014/04/03/298736678/microaggressions-be-careful-what-you-say>.

9.) *Id.*

10.) See Tanzina Vega, *Students See Many Slights as Racial "Microaggressions"*, N.Y. TIMES (Mar. 21, 2014), <http://www.nytimes.com/2014/03/22/us/as-diversity-increases-slights-get-subtler-but-still-sting.html>; Heben Nigatu, *21 Racial Microaggressions You Hear on a Daily Basis*, BUZZFEED (Dec. 9, 2013, 10:27AM), <http://www.buzzfeed.com/hnigatu/racial-microaggressions-you-hear-on-a-daily-basis#.ouAPDQo8L>.

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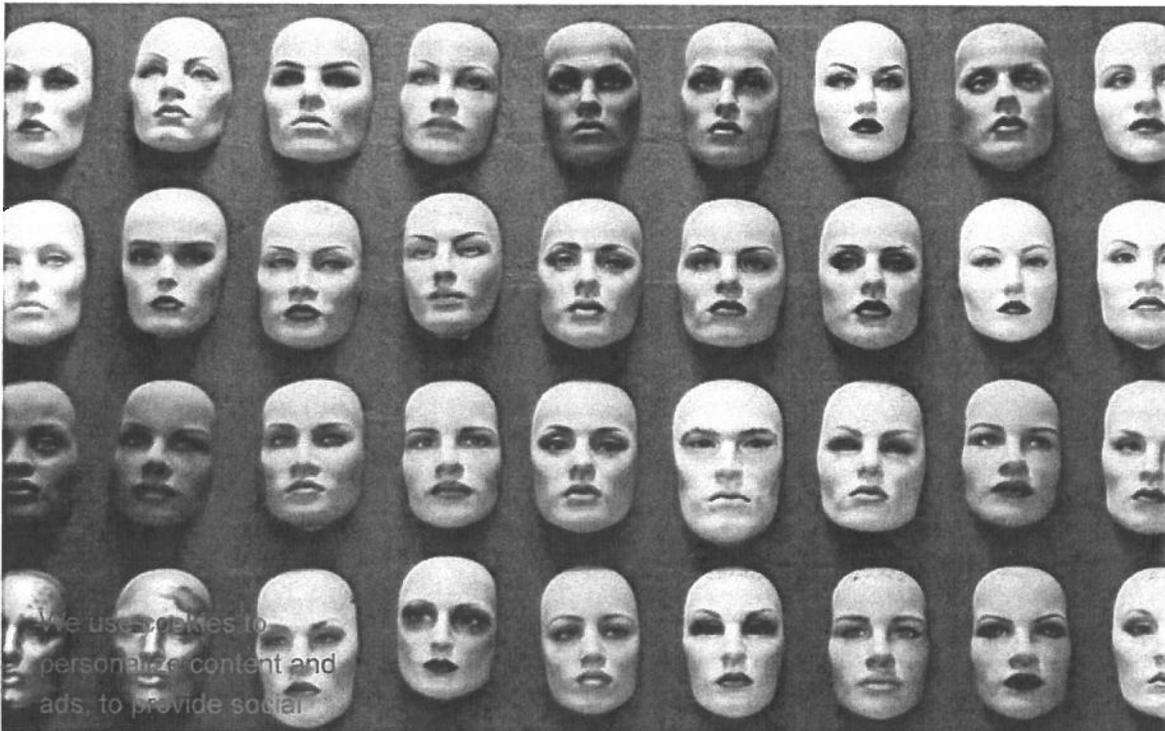
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How to Think about "Implicit Bias"

Amidst a controversy, it's important to remember that implicit bias is real—and it matters

By Keith Payne, Laura Niemi, John M. Doris on March 27, 2018



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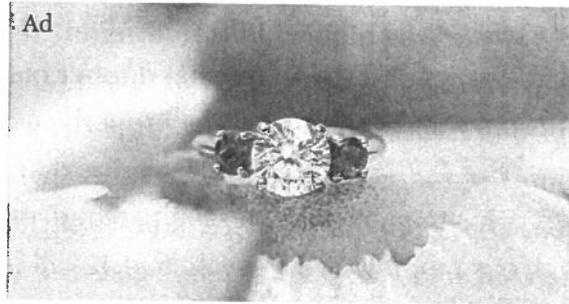
When is the last time a stereotype popped into your mind? If you are like most people, the authors included, it happens all the time. That doesn't make you a racist, sexist, or whatever-ist. It just means your brain is working properly, noticing patterns, and making generalizations. But the same thought processes that make people smart can also make them biased. This tendency for stereotype-confirming thoughts to pass spontaneously through our minds is what psychologists call implicit bias. It sets people up to overgeneralize, sometimes leading to discrimination even when people feel they are being fair.

Studies of implicit bias have recently drawn ire from both right and left. For the right, talk of implicit bias is just another instance of progressives seeing injustice under every bush. For the left, implicit bias diverts attention from more damaging instances of explicit bigotry. Debates have become heated, and leapt from scientific journals to the popular press. Along the way, some important points have been lost. We highlight two misunderstandings that anyone who wants to understand implicit bias should know about.

First, much of the controversy centers on the most famous implicit bias test, the Implicit Association Test (IAT). A majority of people taking this test show evidence of implicit bias, suggesting that most people are implicitly biased even if they do not think of themselves as prejudiced. Like any measure, the test does have limitations. The stability of the test is low, meaning that if you take the same test a few weeks apart, you might score very differently. And the correlation between a person's IAT scores and discriminatory behavior is often small.

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The IAT is a measure, and it doesn't follow from a particular *measure* being flawed that the *phenomenon* we're attempting to measure is not real. Drawing that conclusion is to commit the *Divining Rod Fallacy*: just because a rod doesn't find water doesn't mean there's no such thing as water. A smarter move is to ask, "What does the other evidence show?"

In fact, there is lots of other evidence. There are perceptual illusions, for example, in which white subjects perceive black faces as angrier than white faces with the same expression. Race can bias people to see harmless objects as weapons when they are in the hands of black men, and to dislike abstract images that are paired with black faces. And there are dozens of variants of laboratory tasks finding that most participants are faster to identify bad words paired with black faces than white faces. None of these measures is without limitations, but they show the same pattern of reliable bias as the IAT. There is a mountain of evidence—independent of any single test—that implicit bias is real.

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The second misunderstanding is about what scientists mean when they say a measure predicts behavior. It is frequently complained that an individual's IAT score doesn't tell you whether they will discriminate on a particular occasion. This is to commit the



Palm Reading Fallacy: unlike palm readers, research psychologists aren't usually in the business of telling you, as an individual, what your life holds in store. Most measures in psychology, from aptitude tests to personality scales, are useful for predicting how *groups* will respond *on average*, not forecasting how particular *individuals* will behave.

The difference is crucial. Knowing that an employee scored high on conscientiousness won't tell you much about whether her work will be careful or sloppy if you inspect it right now. But if a large company hires hundreds of employees who are all conscientious, this will likely pay off with a small but consistent increase in careful work on average.

Implicit bias researchers have always warned against using the tests for predicting individual outcomes, like how a particular manager will behave in job interviews—they've never been in the palm-reading business. What the IAT does, and does well, is predict average outcomes across larger entities like counties, cities, or states. For example, metro areas with greater average implicit bias have larger racial disparities in police shootings. And counties with greater average implicit bias have larger racial disparities in infant health problems. These correlations are important: the lives of black citizens and newborn black babies depend on them.



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Field experiments demonstrate that real-world discrimination continues, and is widespread. White applicants get about 50 percent more call-backs than black applicants with the same resumes; college professors are 26 percent more likely to respond to a student's email when it is signed by Brad rather than Lamar; and physicians recommend less pain medication for black patients than white patients with the same injury.

Today, managers are unlikely to announce that white job applicants should be chosen over black applicants, and physicians don't declare that black people feel less pain than whites. Yet, the widespread pattern of discrimination and disparities seen in field studies persists. It bears a much closer resemblance to the widespread stereotypical thoughts seen on implicit tests than to the survey studies in which most people present themselves as unbiased.

One reason people on both the right and the left are skeptical of implicit bias might be pretty simple: it isn't nice to think we aren't very nice. It would be comforting to conclude, when we don't consciously entertain impure intentions, that all of our intentions are pure. Unfortunately, we can't conclude that: many of us are more biased than we realize. And that is an important cause of injustice—whether you know it or not.

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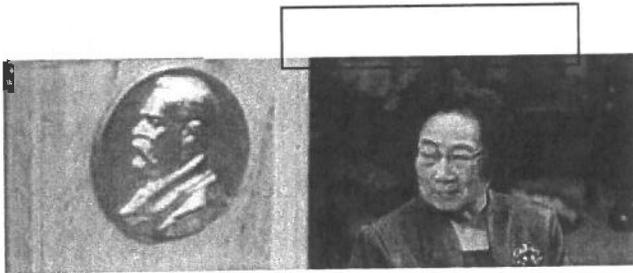
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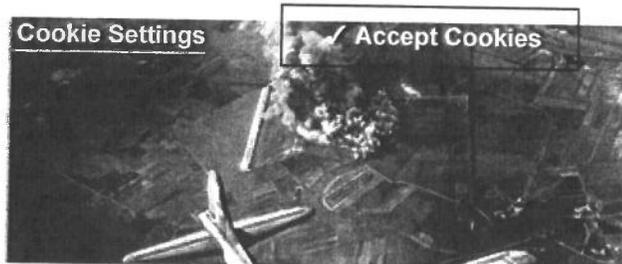
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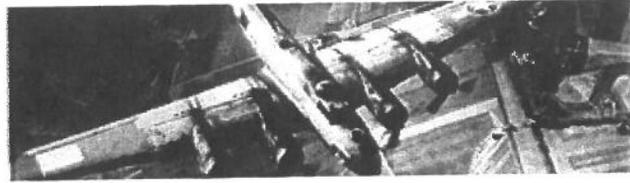


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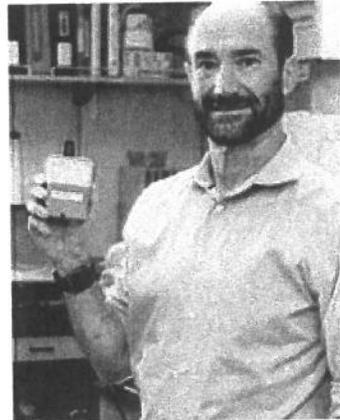




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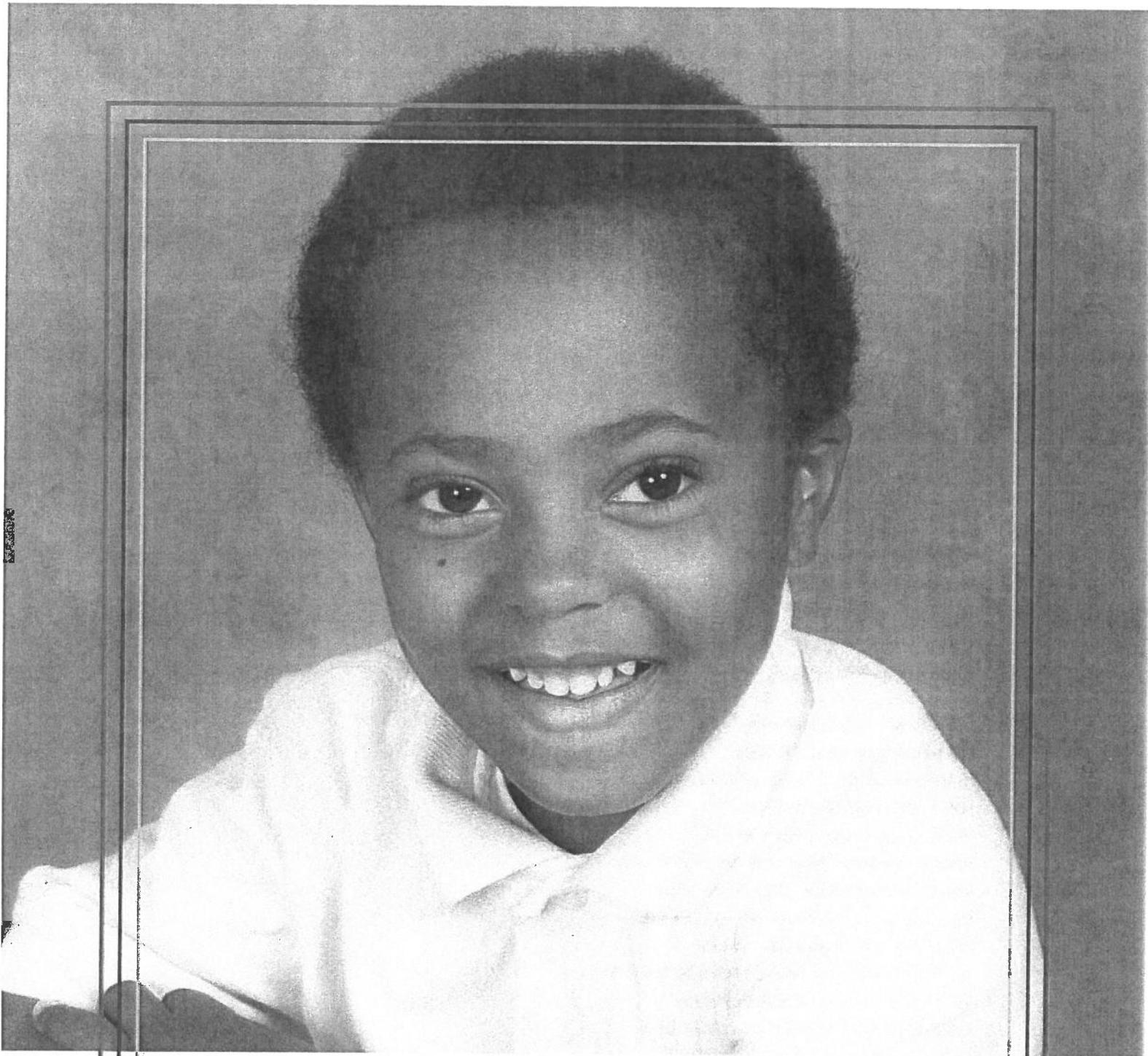
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Transforming Perception: Black Men and Boys

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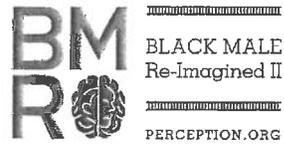
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Transforming Perception: Black Men and Boys

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INTRODUCTION

We see so much promise in our children. We want their lives to be filled with love, play, and achievement. We hope their teachers recognize what is special and teach them all they need to learn. We hope their schools spark their curiosity about the world and a desire to excel.

We hope that their schools and communities are supportive and forgiving during the difficult teen years. We hope our children will commit their energies to a sport, an instrument, or some other activity that demands discipline, commitment, and mastery. We imagine their future when they find and fulfill their own unique gifts in a career that brings them satisfaction and respect. We envision a steady path toward college or a skilled trade followed by a good job and a family. While the economic situation is precarious and the future is uncertain, we try to prepare our children to succeed and flourish.

If we are Black parents in the United States, we share these same hopes for our children. However, based on our own experience, we also fear for our children. This is especially true for our sons, as they navigate the complexity of race in the 21st century.

While there has been undeniable progress in terms of racial attitudes and opportunities, the daily realities facing Black men and boys create substantial challenges and obstacles. We know someone will use race

to mock or taunt our sons. We know some teachers will underestimate our sons' capacities and will subtly convey those attitudes to our sons. Their enthusiasm and exuberance may be judged as unruly behavior and they will be disciplined. On the opposite end of the spectrum, a teacher, thinking that she is being "nice" – or worried about facing us in parent teacher meetings -- will give our sons good grades for work that is not their best effort. We know what kind of message that will send to our sons – who will become experts at recognizing when they are being patronized.

We will have "the conversation" with our son about the potential danger he faces from police – who may protect him, but sometimes pose the greatest threat. Our conversation will include a warning that some people may view *him* as a threat and will respond to him with fear. We worry that employers will overlook our son's potential. We can imagine a White employer cutting a job interview short before he has a chance to display his skill.

We worry that the economic challenges we face in the Black community will create instability for them – our house will be undervalued and the college fund lessened, our jobs lost and not easily replaced. Our greatest fear is that they will lose us too early: because of discriminatory health care treatment, street violence, a misidentification – the list is still far too long.

Black men and boys face a country beset with contradictions. Both the hopes and the fears are real. Black men and boys can reach every pinnacle of success our country has to offer. They also face a set of obstacles unique to them as they work toward those successes.

We cannot accept that these obstacles are either permanent or insurmountable. Our predecessors in the Civil Rights Movement created a path toward political change that toppled Jim Crow and opened doors previously nailed shut. Civil Rights leaders masterfully harnessed the media and popular culture to challenge stereotypes and to shed light on the horrors of racial oppression. Their strategies were rooted in a sophisticated understanding of human motivations and the complexity of people's fears and ideals.

Race has always been a social construct. Until the middle of the last century, that construct was fixed by the belief that races were blunt categories into which each of us fit. The category into which Black people fit was defined as inferior and, particularly in the Jim Crow South, neither class nor individual circumstance mattered. With the legal changes wrought by the *Brown v. Board of Education* litigation and the impact of the Civil Rights Movement, that categorical inferiority has been successfully challenged.

We no longer live in a racial binary. Perceptions and reactions to a particular Black man or boy will depend upon how he is sit-

uated: class status, skin color, comfort level, and context all matter. Whites and members of other racial and ethnic groups may also differ markedly in their perceptions and reactions based upon their own experiences in integrated environments and a host of other factors. But race remains highly salient. Black males remain at significant risk of experiencing high suspension rates in school, disproportionate levels of arrest and imprisonment, and chronic unemployment.

Social science has enormous promise, however, to change the way his teachers and coaches, those who may be his employers, and the police he will encounter see him and more importantly respond to him. Advances in psychology and neuroscience allow us to understand the complexities of people's racial reactions and measure the effect of our toxic racial culture on perceptions and behavior. With this information, we are devising interventions that alter the effect of racial bias and anxiety on the everyday life of Black men and boys.

The American Values Institute and our research advisors from academia and advocacy are in the vanguard of this work. This report shares AVI's original research along with the cutting edge research in social psychology and neuroscience that provides empirically grounded proposals for change. It reviews the current research on the complex psychology of race, which shows that while the shift in values precipitated by the Civil Rights Movement has been profound, these egalitarian ideals have not yet truly permeated people's unconscious stereotypes, or their emotions and fears.

Understanding Our Brain: The Power of Perception

“We use categories for people too. Based upon visual and aural cues, we make automatic judgments about what category a particular person fits within and we often act on those judgments.”

Knowing how the brain works is critical to understanding how race operates. Most of our actions occur without our conscious awareness. Through socialization, our brains have created visual and aural categories (or schemas, to use the scientific phrase) for most of the sights we see and sounds we hear (Macrae & Bodenhausen, 2000). This process is referred to as ‘implicit social cognition.’

We use categories for people as well as objects. Based upon visual and aural cues, we make automatic judgments about what category a particular person fits within and we often act on those judgments. These categories and judgments normally serve us well. However, we can obviously be wrong. Our errors are usually meaningless – not recognizing that a small flat object playing a song is an mp3 player and not a cell phone. In some instances, these errors can be life-threatening – the object in a man’s hand is a cell phone and not a gun. Why might the life-threatening errors occur more in some situations than others? Because categories also influence what people pay attention to, how they organize their attention, and what they later remember (Whitley & Kite, 2010; Hamilton, 1981).

Not surprisingly, our brain’s automatic use of categories is particularly risky with respect to humans. Categorization can activate stereotypes that hamper rather than help our assessment of how to behave or respond in a given situation (e.g. Hamilton & Sherman, 1994). The widespread stereotype of Black criminality makes it more likely that a cell phone will appear to be gun if the man holding it is Black rather than White.

Scientists define stereotypes as the beliefs and opinions people hold about the characteristics, traits, and behaviors of a certain group (Allport, 1954; Macrae, Mile, Bodenhausen, 1994; Hilton & Von Hippel, 1996). Stereotypes often cause us to make assumptions (both negative and positive) about people based upon superficial characteristics (Schneider, 2004). They also tend to be self-perpetuating, which leads to their deep entrenchment.

Creating Perceptions of Black Men and Boys: Culture of Racial Stereotypes

For those whose knowledge of race is largely mediated through the media, race itself triggers a complex set of emotions: fear, envy, anxiety, but also admiration and desire.

Negative stereotypes continue to be powerful despite the egalitarian norms we purport to hold. Media plays a significant role in shaping our perceptions of race. For many Whites and people of other races and ethnicities, the media’s portrayal of Black men and boys is the primary basis for their knowledge and emotional reaction. With a few notable examples in politics, most media present Black men as figures to be admired for their athleticism, artistic or entertainment talent, or feared for their criminality. For those whose knowledge of race is largely mediated through the media, race itself triggers a complex set of emotions: fear, envy, anxiety, but also admiration and desire.

Black men and boys are systematically portrayed in negative ways in both news and entertainment programming, which can have the effect of activating and exacerbating racial stereotypes (Dixon, 2008).

On local news shows, Blacks are disproportionately portrayed as criminals, and Whites as victims. The overrepresentation of the criminality of Blacks and the victimization of Whites

is accompanied by other racially-skewed effects, such as the over-portrayal of Black-on-White violence, and the increased likelihood that a Black defendant will face prejudicial pretrial news coverage (Dixon, 2008).

Network news programs also portray negative racial stereotypes in ways that conflict with reality and create a series of harmful associations (Dixon, 2008). In 1996, a study demonstrated that networks typically associated Blacks with poverty and overrepresented poor Blacks in their coverage. Other studies confirmed that Black criminality is over-portrayed both at the national and local level. Together, these media-perpetrated tendencies toward bias and discrimination have the potential to agitate and reinforce numerous harmful racial stereotypes.

Once a group or category has been defined, humans tend to exaggerate the differences between different groups and to presume homogeneity among all "members" of the group (Quattrone & Jones, 1980; Nelson, 2006). People are more easily able to differentiate or individualize among members of their own group (Whitley & Kite, 2010). They are also more likely to attribute negative behavior of a member of their own group to the particularities of the person or situation, but to attribute the same behavior of a member of an "out-group" to a characteristic of the group (Pettigrew 1979; Duncan, 1976).

Social psychologists report that these stereotypes are robust and frequent and lead to a wide variety of negative associations, including people's categorization of ambiguously aggressive behavior (Devine, 1989), their decision to categorize non-weapons as weapons (Payne, 2001), the speed at which people will shoot someone holding a weapon (Correll, et al., 2002), and the likelihood that they will shoot at all (Greenwald, et al., 2003; Eberhardt, Goff, Davies & Purdie, 2004).

Implicit Bias Against Black Men and Boys

Modern bias against Black men and boys has morphed into a new form. Some continue to hold explicit stereotypes about Black men and boys and to be consciously prejudiced attitude against them, but the numbers of such people have declined markedly in the last century (Sears, Hetts, Sidanius & Bobo, 2000). In 1933, 75% of whites openly described Black people as "lazy" but fewer than 5% did so beginning in the 1990s (Brown, 1995). Researchers have found that most Americans subscribe consciously to the norm that Black people deserve equal treatment and that racial integration is a desirable goal (Bobo & Charles, 2009, p. 245).

The evolution of egalitarian conscious values does not mean that stereotypes traditionally associated with Black people have been eliminated; rather they continue to linger in people's unconscious and express themselves in a variety of ways constituting what is termed "implicit bias."

Measuring implicit bias against Black men and boys

To understand implicit bias, we need to move beyond "self reporting" because most people consciously reject bias. However, scientists can assess implicit bias levels by measuring people's reactions to stimuli. A widely used measure of implicit bias is the "Implicit Association Test" (IAT) which is housed on the website Project Implicit. The IAT is a computer task that asks participants to link pictures of White male faces or Black male faces with either Good words

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(e.g. Joy, Love, Peace) or Bad words (Nasty, Evil, Awful) by pressing a particular key on the computer's keyboard. Project Implicit has found that most people respond more quickly when White male faces and Good words are assigned the same key and Black male faces and Bad words the same key than the reverse.

A significant majority of Whites as well as Asian Americans and Latinos show anti-Black bias in the IAT and almost half of African Americans also show anti-Black bias (for reviews of this research see Dasgupta, 2004; Dasgupta, 2008). This research has also shown a marked discrimination against skin tone; men with darker skin fare less well in both tests of implicit bias and in empirical work on sentencing, hiring, and other important life domains (Kahn & Davies, Eberhardt, et al., 2006; Blair & Maddox).

Other measures of implicit bias include physiological responses to images of Black male faces, assessing blood pressure changes, increases in sweat, and brain imaging shown in fMRI (functional magnetic resonance imaging) scans (Pheips, 2000). Because so many of our actions are a result of our unconscious associations, implicit bias can result in behaviors that are contrary to our conscious values.

Favoring our own kind

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Some implicit bias is a result of the unconscious association of negative stereotypes with Black men – but bias can manifest as a result of comparatively positive preference for one group versus another. Social scientists refer to this phenomenon as "in-group" bias or preference and it is sometimes implicit and sometimes explicit. Those Whites who hold explicit in-group preference will rarely understand their feelings as "racist" because they do not involve *active* animus against people of other races. However, although we tend to think of racial discrimination foremost as treating a person or a group *worse* because of the different or disfavored racial group, treating a favored racial group better results in the same outcome. In both, one racial group benefits and the other is harmed because of race.

Contemporary social science research has identified that much present discrimination is a result of favoritism toward an in-group rather than hostility toward an out-group (Tropp & Molina, 2012). For example, when evaluating Whites and Blacks, Whites generally will not overtly rate Blacks negatively—they will simply rate similarly situated Whites more positively (Dovidio & Gaertner, 2006).

Dehumanizing the other

At its most pernicious, our country's historical subordination has resulted in the dehumanization of Black people. This is a practice that often undergirds subordination, war, and violence toward other groups throughout history. The association of groups of people as non-human has been used as a way to reduce the moral resistance to actions that would otherwise be unacceptable to the actor. While this practice is no longer an explicit strategy in our country, the associations linger. A recent study has found that the association of blacks with apes is closely correlated with police officers' use of excessive force against young Black males. (Goff et al., 2008).

Modern Bias on the Ground

Implicit bias and the tendency toward in-group preference are not inactive in the unconscious. They have a pernicious effect in important life domains including criminal justice, employment, education, and health treatment. It cannot always be determined whether a particular disparate effect is a result of a negative view toward Black men and boys or an in-group preference toward White men and boys – but the combined negative results of the two are profound.

Recent studies provide powerful evidence that implicit bias (either negative toward Blacks or positive toward Whites) translates into a wide range of behaviors that have significant negative effects on Black men and boys. These behaviors include allowing racial biases to bleed into important decision making as well as non-verbal behaviors that affect day-to-day interactions.

Criminalizing the Black Male

Researchers working to determine whether there is a link between stereotypes about Black criminality and police response have found that when police officers are primed to think about crime by words such as “violent, crime, stop, investigate, arrest”, they more quickly focus on Black male faces than comparable White male faces (Eberhardt, et al., 2004). The priming also led police officers to remember the faces as having more stereotypically African American features than they actually did and “more likely to *falsely* identify a face that was more stereotypically Black.” (Eberhardt, et al., 2004).

Police officers showed bias when confronted with pictures of faces and asked, “who looks criminal?” They more often choose Black faces than White and the disparity increases as the Black face becomes more stereotypically Black. The study demonstrated well the powerful effects of stereotypical associations on visual perceptions and attentions – findings that carry important implications for split-second police-citizen interactions (Eberhardt, 2004).

Black men and boys appear also to fare worse with prosecutors – though there are fewer studies and most are decades old (Kang et al, 2012). Studies in the 1980s and 90s found that some city prosecutors were more likely to prosecute Black than White defendants and a 2000 report found that prosecutors were more likely to offer White defendants generous plea bargains (Kang et al, 2012).

Race matters in capital sentencing in more than one way. Not only are murderers of White victims more likely to be capitally sentenced than murderers of Black victims, but Black murderers of White victims are more likely to be sentenced to death if they appear more stereotypically Black (Eberhardt, 2006).

Racialized Obstacles to Educational Opportunity

While the vast majority of teachers undoubtedly have the best of intentions, the evidence is strong that implicit bias is affecting our classrooms. National statistics on school suspension paint a particularly grim portrait of the fate of Black boys. The disproportionate suspension

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rates are a striking example of the "discriminatory discipline" that many Black boys experience. This phenomena is experienced by many parents as particularly noticeable beginning in fourth grade as boys move closer to adolescence, often referred to as the "fourth grade" syndrome. In general, suspension rates are higher for boys. Boys are suspended twice as often as girls (9.1% vs. 4.5%), but the problem is acute for Black boys who are suspended at twice the rate of Hispanic boys and three times the rate of White boys (15.0%, 6.8%, and 4.8%, respectively). According to the National Center of Education Statistics, in 2006, Black and Hispanic boys accounted for nearly two thirds of the three million suspensions and over half of the 102,080 expulsions in U.S. public schools (Planty et al., 2009).

A male student of color who is suspended is three times as likely to drop out of school by the 10th grade and is in turn three times as likely to end up incarcerated (Goertz, Pollack, & Rock, 1996). One little-known but chilling marker of this disproportionality is that, by the age of 15, roughly 2% of the black male American population is simply *missing*; these boys are neither in school nor in the criminal justice system. They are most likely alive, but they are utterly disenfranchised from society (Flynn, 2008). This is a fate suffered by no other demographic group in America.

Sadly, statistics such as these are often thought to reflect objectively worse conduct among black boys – research shows this assumption to be wrong (Gregory, Skiba, & Noguera, 2010). Rather, black boys in particular appear to be referred for suspension more readily because their group membership leads them to be stereotyped as more threatening, disruptive, and uncooperative by teachers and school administrators. For example, studies find that whereas white boys are typically suspended for concrete and observable violations such as smoking, fighting, or obscenity, Black boys tend to be suspended for violations such as disrespect, noisiness, or defiance, which are more abstract and subjective in nature and therefore more likely to be influenced by stereotyping or bias (Skiba et al., 2002). Black boys' behaviors seen through the lens of implicit bias are interpreted far differently than the same behavior by a White boy. The suspension statistics are a chilling example of how stereotypes shape behavioral ambiguity to color social judgments (Aronson & Noguera, 2013).

The Bias Continues

HIRING HURDLES : Implicit bias may also impact employment. Researchers have found that race can have powerful effects on a job applicant's prospects for an interview (Bertrand, 2003). Once inside the door, the racial tensions and biases often continue. Measures of implicit bias have been shown to correlate with discriminatory hiring decisions (Ziegert, 2005). Over time, although self-reported measures of racial bias in hiring selections have generally declined over time, the impact of implicit bias on employment decisions has not (Dovidio & Gaertner, 2000).

IMPLICIT ASSUMPTIONS AND HEALTHCARE : Racial disparities in health treatment are well-documented and widespread, cutting across socioeconomics, geography, and even affecting those portions of our healthcare system with universal access (i.e. veteran access to healthcare) (Sabin 2009). Black patients received a poorer quality of care in studies involving cancer treatment, cardiovascular diseases, kidney transplants, children's medication, pain management, and many other areas. Racial disparities existed in doctor-patient communications, and in overall clinical interactions. Doctors also exhibited tendencies to believe that White men would be more likely to follow prescriptions than Black men.

Blocking the Pipeline

Often it is assumed that Black students benefit in the college admissions and higher admissions contexts. However, studies by Hodson & Dovidio show that in making college admission decisions using two criteria (GPA and SAT), decision-makers weigh these criteria differently depending on the race of the candidate. For White candidates they emphasize the criterion where the candidate is strong and de-emphasize the criterion on which the candidate is weak. For Black candidates they do the opposite.

In our report, we describe the role that implicit bias plays in undermining perceptions of capacity of Black students and the continuing stigmatization experienced by Black students. We also discuss the particularly hostile climate faced by Black students in states that have abolished affirmative action.

Altering Perceptions and Reducing Bias

What mechanisms can alter inaccurate perceptions and reduce the effects of modern bias? Early research shows that thoughtful interventions can reduce both the bias itself and the behaviors linked to implicit bias. Because implicit bias is caused by the automatic association of Black men and boys with negative stereotypes, researchers have focused on whether exposing people to counter-stereotypes can decrease implicit bias. Research to date suggests that this strategy has merit.

The studies focusing on decreasing implicit racial bias have included exposing people to positive historical exemplars like Martin Luther King, Jr. (and contrasting these positive associations with negative White figures such as Charles Manson) and showing videos of comforting settings such as outdoor barbecues (Dasgupta & Greenwald, 2001). Both have reduced implicit bias as measured by the IAT significantly and the result lasted for over 24 hours (Kang et al, 2012; Dasgupta & Rivera, 2008). While not all exposure studies have showed such significant results (Joy-Gaba & Nosek, 2010), the majority of published studies have shown implicit bias reduction after exposure to admired counter-stereotypic individuals suggesting that repeated exposure to positive images of Black men and boys will be an important strategy to reduce implicit bias – and reducing the saturation of continued negative stereotypes is likely of even greater significance (Kang, 2012).

Even as we work to reduce implicit bias itself, we must also focus on interrupting the behavioral effects of existing bias. Research shows that people can and do over-ride implicit biases on decision-making (e.g. Dasgupta & Rivera, 2006). In situations where we are making important decisions – who to hire, whether to find a defendant guilty or not, what diagnosis to give a patient – we can act according to our conscious egalitarian values even if we hold implicit biases. Studies also show that people will act according to egalitarian values when conscious that race may affect their decision-making. People can be taught to doubt their own objectivity around race and other charged categories that can lead to this sort of vigilance (Casey et al, 2012).

Several organizations and academics, including AVI and researchers with whom we work, are involved in projects to educate judges and other important actors in the legal system about the possibility that implicit bias affects behavior (e.g. Kang, 2012). These trainings appear successful in altering judges' perceptions that they are objective and alerting them to the possibility that implicit bias may affect their decisions about sentencing and other important

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outcomes. (Casey et al., 2012). Federal Judge Mark Bennett also does direct jury training about implicit bias during jury selection and in his jury instructions, he expressly directs jurors not to “decide the case based on ‘implicit biases.’” (Bennett, 2012).

Researchers such as Pedro Noguera and Joshua Aronson are developing interventions to reduce teachers’ unconscious stereotyping of Black boys. These interventions are based on the premise that teachers who learn to appreciate their students as individuals will be less likely to default to stereotypes when viewing student behavior. It simply becomes much harder to dislike a student or see him as merely a representative of a group (e.g., black troublemaker) if one has been given a window into his life and circumstances (Wilson, 2011).

Individualized interventions show promise, but of equal or even greater significance are addressing structural conditions in which people operate. In other words, segregated work places, schools, and neighborhoods deeply affect the incidence of implicit bias and in-group preference.

Becoming Colleagues, Friends, and Family: Inter-group Contact

The individualized interventions show promise, but of equal or even greater significance are addressing the structural conditions in which people operate. In other words, segregated work places, schools, and neighborhoods deeply affect the incidence of implicit bias and in-group preference. Whites who grow up and are educated in segregated environments appear more likely to hold implicit biases and in-group preferences than those who benefited from early experiences of integration (Tropp & Molina).

Increased diversity has also been shown to decrease the automaticity of stereotypical associations and to encourage more thoughtful decision-making. Studies of juror deliberations have shown, for example, that racially diverse jurors engage in longer discussions, make fewer inaccurate statements, and have greater discussions of race-related topics (Sommers, 2006). Indeed, Professor Sommers found that the simple knowledge that they would be serving on a diverse rather than an all-White jury led White jurors to be less likely to believe at the conclusion of the evidence that the Black defendant was guilty (Sommers, 2006).

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Race as an Emotional Construction

Our researchers have concluded that the emotions of race are a critically important component of the challenges confronting Black men and boys. This literature is less known than the implicit bias work that has garnered increasing attention recently. Our report contains a detailed review of this literature and shares our original research in this domain.

Race triggers powerful emotions. Among them is “racial anxiety,” which is discomfort about the potential consequences of inter-racial interactions. Black men and boys often experience the anxiety that they will be the subject of discrimination and hostile or distant treatment. White people may experience the mirror anxiety that they will be assumed to be racist by the Black man or boy and therefore, will be met with distrust or hostility.

It may seem surprising that Whites experience “racial anxiety” – but in light of the importance of the social norm of egalitarianism, many Whites truly fear being perceived as racist. This fear is a subset of a broader form of identity anxiety—which has been labeled “stereotype threat” (Steele & Aronson, 1995). Stereotype threat is the frequently unconscious fear that one’s actions may confirm stereotypes about their identity groups. Stereotypes differ across groups

so this anxiety can play out differently for particular identity groups and in different situations (Steele, Spencer & Aronson, 2001). It has been most well documented by its effect on the academic performance of students of color who fear confirming the negative stereotypes of intellectual inferiority (Steele & Aronson, 1995). This form of stereotype threat also affects women in math and science and can be triggered in white men when compared to Asian Americans (Aronson & McGlone, 2009).

More recently, it has also been identified in whites with respect to the stereotype that they are racist or otherwise biased against members of marginalized groups (Goff, Steele, and Davies, 2008). Because our society considers racism or bias immoral, the fear of being thought racist or biased can be quite powerful. This anxiety has been shown to reduce the cognitive functioning of whites with high implicit bias levels after they have interacted with a person of color (Trawalter, Richeson & Shelton, 2009).

Race and Identity Threat

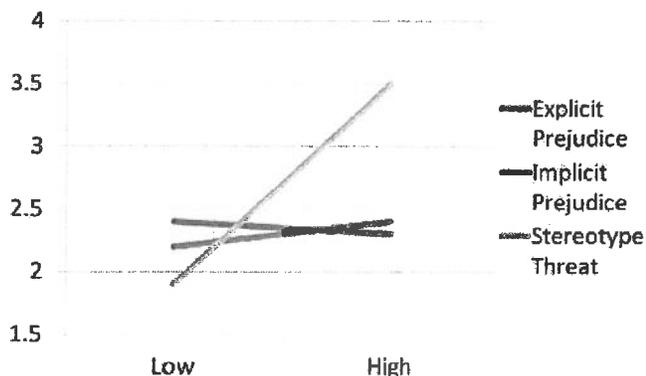
Because of the salience of race in the United States, people of all races and ethnicities often experience physiological threat and cognitive depletion in anticipation of and following an interracial interaction (Page-Gould, Mendoza-Denton & Tropp, 2008). Indeed, research has shown that Black people's physiological and psychological health can be compromised by interracial interactions or by the anticipation of assessment by Whites (Trawalter, Richeson & Shelton, 2009; Steele, 2011). As with other stressors, racial anxiety can yield cardiovascular and other stress-induced illnesses (Mays, Cochran & Barnes, 2006).

In addition to the physical symptoms, racial anxiety tends to affect the verbal and non-verbal behaviors of members of both groups (Dovidio, Kawakami & Gaertner, 2002). People experiencing anxiety often physically distance themselves from each other, share eye contact less, and their verbal tone is less friendly and engaging. When both sides of the inter-racial dyad are experiencing anxiety, both members felt the interaction was negative and the anxiety can spiral (Page-Gould et al, 2008). As with implicit bias, racial anxiety can have significant effects across important life domains from the criminal justice system, employment, education, and health.

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Police to Fear

Among the most dramatic and troubling findings about racial anxiety is its correlation with police use of excessive force. In his work with police departments across the country, Professor Phillip Atiba Goff has found that anxiety about appearing racist has a *greater* correlation with the excessive use of force than either explicit or implicit bias. The graph below shows the conditions most linked to excessive use of force.



The results were significant. Racially anxious police officers are more of a risk of using excessive force than are explicitly racially biased police officers (though the latter are more likely to engage in racially disparate pedestrian stops) (Goff & Martin, 2013).

Stereotype Threat

Research shows that anxiety about negative stereotypes can trigger physiological changes in the body and the brain (especially an increased cardiovascular profile of threat and activation of brain regions used in emotion regulation), cognitive reactions (especially a vigilant self-monitoring of performance), and affective responses (especially the suppression of self-doubts). These effects all divert cognitive resources that could otherwise be used to maximize task performance, (Schmader & Johns, 2003).

Stereotype threat was initially identified in the academic domain. It has been shown to hurt the academic performance of Black students who fear confirming pernicious stereotypes about intellectual inferiority (Steele & Aronson, 1995). Why does stereotype threat have such striking effects? When people are aware of a negative stereotype related to the particular domain, their attention may be split between the test at hand and concern that their actions may confirm that stereotype. Or their actions may respond to the need for self-image and/or group based maintenance.

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"White" stereotype threat (the fear of being seen as a racist) can also diminish the likelihood of academic success for Black boys and young men. There are fewer studies in this area, but those studies suggest that some White teachers may be undermining their students' educational advancement out of fear that they will be viewed as racist.

In a recent study, poorly written essays were sent to 113 middle school teachers in the Northeast who were instructed to provide feedback to the student author (Harber, 2012). The teachers who thought they were responding to Black and Latino students provided less critical feedback and more praise than to White students. The only exceptions were teachers who felt that they had supportive principals; these teachers provided equal feedback to White and Black students (though still less critical feedback to Latino students).

A related phenomena is that a fear of appearing prejudiced can lead to a "failure to warn"—a documented phenomenon where teachers or counselors fail to instruct a Black student about the potential negative consequences of a difficult proposed course or plan (Crosby, 2007). In a 2007 study, peer advisors were given information about a prospective student who was seeking advice about whether to take a particularly challenging schedule. Peer advisors who thought the student was White or Asian American recommended against the schedule as too much work for a given semester, but advisors who had Black students did not (Crosby, 2007).

Successful Interventions

Reducing racial anxiety and its effects on behavior is as important as reducing bias. Both result in conditions that create significant obstacles to the full inclusion of Black men and boys in our society – and in the context of the criminal justice system, can literally be dangerous.

POLICE DEPARTMENTS : Cutting edge work by Phillip Atiba Goff with several major police departments provides an instructive pathway to ameliorate the harmful effects of racial anxiety. Professor Goff's solutions begin with an intensive diagnostic process of institutional dynamics to determine the factors that create racial anxiety. He then devises institutional interventions that alter the dynamics within the institutions to reduce the discriminatory outcomes.

SCHOOLS : Stereotype threat can be mitigated and schools can create conditions in which Black boys and young men have a greater likelihood of reaching their potential. We have learned for example that Black students who have been taught that intelligence is malleable rather than fixed were more engaged with their studies and ultimately had higher grade point averages. (Aronson et al., 2002)

In addition, stereotype threat diminishes and Black students are more apt to perform to their potential when they are not the only representative or one of few representatives of their group and when same-race role models are present (Inzlicht & Ben-Zeev, Marx & Roman, Marx & Goff, Sekaquaptewa & Thompson, 2002; Walton et al, 2008; Purdie-Vaughn et al, 2008). In diverse environments, group membership tends to become less defining of individual identity. Rather than feeling like “the Black guy” in the engineering class, the student can simply be himself and not see his performance as linked to his group identity.

Conclusion: A Culture Shift

To counter implicit bias and the heightened emotion around race, we ultimately have to change the distorted perceptions of Black men and boys. This report explains why we need a change in the cultural context. Visual culture, in particular, plays an important role in reinforcing implicit bias, increasing our racial anxieties and undermining conversations about racial equality and opportunity. Thus, we must work toward developing a more accurate portrayal of Black men and boys in the cultural domain. This cultural shift will show the similarities in experiences, concerns, and values among men and women of all races. Challenging the caricatures—Black men and boys as either criminals or exceptionals (the President, the occasional judge, the star athlete)—will enhance productive interaction among all communities. A cultural shift has enormous potential to increase inter-group empathy. Although we have seen some movement in popular culture with regard to race, we must also be vigilant about the continued prevalence of stereotyped portrayals of black criminality and inferiority. Those of us seeking to address issues of race through messaging campaigns and programs face enormous obstacles in light of the continuous onslaught of stereotypes prevalent in the mainstream media and the myth of colorblind perception that has been largely internalized. American society has a profound misunderstanding of the role that bias plays in creating structural and individualized obstacles to full inclusion of marginalized groups. Using the framework of “implicit bias” and “race as an emotional trigger” allows us to talk about race without accusing people of “being racist,” when they genuinely believe they are egalitarian. The social science described in this report helps people understand why inter-racial dynamics can be so complicated and challenging for people despite their best intentions. AVI is working with multifaceted research, a positive counter-narratives and de-biasing messaging to reach and engage a mainstream audience in the ongoing struggle to end racism.

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Research Advisors

Joshua Aronson is an Associate Professor of Applied Psychology at New York University.

After receiving a PhD from Princeton, Aronson did post-doctoral work at Stanford University with Professor Claude Steele. In 1995 Steele and Aronson published their landmark laboratory studies on "stereotype threat," a performance-inhibiting phenomenon that occurs when students confront the negative expectations of the particular stereotypes assigned their race. The studies show that if you could minimize stereotype threat in testing situations, you could get rid of a big portion of the gap between blacks and whites on standardized tests.

Since then, Aronson has continued his laboratory research, but he has also conducted intervention work in the schools, both examining the psychological underpinnings of the performance gap and developing practical methods for reducing it. Aronson is also starting to assemble a nationwide coalition of experts concerned with this achievement gap who will eventually create a national task force to focus their efforts and share research.

Matt A. Barreto is an Associate Professor in Political Science at the University of Washington, Seattle and a founding member of the Washington Institute for the Study of Ethnicity, Race and Sexuality (WISER).

He received his Ph.D. in political science from the University of California, Irvine in 2005. His research examines the political participation of racial and ethnic minorities in the United States and his work has been published in the *American Political Science Review*, *Political Research Quarterly*, *Social Science Quarterly*, *Urban Affairs Review*, and other peer-reviewed journals. Matt specializes in Latino and immigrant voting behavior, and teaches courses on Racial and Ethnic Politics, Latino Politics, Voting and Elections, and American Politics at UW. Part of his research agenda also includes public opinion and election surveys, including exit polling methodology. Matt is also an affiliated research scholar with the Tomas Rivera Policy Institute (www.trpi.org) since 1999 and with the Center for the Study of Los Angeles (www.lmu.edu/csla) since 2002. In 2004, he was a co-author of the TRPI/Washington Post National Survey of Latino voters and in 2005, he was co-principal investigator of the CSLA Los Angeles Mayoral exit poll.

DeAngelo Bester has nearly 10 years of experience leading local, state, and national racial justice organizing campaigns around issues such as educational equity, preservation and expansion of affordable housing, and increasing access to living wage jobs for African Americans. During his tenure with NPA, DeAngelo has designed a number of political education trainings. In his current role as the project director for NPA's Dismantling Structural Racism Project, he is designing a comprehensive curriculum around structural racialization and developing effective communications around race for community based organizing groups. He is a skilled facilitator and strategic planner.

Ludovic Blain is an author and progressive entrepreneur, having created projects domestically and on three continents. Ludovic is currently Program Director of the Progressive Era Project/Color of Democracy Fund, working with donors to build progressive power of people of color in key counties in California. Previously he helped to direct the Closing the Racial Wealth Gap Initiative at the Insight Center, working with 140 economic and financial experts of color to develop and advocate for federal policies that would close the racial wealth gap. Previously Ludovic was the National Campaign Coordinator for the \$6 million 12 state Equal Voice for America's Families Campaign, and has led organizing and advocacy work for almost two decades on environmental justice, anti-racist strategic communications and other racial justice issues.

Camille Charles is Edmund J. and Louise W. Kahn Term Professor in the Social Sciences and Professor of Sociology and Education, at the University of Pennsylvania.

She is author of *Won't You Be My Neighbor: Race, Class and Residence in Los Angeles* (Russell Sage, Fall 2006), which classifies and race-based explanations for persisting residential segregation by race. She is also co-author of *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities* (2003, Princeton University Press). More recently, she is co-author of the forthcoming book, *Taming the River: Negotiating the Academic, Financial, and Social Currents in Selective Colleges and Universities* (co-authored with Douglas S. Massey and colleagues; Princeton University Press), the second in a series based on The National Longitudinal Survey of Freshmen, and *Race in the American Mind: From the Moynihan Report to the Obama Candidacy* (with Lawrence Bobo). She is also nearing completion of a sole-authored book on Black racial identity in the United States, tentatively titled, *The New Black: Race Conscious or Post Racial?* Professor Charles earned her Ph.D. in 1996 from the University of California, Los Angeles, where she was a project manager for the 1992-1994 Multi-City Study of Urban Inequality. Her research interests are in the areas of urban inequality, racial attitudes and intergroup relations, racial residential segregation, minorities in higher education, and racial identity; her work has appeared in *Social Forces*, *Social Problems*, *Social Science Research*, *The DuBois Review*, the *American Journal of Education*, the *Annual Review of Sociology*, *The Chronicle of Higher Education*, and *The Root*.

Nilanjana Dasgupta is a Professor of psychology at the University of Massachusetts, Amherst. She is interested in people's beliefs and attitudes toward social groups, with special attention to mental processes that promote stereotypes and prejudices toward disadvantaged social groups.

Her recent projects focus on specifying factors that create and magnify stereotypes and prejudice, examining their influence on behavior and developing strategies aimed at undermining such biases. These projects have been funded by the National Science Foundation, National Institute of Mental Health and the American Psychological Foundation.

Rachel D. Godsil is the co-founder and research director for the American Values Institute, a national consortium of social scientists, advocates, and law professors focusing on the role of implicit bias in law and policy, as well as the Eleanor Bontecou Professor of Law at Seton Hall University Law School.

She is currently pursuing research projects to determine differential empathy levels toward young men and police officers, media messages to address racialized moments, and the link between stereotype threat and the success of students of color in law. Professor Godsil's recent publications include *Implicit Bias in the Courtroom* (UCLA Law Review) co-authored with Jerry Kang et al.; *Implicit Bias in Environmental Decision Making in Implicit Racial Bias Across the Law* (Oxford University Press, 2012), and *Implicit Bias Insights as Preconditions to Structural Change*, co-authored with John Powell. She has written several amicus briefs in cases involving civil rights, including on behalf of the National Parent Teacher Association in the Parents Involved in Community Schools v. Seattle School District litigation at the Supreme Court. She is also the co-editor of *Awakening from the Dream: Civil Rights Under Siege and the New Struggle for Equal Justice* (Carolina Academic Press, 2005).

Phillip Atiba Goff is an Assistant Professor of Social Psychology at the University of California, Los Angeles.

He was born in Philadelphia, PA, and raised in the nearby suburbs. He concentrated in Afro-American Studies at Harvard University and studied Social Psychology at Stanford University before taking his first appointment at The Pennsylvania State University. While there, Dr. Goff created the Africana Research Center's Post-Doctoral Fellowship Program and coordinated it for 2 years before leaving. His research has led him to become an expert in race, policing, and intersectional identity. In that capacity, Dr. Goff has been recruited as an equity researcher and consultant for police departments around the country, a role he continues to play enthusiastically. His work on equity issues in policing has led to foundation of the Consortium for Police Leadership in Equity with Tracie L. Keese. Goff's research investigates the possibility that contextual explanations play an under-explored role in producing racial inequality. Rather than focusing on racial attitudes that are internal to an individual, his research examines ways in which environmental factors can produce racially disparate outcomes. Through this research, he hopes to expand the scope of what comes to mind when one thinks of the causes and consequences of inequality.

DeLeon L. Gray is an Assistant Professor of Educational Psychology at North Carolina State University.

He has several early career highlights including working in the professional sector at three national organizations that specialize in understanding the science of the mind and human behavior—the National Institutes of Health, the Association for Psychological Science, and the American Institutes for Research. He possesses a command over quantitative analytical approaches with a Master's degree in Quantitative Research,

Evaluation, and Measurement. To date, his research program has been recognized with several prestigious honors, including a Spencer Foundation Dissertation Fellowship, a Dissertation Research Fellowship from The Ohio State University, and an AERA Minority Dissertation Fellowship. In addition, the quality of his work has been acknowledged with national awards such as the Research on Socially and Economically Underrepresented Populations Award (RiSE-UP) from the Association for Psychological Science. DeLeon examines the "social triggers" that prompt achievement behavior in diverse educational environments. Specifically, he is intrigued by how students perceive, remember, and interpret information about themselves and others, and how these mental representations facilitate the adoption of the very goals, values, and self-perceptions that determine aptitude. Practically, his research informs discussions on how student patterns of underachievement and emotional turbulence can be disrupted by strategies borne of an understanding of social cognition and motivation.

Connie Cagampang Heller is co-founder of the Linked Fate Salon. The salon offers progressive activists and funders an informal place to think about and discuss movement building strategies with peers across issues and sectors. She serves on the Advisory Board of the Center for Social Inclusion and Americans for American Values, as well as on the Boards of Americans For a Fair Democracy, and World Trust Educational Services.

Jerry Kang is a Professor of Law at UCLA School of Law and also of Asian American Studies. His teaching and research interests include civil procedure, race, and communications. He is also an expert on Asian American communities, and has written about hate crimes, affirmative action, the Japanese American internment and its lessons for the War on Terror.

On communications, Professor Kang has published on the topics of privacy, pervasive computing, mass media policy, and cyber-race (the techno-social construction of race in cyberspace). His work regularly appears in leading journals, such as the UCLA, Stanford, and Harvard Law Reviews. During law school, Professor Kang was a supervising editor of the Harvard Law Review and Special Assistant to Harvard University's Advisory Committee on Free Speech. He joined UCLA in Fall 1995 and was elected Professor of the Year in 1998 and received the Rutter Award for Excellence in Teaching in 2007. At UCLA, he helped found the Concentration for Critical Race Studies, the first program of its kind in American legal education and acted as its founding co-director for two years. During 2003-05, Prof. Kang visited at both Georgetown Law Center and Harvard Law School. Prof. Kang is a member of the American Law Institute, has chaired the American Association of Law School's Section on Defamation and Privacy, serves on the Board of Directors of the Electronic Privacy Information Center, and has received numerous awards including the World Technology Award for Law and the Vice President's "Hammer Award" for Reinventing Government.

john a. powell is an internationally recognized expert in the areas of civil rights and civil liberties and a wide range of issues including race, structural racism, ethnicity, housing, poverty, and democracy. In addition to being a Professor of Law and Professor of African American Studies and Ethnic Studies, Professor powell holds the Robert D. Haas Chancellor's Chair in Equity and Inclusion. He is also the Director of the Haas Diversity Research Center (HDRC), which supports research to generate specific prescriptions for changes in policy and practice that address disparities related to race, ethnicity, gender, sexual orientation, disability, and socioeconomic in California and nationwide. He was recently the Executive Director of the Kirwan Institute for the Study of Race and Ethnicity at The Ohio State University and held the Gregory H. Williams Chair in Civil Rights & Civil Liberties at the Moritz College of Law.

Professor powell has written extensively on a number of issues including structural racism, racial justice and regionalism, concentrated poverty and urban sprawl, opportunity based housing, voting rights, affirmative action in the United States, South Africa and Brazil, racial and ethnic identity, spirituality and social justice, and the needs of citizens in a democratic society.

Previously, Professor powell founded and directed the Institute on Race and Poverty at the University of Minnesota. He also served as Director of Legal Services in Miami, Florida and was National Legal Director of the American Civil Liberties Union where he was instrumental in developing educational adequacy theory.

Professor powell has worked and lived in Africa, where he was a consultant to the governments of Mozambique and South Africa. He has also lived and worked in India and done work in South America and Europe. He is one of the co-founders of the Poverty & Race Research Action Council and serves on the board of several national organizations.

L. Song Richardson is Professor of Law at the University of Iowa College of Law. She received her BA from Harvard College and her JD from The Yale Law School. Professor Richardson's current research utilizes the science of implicit social cognition to study criminal procedure, criminal law and policing. Currently, she is working on a book that examines the legal and moral implications of mind sciences research on policing and criminal procedure. She is also co-editing a book titled *The Future of Criminal Justice in America* that will be published by

Cambridge University Press. Professor Richardson's scholarship has been published by law journals at Cornell University, the University of California, Duke, Iowa, Northwestern University, the University of Minnesota, and Indiana (Bloomington), among others. Her legal career has included partnership at a boutique criminal law firm and work as a state and federal public defender in Seattle, Washington. She was also an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc. Immediately upon graduation from law school, Professor Richardson was a Skadden Arps Public Interest Fellow with the National Immigration Law Center in Los Angeles and the Legal Aid Society's Immigration Unit in Brooklyn, NY. Professor Richardson has been featured in numerous local and national news programs, including 48 Hours. She teaches Criminal Law, Criminal Procedure, and Law and Social Science.

Linda Tropp is Professor and Director of the Psychology of Peace and Violence Program at the University of Massachusetts Amherst.

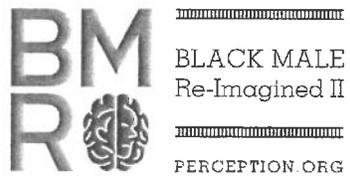
Her main research programs concern experiences with intergroup contact, identification with social groups, interpretations of intergroup relationships, and responses to prejudice and disadvantage. She has received the Gordon Allport Intergroup Relations Prize from the Society for the Psychological Study of Social Issues for her research on intergroup contact, the Erikson Early Career Award for distinguished research contributions from the International Society of Political Psychology, and the McKeachie Early Career Teaching Award from the Society for the Teaching of Psychology. Dr. Tropp has been a member of the Governing Council of the Society for the Psychological Study of Social Issues, and she currently serves on the editorial boards of *Personality and Social Psychology Bulletin* and *Group Processes and Intergroup Relations*. In addition, Dr. Tropp has been engaged in many efforts to integrate contributions from researchers and practitioners to improve intergroup relations. She has collaborated with national organizations to present social science evidence in US Supreme Court cases on racial desegregation, and she has worked on state initiatives designed to improve interracial relations in schools. She is currently a member of the Joint Learning Initiative on Children and Ethnic Diversity (JLICED), an international, interdisciplinary network of researchers, policymakers, and practitioners working to reduce racial and ethnic divisions and build social inclusive communities through effective early childhood education programs.

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The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion

Robert J. Smith & Justin D. Levinson*

I. INTRODUCTION

The disproportionate incarceration of minorities is one of the American criminal justice system's most established problems. In spite of a societal backdrop in which descriptive claims of a "post-racial" America prosper, the problematic racial dynamics of criminal justice persist. The numbers are stark and clear: one out of every twenty-nine black adult women and men are currently incarcerated compared with only one out of every 194 whites.¹ But less clear are the causes of these disparities. For decades, scholars have struggled to understand why America prosecutes and incarcerates minorities at such massive rates. Perspectives on this troubling issue cover an incredibly wide range of themes, spanning from racist discussions of "biological differences" to thoughtful considerations of structural racism. A scientific revolution, however, has generated new interest with regard to how upstanding people—including judges, jurors, lawyers, and police—may discriminate without intending to do so. This implicit bias revolution has created new opportunities to empirically investigate how actors within the legal system can perpetuate discrimination in ways that have been—until now—almost impossible to detect.

The topic of implicit racial bias in the legal system is extraordinarily broad, and scholars are beginning to consider how it might illuminate inequality across a range of legal domains.² In the criminal law setting, in

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1. JENIFER WARREN, THE PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008 34 tbl.A-6 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (aggregating numbers for all fifty states). For younger adults, the numbers are similarly startling. *See id.* One out of every nine black males between ages twenty and thirty-four are incarcerated. *Id.*

2. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., forthcoming 2012) (considering implicit racial bias across fourteen different legal domains).

particular, there has been noticeable progress. Recent empirical projects have begun the pursuit of assessing how implicit racial bias likely affects police, judicial, and juror decision-making.³ But scholars have yet to conduct an in-depth examination of how implicit bias might affect one of the most noteworthy parts of the criminal justice system—prosecutorial discretion—and no empirical projects focused on implicit bias have gained access to prosecutors as study participants. The idea that prosecutors might be partially responsible for propagating inequality in the criminal justice system is far from new.⁴ Until now, however, it has been difficult to explain in detail why prosecutors—the vast majority of whom would never intend to hold double-standards based on race—might nonetheless be unwitting propagators of bias.

From the arrest of a suspect to the sentencing of a defendant, consider the range of discretion-based decisions that prosecutors must make on a daily basis: Should an arrested citizen be charged with a crime? At what level should bail be recommended? Should bail be opposed? What crime or crimes will be charged? Should charges be dropped? Should a

3. See 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, 1006–09 (2007); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007) [hereinafter Levinson, *Forgotten Racial Equality*]; Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 187–89 (2010) [hereinafter Levinson et al., *Guilty by Implicit Racial Bias*]; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195–96 (2009).

4. See Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2094–106 (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) (proposing that it “[i]s likely that unconscious racism influences a prosecutor even more than it affects others”); 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) (“[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) (footnote omitted))).

We do not claim that implicit racial bias accounts for all of the racial discrepancies in the criminal justice system. Structural racism, for example, may explain some of the disparity. In addition, for some types of crime, differences in offense rates also may help explain part of the variance. See *Homicide Trends in the U.S.*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/homicide/race.cfm> (last visited Feb. 3, 2012) (indicating that black Americans represent 52% of the known homicide offenders between 1976 and 2005). It should be noted, however, that both structural racism and implicit bias could account for some or even all of the disproportionality in arrest rates.

plea bargain be offered or negotiated? Which prosecuting attorney will prosecute which alleged crime? What will the trial strategy be? Will minority jurors be challenged for cause or with peremptory challenges? What sentence will be recommended?

This range of discretion offers a starting point with which to investigate how implicit bias might infect the prosecutorial process. Following a long line of scholarship examining the causes of racial disparities in the criminal justice system,⁵ this Article argues that implicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways.

The Article is organized as follows: Part II provides an introduction to implicit bias research, orienting readers to the important aspects of implicit bias most relevant to prosecutorial discretion. Part III begins the examination of implicit bias in the daily decisions of prosecutors. The Part presents key prosecutorial discretion points and specifically connects each of them to implicit bias. Part IV recognizes that, despite compelling proof of implicit bias in a range of domains, there is no direct empirical proof of implicit bias in prosecutorial decision-making. It thus calls for an implicit bias research agenda designed to further examine how and when implicit bias affects prosecutorial decision-making, including studies designed to test ways of reducing the harms of these biases. It then begins a necessarily early look at potential remedies for the harms associated with implicit bias in prosecutorial discretion.

II. IMPLICIT BIAS AND ITS RELEVANCE TO PROSECUTORIAL DISCRETION

Implicit racial bias describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways. Since the late 1990s, a vast amount of research on implicit bias has demonstrated that a majority of Americans, for example, harbor negative implicit attitudes toward blacks and other socially disadvantaged groups, associate women with family and men with the workplace, associate Asian-Americans with foreigners, and more.⁶ Fur-

5. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011); James Foreman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, N.Y.U. L. REV. (forthcoming 2012); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

6. See Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 447–48 (2005); Thierry Devos & Debbie S. Ma, *Is Kate Winslet More American Than Lucy Liu? The Impact of Construal Processes on the Implicit Ascription of a National Identity*, 47 BRIT. J. SOC. PSYCHOL. 191, 191–92 (2008); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs*

thermore, researchers have found repeatedly that people's implicit biases often defy their awareness and self-reported egalitarian values. In this Part, we begin by summarizing research on implicit racial bias generally,⁷ and then provide specific examples of studies that facilitate our consideration of whether prosecutors may make decisions in biased ways. Because we believe that prosecutors' implicit biases manifest in a series of related decisions in which their perceptions of the defendants' dangerousness are paramount (ranging from the decision to charge to sentencing recommendations), we consider implicit bias studies that show that people automatically classify members of certain groups (particularly African-Americans) as dangerous, aggressive, and hostile. We also consider studies that show that when racial stereotypes such as these are active, people unintentionally make decisions in biased ways. These studies will set the stage for a step-by-step consideration of the points in time at which prosecutors might be unwittingly influenced by implicit bias.

A. Priming: The Automatic Activation of Stereotype Networks

"Priming" is a cognitive phenomenon that reveals how exposing people to photos, symbolic representations, or members of stereotyped groups activates a vast network of stereotypes about that group. Psychologists define priming as "the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context."⁸ In the context of prosecutorial decision-making, priming might explain how, even with only minimal contact with an arrestee (such as seeing the arrestee's name, racial or ethnic classification, or photograph), racial stereotypes can be immediately and automatically activated in the mind of a prosecutor, without the prosecutor's awareness.

Racial and ethnic stereotypes can be primed easily. A study by Daniel Gilbert and Gregory Hixon demonstrated that simply seeing a person from a stereotyped group can activate stereotypes related to that

from a *Demonstration Website*, 6 *GROUP DYNAMICS* 101, 101-02 (2002) (reporting results from 600,000 IATs on a popular online website). Much of this Part's description of implicit bias is based on Justin D. Levinson, *SuperBias: The Collision of Behavioral Economics and Implicit Social Cognition*, *AKRON L. REV.* (forthcoming 2012). Some of the descriptions of implicit bias, including study summaries and footnotes, are reproduced sometimes verbatim from that article.

7. Our goal is to provide a focused discussion of implicit racial bias as it relates to prosecutorial discretion. We therefore do not provide a full review of implicit bias scholarship. Other articles have provided broader reviews of implicit bias more generally. See generally *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 2; Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489 (2005); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 *ANN. REV. L. & SOC. SCI.* 427 (2007); Levinson, *Forgotten Racial Equality*, *supra* note 3.

8. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 *J. PERSONALITY & SOC. PSYCHOL.* 230, 230 (1996).

group. Participants in the study were asked to complete a videotaped word fragment task presented by a research assistant holding cue cards.⁹ Half of the participants watched a video featuring an Asian research assistant, and half watched a video featuring a Caucasian research assistant.¹⁰ In each condition, the research assistant held the cards containing fragments that could be completed with either neutral words or with words stereotypic of Asians.¹¹ For each fragment, participants completed as many words as possible in fifteen seconds. The researchers found that simply seeing an Asian research assistant activated participants' ethnic stereotypes.¹² Participants who saw an Asian research assistant completed more stereotype-consistent words than participants who saw a Caucasian assistant.¹³ This study shows how easily racial or ethnic stereotypes can be activated; simply seeing a person from a certain group can awaken harmful stereotypes.

Studies show that priming specifically activates the stereotype of the dangerous black male. Researchers Laurie Rudman and Matthew Lee, for example, primed participants by playing either pop music or rap music.¹⁴ They hypothesized first that simply hearing rap music would activate participants' racial stereotypes, and second that these primed stereotypes would cause people to make more negative judgments about a black person.¹⁵ The results of the study confirmed these predictions. Participants who listened to the rap music not only had their stereotypes activated but also rated a black person's behavior as less intelligent and more hostile than participants who listened to popular music.¹⁶ It should be noted that asking participants about their own prejudices did not predict their judgments of the black person—a finding that supports the theory that stereotypes can affect decision-making even absent a person's endorsement or awareness.¹⁷

9. Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 510 (1991). As Gilbert and Hixon point out, "Stereotypes are forms of information and, as such, are thought to be stored in memory in a dormant state until they are activated for use." *Id.* at 511.

10. *Id.* at 512.

11. For example, participants saw the fragments: "RI_E," "POLI_E," "S_OR_T," and "S_Y." *Id.* at 510.

12. *Id.* at 513–14.

13. For example, they wrote: RICE, POLITE, SHORT, and SHY. *Id.*

14. Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 136–39 (2002). On average, participants listened to the music for thirteen minutes. *Id.* at 136. Participants were led to believe that they were participating in a marketing study. *Id.* at 135.

15. *Id.*

16. *Id.* at 139. This result was compared to participants who read about and rated a white person. *Id.* at 136.

17. *Id.* at 145.

Other researchers have shown how even subliminal priming techniques can activate a range of negative stereotypes about African-Americans. In one of the most well-known studies of subliminal priming and race, Patricia Devine showed participants rapidly flashing words, including stereotypes, that were associated with African-Americans, including “Blacks,” “Harlem,” “poor,” and “athletic.”¹⁸ Participants then were asked to read a story about a person engaging in hostile behaviors that were designed to be somewhat ambiguous, such as demanding money back from a store clerk, and asked to make judgments about the person engaging in these behaviors. The results of the study confirmed the dangers of priming racial stereotypes. Participants who were primed with more of the African-American stereotyped words judged the actor’s ambiguous behavior as more hostile than participants who were primed with fewer of the stereotyped words. Devine concluded, “[T]he automatic activation of the racial stereotype affects the encoding and interpretation of ambiguously hostile behaviors for both high- and low-prejudice subjects.”¹⁹

Stereotypes can thus be activated by seeing a member of a stereotyped group, by hearing a certain type of music, or by being exposed to stereotype-consistent words. In the trial context, studies related to priming have found that even simply showing mock jurors a photograph of a dark-skinned suspect can activate harmful racial stereotypes and affect decision-making.²⁰ Justin Levinson and Danielle Young, for example, showed mock juror participants a series of photographs of a crime scene, including one security camera photo that showed a masked suspect robbing the store.²¹ In the photo, the suspect, who was holding a gun, was dressed such that the only racially identifying information was the skin of his forearm. Half of the participants saw the photo showing the suspect with dark skin, and the other half of the participants saw a photo of the suspect with lighter skin. Despite the obvious legal irrelevance of the suspect’s skin color to the evidence, Levinson and Young found that the skin tone of the perpetrator in the photo affected the way participants

18. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 9, 10 (1989).

19. *Id.* at 11.

20. See 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, 310 (2010); see also Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How “Legal Priming” Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059, 1059–62 (2005) (finding that simply informing study participants that they were jurors in a criminal trial caused them to make harsher behavioral and mental state attributions of out-group members).

21. Levinson & Young, *supra* note 20, at 337.

judged trial evidence and rated the defendant's guilt on a guilty/not-guilty scale.²²

More specifically, mock jurors who saw the darker-skinned perpetrator found the same ambiguous evidence as more likely to indicate guilt, compared to mock jurors who saw the photo of the lighter-skinned perpetrator. Another study by Levinson found that simply changing the name and race of a suspect caused participants to remember case-relevant information in racially biased ways.²³ That is, participants who read about an African-American participant in a fight were more likely to remember that person's aggressive actions than those who read about a white fight participant. Furthermore, in some instances participants even "misremembered" certain facts—falsely recalling aggressive things the perpetrator had actually not done—in racially biased ways.²⁴ These studies show how simple situational cues, such as even brief exposure to racial information, can activate a vast network of racial stereotypes and affect decision-making in concerning ways. It would be expected, then, that when prosecutors work on cases involving members of stereotyped groups, stereotypes regarding these group members are automatically activated.

B. The Implicit Association Test

In addition to the obvious relevance of research on priming to prosecutorial discretion, other research in the field of implicit social cognition helps illustrate how implicit biases might operate to affect prosecutors' decisions. The development of the Implicit Association Test (IAT), for example, revolutionized the way the world looked at and understood implicit bias.²⁵ Perhaps because its Web accessibility allows people to test (and attempt to overcome) their biases first hand, the IAT has served as a compelling and sometimes controversial symbol of implicit bias.²⁶ In the IAT,

22. *Id.*

23. Levinson, *Forgotten Racial Equality*, *supra* note 3, at 350.

24. *Id.* at 400–01.

25. Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, in *THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER* 123 (Henry L. Roediger III et al. eds., 2001); Greenwald et al., *supra* note 6, at 1464.

26. Several legal scholars have debated the best uses of the IAT, focusing on such issues as the meaning of reaction times as well as the question of whether IAT scores can predict behavior, known as predictive validity. See Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 *HARV. L. & POL'Y REV.* 477, 479 (2007); Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 *EMORY L.J.* 1087, 1130–31 (2008); Lane et al., *supra* note 7, at 430; Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 *OHIO ST. L.J.* 1023, 1028, 1032–33 (2006);

Participants sit at a computer and are asked to pair an attitude object (for example, black or white, man or woman, fat or thin) with either an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts) by pressing a response key as quickly as they can. For instance, in one task, participants are told to quickly pair pictures of African American faces with positive words from the evaluative dimension. In a second task, participants are obliged to pair African American faces with negative words. The difference in the speed at which the participants can perform the two tasks is interpreted as the strength of the attitude (or, in the case of attributes, the strength of the stereotype). For example, if participants perform the first task faster than the second task, they are showing implicitly positive attitudes toward blacks. Similarly, if they are faster to perform tasks that oblige categorizing women with home than tasks that oblige categorizing women with career, they are showing implicit sex stereotyping.²⁷

Nilanjana Dasgupta and Anthony Greenwald explain why the speed of association is important: “When highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty.”²⁸ Laurie Rudman and Richard Ashmore similarly describe the IAT’s methodology as relying on “well-practiced associations between objects and attributes.”²⁹

Researchers who employ the IAT have found that the majority of tested Americans harbor negative implicit attitudes and stereotypes toward blacks, dark-skinned people, the elderly, and overweight people, among others.³⁰ For example, with regard to race, people consistently implicitly associate black with negative attitudes such as *bad* and *unpleasant*, and with negative stereotypes such as *aggressive* and *lazy*.³¹

Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737, 737 (2009).

27. Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 2, at 9, 16–17 [hereinafter Levinson et al., *Social Science Overview*].

28. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001).

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

30. Nosek et al., *supra* note 6, at 101.

31. Rudman & Ashmore, *supra* note 29, at 361.

With regard to gender, for example, Americans tend to associate men with *career* and women with *home*.³²

To legal scholars, the IAT has become a symbol of implicit bias.³³ There are two primary reasons for the compelling nature of the measure. First, research has shown consistently that people's implicit biases frequently diverge from their self-reported attitudes, a phenomenon known as dissociation.³⁴ Thus, people who view themselves as having favorable attitudes toward certain groups may be surprised to learn that this explicit favorability is not reflected in their own implicit cognitions. This fact would likely be relevant in the context of prosecutors, as we would predict that most prosecutors report their racial attitudes to be egalitarian.

Second, the IAT's popularity among scholars as a symbol of inequality may be traced to its success in predicting the way people make decisions. That is, the simple methodology of the IAT has shown how implicit bias leads to important real-world consequences, ranging from doctors' medical treatment decisions to human resource officers' decisions on whether to offer an interview to a job candidate.³⁵ In the case of prosecutors, we are primarily interested in whether prosecutors' implicit

32. See Nosek et al., *supra* note 6, at 101; see also Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 1 (2010) (finding that law students display this particular implicit bias as well as an implicit association between men and judges, and women and paralegals).

33. Numerous scholars have discussed implicit racial bias and the IAT. See, e.g., Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 365–66 (2009) (suggesting that hate speech may lead to implicit bias); Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 658 (2007) (claiming that racial profiling relies on cognitive processes that harbor implicit biases); Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1445–54 (2008) (considering the relational aspects of implicit bias in the workplace); Jonathan Kahn, *Race, Genes, and Justice: A Call to Reform the Presentation of Forensic DNA Evidence in Criminal Trials*, 74 BROOK. L. REV. 325, 373 (2008) (discussing the results of IATs in the context of forensic DNA evidence); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 479 (2008) (discussing implicit bias in the context of sexual orientation bias); Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 41–46 (2009) (discussing implicit bias in the context of prisoners' rights); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 74–77 (2009) (predicting that implicit bias leads to housing discrimination against illegal immigrants); Gregory S. Parks & Quinetta M. Roberson, *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination through the Lens of Title VII*, 20 HASTINGS WOMEN'S L.J. 3, 19–34 (2009) (considering race- and gender-based implicit bias in politics and in the workplace); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 507 (2007) (noting that implicit bias may affect housing rentals more than employment decisions).

34. See Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meanings and Use*, 54 ANN. REV. PSYCHOL. 297, 303 (2003); Kang, *supra* note 7, at 1513; see also Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUST. RES. 129, 133 (2004).

35. See Siri Carpenter, *Buried Prejudice*, SCI. AM. MIND, Apr./May 2008, at 32–33.

biases will lead to biased decision-making. Although no studies have yet tested whether implicit biases affect prosecutorial decisions, similar research in nonlegal professions has shown that implicit biases predict important decisions in concerning ways.

For example, medical researchers found that when asked to diagnose and treat a hypothetical patient (who was pictured as either black or white), emergency room doctors in Boston and Atlanta relied on their implicit racial biases.³⁶ Doctors who showed more bias in the black-white IATs were more likely to offer a preferred heart treatment to a white patient than a black patient.³⁷ Similarly striking research emerged in Sweden where Dan-Olof Rooth replied to hundreds of job postings by submitting resumes that differed only in the ethnicity revealed by the applicant's name.³⁸ Rooth measured which resumes elicited invitations to interview and subsequently tracked down the individual human resources officers responsible for making the interviewing decisions. Without knowing the true purpose of the study, the human resources officers completed an IAT. The researcher was able to measure the relationship between the officers' IAT scores and their previous decisions of whether to interview a candidate.³⁹ He found that the greater the human resources officers' implicit bias, the more likely those officers were to extend an interview to a non-Arab candidate. Other studies, including a meta-analysis of over 100 IATs, confirm that implicit bias on the IAT indeed predicts the way people make decisions in the real world.⁴⁰

Few IATs have been conducted in the legal setting, but the ones that have tend to show that implicit racial biases are powerful and have broad effects.⁴¹ A study by Levinson, Young, and Huajian Cai, for ex-

36. 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, 1231 (2007).

37. *Id.* at 1235. Specifically, the doctors were asked to recommend a course of treatment for the patient and were then asked to complete three IATs testing their implicit racial biases. *Id.* at 1233. The study showed that doctors not only implicitly preferred white patients to black patients but also that their implicit racial biases predicted whether or not they would recommend thrombolysis (clot busting) treatment to a white or black patient suffering from myocardial infarction. *Id.* at 1234–35. The more the doctors implicitly preferred the white patients, the more likely they were to recommend thrombolysis treatment to white but not black patients. *Id.* at 1235. No similar predictive validity was found by asking doctors about their explicit racial preferences. *Id.* at 1233. On average, doctors self-reported no racial preferences at all. *Id.*

38. Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence* (Inst. for the Study of Labor, University of Kalmar, Discussion Paper No. 2764), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984432.

39. *Id.* at 9–11.

40. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 32 (2009).

41. See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1542 (2004) (finding implicit racial bias among capital defense attorneys); Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblind-*

ample, tested implicit associations relating to the presumption of innocence and found that people hold implicit associations between *black* and *guilty*.⁴² Using an IAT created specifically to examine the implicit connections of the presumption of innocence, as well as a traditional IAT measuring implicit racial attitudes, the researchers also showed that IAT scores predicted the way in which participants evaluated ambiguous trial evidence.⁴³

Considered together, over a decade of research on implicit racial bias shows that racial stereotypes can be activated easily and can lead to powerful and biased decision-making. In the case of prosecutorial decision-making, there is significant reason to be concerned that implicit biases could similarly lead to discriminatory results. The next Part pursues this possibility by deconstructing prosecutorial decision-making and considering the various ways that implicit racial bias could challenge the integrity of the current prosecutorial system.

III. IMPLICIT RACIAL BIAS CAN OPERATE IN EVERY PHASE OF PROSECUTORIAL DISCRETION

Prosecutors enjoy more unreviewable discretion than any other actor in the criminal justice system.⁴⁴ In this Part, we analyze this vast discretion by first isolating its various component parts and then exploring how implicit racial bias can operate in each phase of prosecutorial discretion.⁴⁵ We focus on three primary areas: (1) charging decisions, including both the decision of whether to charge and the decision of what crime to charge; (2) pretrial strategy, such as the decisions to oppose bail, offer a plea bargain, or disclose potentially exculpatory evidence to the defense; and (3) trial strategy, such as the decision to strike potential jurors or to analogize the defendant to an animal during closing arguments.

ness, 7 J. EMPIRICAL LEGIS. STUD. 886 (2010) (finding that implicit stereotypes about the ethnicity of successful litigators predicted judgments of litigator performance); Rachlinski et al., *supra* note 3, at 1195–96 (finding that judges possess implicit biases favoring whites over blacks, and these biases sometimes predicted a judge's decisions).

42. Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 3, at 206.

43. *Id.*

44. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009).

45. For a discussion of the possible impact of implicit racial bias on other actors in the criminal justice system, see Charles Ogletree, Robert J. Smith & Johanna Wald, *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 2, at 45, 50–60.

A. Charging Decisions

The first decision that a prosecutor makes in most criminal cases is whether to charge the suspect, and if so, with what charge.⁴⁶ In some cases the decision involves whether to charge the suspect at all. This power is an expression of mercy—holding back the legitimate power of the State. But as the United States Supreme Court noted in *McCleskey v. Kemp*, “[T]he power to be lenient [also] is the power to discriminate.”⁴⁷ Empirical studies confirm that the Court’s observation has played out; prosecutors are less likely to charge white suspects than black suspects.⁴⁸ These findings are true even when statistically controlled for prior criminal record.⁴⁹ Faced with such discrepancies in charging decisions, the question becomes: If two suspects with substantially similar backgrounds are arrested for identical crimes in the same jurisdiction, how can the suspect’s race possibly matter? One possibility is that implicit bias is at play.

1. Charge or Release?

In order to understand the role that implicit racial bias might play in a decision of whether to charge a suspect with a crime, consider an ambiguous case of self-defense.⁵⁰ Imagine two homicide cases with identi-

46. In federal cases, and in a minority of states, the prosecutor’s charging decision must be approved by a grand jury. This process, however, usually consists of little more than “rubber stamping” prosecutorial charging decisions. See Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication*, 78 MICH. L. REV. 463, 474 (1980) (indicating that grand juries rarely serve as a check against the charging decisions of prosecutors).

47. *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (internal citation omitted); see also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 35 (1998) (“A prosecutor may unconsciously consider a case involving a white victim as more serious than a case involving a black victim. This unconscious view may influence not only the charging decision, but related decisions as well.” (internal citations omitted)); Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 475 (2009) (“In the Jena Six case it can be argued that the prosecutor is capable of compassion in that he chose not to prosecute the white students who placed nooses on the schoolyard tree.”).

48. Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 647 (2012) [hereinafter *Task Force Report*] (“[E]ven after legally relevant factors . . . are taken into account,” racial differences affect how cases are processed: whites are less likely to have charges filed against them. (citing Robert D. Crutchfield, *Ethnicity, Labor Markets, and Crime*, in ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND SPACE (Darnell Hawkins ed., 1995))). Similarly, prosecutors have been shown to charge white and black defendants differently in homicide cases. See Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC’Y REV. 587, 587 (1985) (finding that the race of the defendant and victim mattered in charging decisions in Florida).

49. Radelet & Pierce, *supra* note 48, at 591.

50. This phenomenon is not limited to the self-defense context. For one particularly powerful example, consider the following story from a former United States Attorney:

cal facts except the race of the victim: one is black and the other is white. The suspect in each case claims self-defense, specifically alleging that he accidentally bumped into the deceased outside of a bar at night, at which point the deceased warned, "You better watch yourself, or you're going to get yours." The suspect contends that the deceased then reached toward his waist and began to pull out a shiny object. The suspect, thinking the deceased was reaching for a weapon, fired his own handgun in what turned out to be a fatal shot. No gun was located near the victim's body, but police found a silver cell phone several feet from the deceased.

Prosecutors must assess the strength of a potential self-defense claim to determine whether they should bring charges at all, and if so, whether to offer a plea to manslaughter or another less serious charge. Assessing the strength of a possible self-defense claim requires an instinctual judgment: did the suspect reasonably believe that the deceased was reaching for a weapon? Recall our discussion of research indicating that Americans implicitly associate black citizens with aggression and hostility. Additional empirical research shows that people specifically associate blacks with guns and other weapons. For example, thousands of IATs taken online over the years have confirmed that the vast majority of Americans implicitly associate blacks with weapons and whites with harmless objects.⁵¹ Other studies using priming methodology support this finding. Keith Payne, for example, found that when participants viewed rapidly flashing photos of black faces immediately before seeing photos of guns, they were significantly faster at identifying the guns than after being primed by white faces.⁵² Applying this research to the scenario

I had an [Assistant U.S. Attorney who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, "Why do you want to drop the gun offense?" and he said, "He is a rural guy who grew up on a farm. The gun he had with him was a rifle. He is a good ol' boy, and all the good ol' boys have rifles, and it's not like he was a gun-toting drug dealer." But he [was] a gun-toting drug dealer, exactly.

JAMES E. JOHNSON ET AL., BRENNAN CTR. FOR JUSTICE, RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 11 (2010), http://www.brennancenter.org/page/-/Justice/ProsecutorialDiscretion_report.pdf?nocdn=1.

51. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 55 (2007). We do not intend to suggest that implicit racial biases operate to the detriment of only black minorities. We focus on black Americans primarily, however, because research from the implicit bias literature is most robust in this area. We hope this work will be expanded to include a better understanding of the effects of implicit biases on all negatively stereotyped groups.

52. B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). Similarly, when participants saw photos of white faces immediately before photos of tools, they were significantly faster at identifying the tools. *Id.* at 185. Interested in similar real-world applications of implicit bias and the association with weapons found by other researchers, Joshua Correll created a videogame-like study designed to test a phenomenon called, "Shooter Bias." Joshua Correll et al.,

above, one could predict that a person perceived to be hostile and implicitly associated with weapons—a black person—would be perceived by prosecutors as likely reaching for a weapon.

The research, especially IAT findings that people implicitly dissociate whites and weapons, also suggests that prosecutors might be more likely to believe that the white victim was reaching for his cell phone, and thus, that the suspect acted unreasonably in shooting the deceased. So, switch the facts and assume that both victims are white. If suspect one is black, because Americans associate black citizens with hostility and aggression, then the prosecutor might be inclined to believe that the black suspect acted too quickly in shooting the unarmed man, while the same prosecutor might be inclined to believe that the white suspect—not only unencumbered by these negative associations but also bolstered by positive stereotypes such as lawful, trustworthy, and successful⁵³—acted reasonably in discharging his weapon. Of course, these dynamics would be amplified in a cross-racial shooting because stereotypes affect the evaluation of both the suspect's and the victim's behavior. A white victim would be more likely to be perceived as reaching for a cell phone, and a black victim would be more likely to be perceived as reacting unreasonably in discharging his weapon.

Implicit racial bias might also affect prosecutorial discretion in the charging decision in a non-self-defense scenario. Consider a case in which the prosecutor must decide whether to charge a suspect with forcible rape. According to the suspect, after a romantic dinner and a movie, the complaining witness invited him back to her house. They entered her bedroom. The complaining witness grabbed his crotch area and started kissing him. He directed her onto the bed and began taking off her (and

The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314–15, 1322 (2002) [hereinafter Correll et al., *Police Officer's Dilemma*]. The “game” displays a series of photos of white and black suspects and pairs each individual suspect with either a gun or an innocuous object (such as a cell phone). *Id.* at 1315. Study participants play the game by looking at the suspects as they appear on the screen and then determining (as fast as possible), based upon whether the suspects are holding a gun or not, whether or not to shoot. *Id.* They are instructed to shoot armed suspects as fast as possible, and not shoot (by hitting a safety button) unarmed suspects as fast as possible. *Id.* at 1315–16. Similar to the IAT, the researcher in this study measures the participants' reaction time in milliseconds as well as the number of errors they make in shooting or not shooting suspects. *Id.* at 1317. The results of the study consistently show that the vast majority of participants shoot armed black suspects faster than armed white suspects, and even more concerning, make errors in a systematic way by shooting more unarmed black suspects than unarmed white suspects. *Id.* at 1318; see also Joshua Correll et al., *Event-Related Potentials and The Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 120, 122 (2006) (finding that shooter bias is related to the activation of fear in participants' brains).

53. These are words that are often used in a black–white stereotype IAT. See Rudman & Ashmore, *supra* note 29, at 361.

then his) clothes and began having intercourse. After roughly one minute, she slapped his face. Taking this as a sign of sexual play, he slapped her back. After roughly another minute, he saw tears rolling down her face, immediately stopped having intercourse and asked her, "What's wrong?"

The witness tells a different story. She contends that the suspect closed the door after they entered the bedroom. He approached her quickly as though he was going to shove her against the door. She put up her hand in a defensive posture and struck him in the crotch area. He began kissing her. At first she tried to pull away, but then she "just sort of stopped resisting." He shoved her onto the bed and began taking off her (and then his) clothes. She said it "all happened so quickly" that she didn't know what was happening and felt like she was in "shock." She slapped his face as hard as she could muster. He then slapped her across the face with such force that she thought "my jaw had shattered." She began to sob. After a pause, he asked her, "What is wrong?" and then rolled off from on top of her. She began to sob very loudly. How does the prosecutor evaluate whether to charge this crime as a rape or consider the conduct to represent a reasonable mistake?

As prosecutors process the contested facts of the case, they cannot help but consider both the rape suspect and the complaining witness. Regarding the race of the suspect, research confirms that people associate the crime of rape with black perpetrators. A study by Jeanine Skorinko and Barbara Spellman found that when asked to identify societal conceptions of criminals for certain crimes, participants overwhelmingly selected black perpetrators as being associated with the crime of rape.⁵⁴ After reading the competing statements of the suspect and the complaining witness, and seeing the mug shot of the suspect, a black male, prosecutors might implicitly associate *black male* with sexual aggression and insatiability, and even, as the research suggests, specifically with the crime of rape.⁵⁵ It is not that the prosecutors consciously think about the black suspect and purposefully decide that black males are rapists. Rather, the associations are automatic; the prosecutors might "sense" aggression in the interaction or might have an instinctual reaction that the suspect is an incorrigible offender, but those thoughts are not necessarily

54. Jeanine L. Skorinko & Barbara A. Spellman, Speech at the 1st Annual Conference on Empirical Legal Studies: Stereotypic Crimes: How Group-Crime Associations Affect Memory and (Sometimes) Verdicts and Sentencing 19 (Oct. 27, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917761.

55. See Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 251 (2007) ("Research shows black males have been characterized traditionally as hypersexual, 'lascivious, sexual monsters who preyed upon white women.'" (citation omitted)).

consciously linked to race. And, again, it matters who the complaining witness is too. White women historically have been portrayed as pure and sexually modest. Black women, by contrast, are stereotyped as promiscuous and seductive.⁵⁶ If the complainant in a rape case is a black woman, the prosecutor might implicitly associate the victim with such stereotypes and unintentionally devalue the accusation.

2. Determining What Crime to Charge

In other cases, the question is what crime to charge. The American Bar Association's Standards for the Prosecutorial Function lists the following factors among those for the prosecutor to consider in making the charging decision: What motives did the accused possess? Is the offense proportionate to the potential punishment? What is "the extent of the harm caused by the offense"?⁵⁷ Each of these guideposts requires highly subjective decision-making. Evidentiary assessments in these contexts are not as simple as determining whether a gun was fired. Consider a scenario in which a prosecutor must choose between charging a suspect with simple drug possession or possession with intent to distribute. Imagine two suspects are arrested, both possessing the same quantity of drugs—one suspect is black, one is white. Stereotypes related to drug using versus drug dealing become relevant, and any implicit associations that prosecutors might have regarding race and the particular crimes can affect the charge rendered. If we assume that prosecutors hold similar stereotypes as the rest of us (and there is little reason to believe otherwise)⁵⁸ then it becomes clear how when a prosecutor sees a young black male with drugs, the association between young black male and drug dealer⁵⁹ can affect the evaluation of whether this particular person intended to sell the drugs or to consume them for personal use.⁶⁰

56. *Id.* ("[B]lack female rape victims are either ignored by the media altogether or portrayed as 'loose, promiscuous, oversexed, whorish women.'" (citation omitted)).

57. A.B.A. CRIMINAL JUSTICE SECTION STANDARDS: PROSECUTION FUNCTION §§ 3-3.9(b)(iv), (iii), (ii) (1992), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html.

58. See, e.g., JOHNSON ET AL., *supra* note 50; Levinson et al., *Social Science Overview*, *supra* note 27, at 9–12.

59. Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 446 (2005) (noting that the stereotypical representation of a dangerous drug dealer overlaps with the stereotypical characteristics of black Americans).

60. Supporting this argument, there is evidence of significant gaps between actual drug dealing rates and the arrest rates from drug dealing. See Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 121 (2008) (examining statistics from Seattle, Washington, and finding that although the majority of drug dealers were found to be white, 64% of drug dealing arrestees were black).

Another charging decision that illustrates how implicit racial bias might infect prosecutorial decision-making involves the decision to charge juvenile suspects (those under the age of eighteen) in adult court as opposed to juvenile court. The differences between juvenile and adult proceedings are drastic. Although the goal of adult court is to punish the offender, the goal of juvenile court centers on the well-being of the juvenile delinquent.⁶¹ Moreover, while in most jurisdictions a juvenile charged with a serious offense in juvenile court faces detention until his twenty-first birthday (or five years after the commission of the crime, whichever is longer),⁶² the same juvenile charged in adult court could face decades of (or, in the most serious cases, life) imprisonment.

Several criteria guide the decision to transfer a juvenile into adult court, including: “The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living”;⁶³ “[t]he seriousness of the alleged offense”;⁶⁴ “[w]hether the alleged offense was committed in an aggressive, violent, premeditated or willful manner”;⁶⁵ and “[t]he prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile.”⁶⁶ In order to get a sense of the various ways in which implicit racial bias can operate in the decision to transfer a juvenile to adult court, once again consider the stereotype that black Americans are more aggressive and hostile than their white counterparts. When prosecutors assess “the seriousness of the alleged offense” or whether the offense was committed in an “aggressive or violent” manner, they assess the facts not in a vacuum but in relation to the offender. Similarly, when prosecutors evaluate the juvenile’s “home, environmental situation, emotional attitude and pattern of living,” stereotypes of Latino families living in crowded and squalid conditions may affect the prosecutors’ judgments. Thus, given the broad discretion of prosecutors and the close connection between the legal standards and racial and ethnic stereotypes, it is likely that two identical charges can end up in different courts (juvenile versus adult) despite substantially similar facts.

61. Administrative Office of the Courts of Georgia, *Juvenile Courts*, GEORGIA COURTS.GOV, http://www.georgiacourts.gov/index.php?option=com_content&view=article&id=169&Itemid=0 (last visited Feb. 6, 2012) (“The purpose of our Juvenile Courts is to protect the well-being of children, provide guidance and control conducive to child welfare and the best interests of the state, and secure care for children removed from their homes.”).

62. *Id.*

63. *Kent v. United States*, 383 U.S. 541 app. at 566–67 (1966) (listing factors to be considered in deciding whether to transfer a case to adult court).

64. *Id.* app. at 566.

65. *Id.* app. at 567.

66. *Id.*

Imagine a sixteen-year-old youth who steals a candy bar from a convenience store, the store clerk struggles to restrain the juvenile before he exits the store, and the juvenile punches the clerk in the face, rendering him unconscious. Did the juvenile strike the store clerk because it was the only way he could get free and avoid apprehension? Did the juvenile just panic? Or is the juvenile the type of person who will react violently at the drop of a dime? If the juvenile is black, the prosecutor assessing the facts of this case might be primed by the picture of the juvenile, the notation that he is black, or even the recognition of a stereotypically black name that triggers associations between the black juvenile and the concepts of aggression and hostility.⁶⁷ The activation of these negative constructs can translate into a sense that the crime (or the offender) is more aggressive or violent than would be the case if the prosecutor assessed the facts of the case in a truly race-neutral manner. This implicitly biased evaluation process has been documented in juvenile probation officers and police officer participants. Sandra Graham and Brian Lowery, for example, found that when these participants were subliminally primed with words related to the category black, they judged an adolescent's behavior as more dispositional, of greater culpability, and more likely to lead to recidivism.⁶⁸

Consistent with these startling results, research from the field suggests that decision-makers in fact possess the perception that misbehavior by black youth is more dispositional than misbehavior by white youth. Analyzing official court assessments of juvenile offenders, George Bridges and Sara Steen found that officials "consistently portray black youths differently than white youths in their written court reports, more frequently attributing blacks' delinquency to negative attitudinal and personality traits."⁶⁹ Just as in Graham and Lowery's study, the researchers found that perceived "negative internal attributes" that the black children possessed outweighed even characteristics such as the seriousness of the offense and prior criminality.⁷⁰

The operation of implicit racial bias on the charging decisions of prosecutors can even mean the difference between life and death. For

67. In addition to the stereotypes that apply to black citizens, and especially black males, there is some evidence of powerful stereotypes that apply uniquely to black youth. *See, e.g.,* Rashmi Goel, *Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender*, 27 *LAW & INEQUALITY* 1, 39 (2009) (referencing "the stereotype of the 'big Black kid' as bestial, uncontrollable, and aggressive" (citation omitted)).

68. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *LAW & HUM. BEHAV.* 483, 483 (2004).

69. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 *AM. SOC. REV.* 554, 567 (1998).

70. *Id.*

offenses eligible for capital punishment, the decision to prosecute also includes whether to seek the death penalty. If prosecutors decide to prosecute for capital punishment, they need to choose which aggravating factor(s) (those elements which elevate ordinary first-degree murder to a murder that is eligible for a possible death sentence) to allege.⁷¹ For example, prosecutors could assert that this particular murderer deserved the death penalty relative to the average murderer because he is a “future danger” to society.⁷² All murderers have, by definition, purposefully taken a human life. But how do prosecutors decide which murderers are among the most likely murderers to represent a future danger to society? The decision requires prosecutors to make a highly subjective predictive determination and thus a determination prone to bias. When prosecutors evaluate the capitally accused suspect, whom do they see? As we have explained, the mere activation of a racial stereotype has been shown to lead to harsher attributions of criminal disposition and hostility, even in ambiguous situations. In the case of a black defendant, particularly one who possesses more Afrocentric features, these same negative stereotypes of a hostile black defendant could, in turn, influence whether the prosecutor views the defendant as a future danger.⁷³

Thus, whether the charging decision involves the prosecution of a forcible rape case, the decision to charge a drug crime as either simple possession or possession with the intent to distribute, or even whether to seek the death penalty against a particular defendant, the discretion enclosed in each of these moments of prosecutorial decision-making permits the operation of implicit racial bias in the criminal justice system.

B. Pretrial Strategy

1. Bail Determinations

Once a charging decision has been made, prosecutors must determine whether to oppose bail and, if not, how high of a bail to recom-

71. For a fuller exploration of this phenomenon, see Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 2, at 229, 231–43.

72. See, e.g., *Buck v. Thaler*, 132 S. Ct. 32, 35–36 (2011) (Sotomayor, J., dissenting from denial of certiorari) (“[T]he [Texas] prosecutor [in a capital murder case] said: ‘you have determined that . . . the race factor, black, increases the future dangerousness [of the defendant] . . . [The expert] answered, ‘yes.’”).

73. Indeed, research shows that there is a relationship between death sentences and the stereotypically black appearance of defendants. See Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383, 385 (2006). Other research confirms the effect of stereotypically black appearances in criminal decision-making. See Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 *PSYCHOL. SCI.* 674, 674 (2004).

mend. There is empirical evidence to suggest that, at least in some jurisdictions, minority defendants receive less favorable pretrial detention determinations than their white counterparts.⁷⁴ Similar to a prosecutor's decision to charge, this finding might be partially driven by implicit racial attitudes and stereotypes. In the bail context, in addition to the stereotype of the black defendant as hostile and prone to criminality,⁷⁵ which itself could lead to inflated bail requests, implicit racial bias might also operate through a functionally distinct mechanism—namely, the implicit devaluation of the defendant. One major factor in all bail determinations is the strength of the defendant's ties to the community, including employment situation. Here, the assumption is that if a defendant has a good job and a solid connection with the community, then the defendant will be less likely to flee.

As studies such as stereotype IATs repeatedly demonstrate, black Americans are stereotyped as being less intelligent, lazier, and less trustworthy than white Americans.⁷⁶ If a prosecutor is primed with a picture of the black defendant as she reviews the case file prior to the bail hearing, these negative work- and character-related stereotypes might cause the prosecutor to view the black defendant's work history and community connection with more skepticism than a similar background provided by a white defendant's background.⁷⁷ On the other hand, a white prosecutor might view a similarly situated white defendant with positive implicit attitudes and stereotypes activated. These stereotypes might lead to the judgment that a hard-working and intelligent white defendant has a

74. *Task Force Report*, *supra* note 48, at 628 ("Disparate treatment has been discovered in the context of pretrial release decisions, which systematically disfavor minority defendants."); see also Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 987 (1994) (finding that black and male Hispanic defendants in New Haven, Connecticut appeared to be given bail at unjustifiably high amounts).

75. The pretrial bail context is analogous in many respects to posttrial sentencing, a topic that we do not discuss in depth in this Article. After a jury convicts the defendant, the prosecutor must decide what sentence to recommend to the trial judge. See *Task Force Report*, *supra* note 48, at 647. Here, too, there is evidence to suggest racially disparate outcomes. *Id.* In Washington State, for example, black defendants in felony drug cases are roughly two-thirds more likely than comparable white defendants to receive a prison sentence. *Id.* at 648. The role of implicit racial bias on the operation of prosecutorial discretion might inform these disparities too. Studies suggest that prosecutors recommend harsher sentences for black defendants. *Id.* at 647. The implicit connection between black citizens and hostility, dangerousness, and criminality can operate in the sentencing recommendation context just as it operates to influence the amount of bail the prosecutor recommends for a suspect pretrial. See *id.* at 650.

76. See, e.g., Rudman & Ashmore, *supra* note 29, at 361.

77. Of course, in some circumstances, this employment-related stereotype, as well as others, might reflect reality. For example, there is evidence that black Americans are disproportionately poor and have lower employment rates. There is, however, evidence that implicit bias can lead to such results. See, e.g., Rooth, *supra* note 38.

strong employment background and an intimate connection with the community.

2. Disclosure of Exculpatory Evidence

The Due Process Clause of the Fourteenth Amendment requires prosecutors to disclose to the defense any exculpatory information they uncover.⁷⁸ But the evidence does not always make its way into the defense counsel's hands. Sometimes this is because prosecutors willfully refuse to turn over the evidence despite its exculpatory nature. Take the case of *Connick v. Thompson*.⁷⁹ John Thompson spent eighteen years in the Louisiana State Penitentiary—most of them on death row—before his release in 2003.⁸⁰ At his capital murder trial, Thompson opted not to testify in his own defense because he was previously convicted of armed robbery.⁸¹ The proof of his innocence of the armed robbery languished in the files of the New Orleans Crime Laboratory.⁸² One month before his scheduled execution, a defense investigator stumbled upon a lab report indicating that the blood evidence the prosecution presented at trial did not match Thompson's blood type.⁸³ One assistant district attorney "intentionally suppressed [the] blood evidence," and then, shortly after being diagnosed with terminal cancer, confessed his wrongdoing to another assistant district attorney who did not reveal the secret until five years later.⁸⁴ The Louisiana Supreme Court vacated both convictions.⁸⁵ Upon his release, the Jefferson Parish District Attorney retried Thompson for capital murder. A jury acquitted him.

Why would prosecutors choose to not turn over exculpatory evidence? One possibility is that they are convinced that the defendant committed the crime despite the potentially exculpatory evidence, and they believe that the evidence would unduly harm the chance to convict a dangerous offender. Under this theory, whether to disclose potentially

78. *United States v. Agurs*, 427 U.S. 97, 107 (1976) (holding that prosecutors must turn over to the defense evidence "clearly supportive of a claim of innocence" regardless of whether the defense requests the evidence); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

79. *Connick v. Thompson*, 131 S. Ct. 1350, 1355 (2011). This description of the *Connick* case first appeared in Robert J. Smith, *Recalibrating Constitutional Innocence Protections*, WASH. L. REV. (forthcoming 2012).

80. *Connick*, 131 S. Ct. at 1355.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1356 n.1.

85. *Id.* at 1355.

exculpatory evidence turns, in part, on the seriousness of the charges and the perceived strength of the defense case as discounted for revelation of the piece of evidence to the defense. Perceptions of the seriousness of the crime, in turn, depend in significant part on the how the prosecutor views the defendant. If the defendant is implicitly associated with hostility, criminality, or dangerousness, then implicit racial bias can influence the decision to disclose (or not) the ambiguous evidence by altering the perception of the defendant, which, in turn, alters the perception of the seriousness of the crime. Thus, prosecutors' decisions to comply with their *Brady* obligations also can be infected by implicit racial bias.

3. Plea-Bargaining

Most criminal cases are resolved by plea bargain, where the defendant admits guilt in exchange for a reduced charge (or a lesser sentencing recommendation). Unlike the disclosure of exculpatory evidence, plea-bargaining is subject to almost zero oversight. We have argued that, in several contexts, implicit racial bias thrives in the midst of discretionary determinations. Plea-bargaining is no exception. Consider a sampling of four "factors" among those the Department of Justice instructs federal prosecutors to consult in deciding whether to pursue a bargained disposition: (1) "[T]he nature and seriousness of the offense or offenses charged"; (2) "the defendant's remorse or contrition and his willingness to assume responsibility"; (3) "the public interest in having the case tried rather than disposed of by a guilty plea"; and (4) "the expense of trial and appeal."⁸⁶ How might the defendant's (or the victim's) race have an impact on the prosecutor's decision whether to offer a plea bargain, and if a plea is in fact offered, how much of a charging reduction will be offered in exchange for the guilty plea?

First, consider prosecutors' assessment of the "seriousness of the offense charged." Imagine a domestic violence case where a man severely abuses his spouse. Does it matter if the spouse is black?⁸⁷ Imagine white prosecutors deciding whether to offer the suspect a plea deal on a misdemeanor battery charge. As the prosecutors attempt to quantify the seriousness of the offense, they might not be able to empathize with the fear and pain of a black woman as much as they could empathize with a white woman subjected to domestic abuse. This phenomenon is known as "in-group favoritism," which is defined as "our tendency to favor the

86. U.S. DEP'T OF JUSTICE, GRAND JURY MANUAL: PLEA AGREEMENTS IX-7 to -8 (1991), available at <http://www.justice.gov/atr/public/guidelines/207144.pdf> (excerpted from Principles of Federal Prosecutions).

87. Similarly, does it matter if his spouse is a man?

groups we belong to.”⁸⁸ Justice Scalia might use the term in-group favoritism to label the “undeniable reality” he described in his dissent in *Powers v. Ohio* “that all groups tend to have particular sympathies . . . toward their own group members.”⁸⁹

There is experimental support for the existence and power of in-group favoritism, or bias, as it relates to empathizing with a victim. Alessio Avenanti used a method called transcranial magnetic stimulation (TMS) to measure corticospinal activity level in participants who viewed short video clips of a needle entering into the hand of either a light-skinned or dark-skinned person.⁹⁰ Consistent with the in-group empathetic-bias explanation, Avenanti found that region-specific brain activity levels were higher when Caucasian-Italian participants viewed the clip of a light-skinned participant experiencing pain than when they saw a clip of a dark-skinned target being subjected to pain.⁹¹ Returning to the white prosecutors trying to assess the seriousness of the domestic abuse suffered by a black woman, prosecutors might undervalue the extent of the harm caused by the abuse relative to the harm that they would consider a similarly situated white woman—perhaps someone who reminds them of their mothers, sisters, or daughters—to have suffered.

The defendant’s race (as well as the victim’s race) can also influence the plea-bargaining process. Imagine a prosecutor trying to determine whether to offer a defendant a plea to manslaughter (and thus a term of years) or to proceed to trial to try to obtain a second-degree murder conviction (and thus, in many jurisdictions, life without parole). Whether “the public interest” is satisfied by a plea bargain (as opposed to going to trial where the defendant could receive a harsher sentence) and whether “the expense of trial” is worth it turn on how the prosecutor views the defendant. Is this person dangerous and thus likely to commit a future crime? As a white prosecutor reviews the case file of a young white defendant, the prosecutor might be unknowingly affected by positive implicit stereotypes relating to lawfulness and trustworthiness. This could lead to a more lenient evaluation of the defendant—troubled, but

88. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476 (2010).

89. *Powers v. Ohio*, 499 U.S. 400, 424 (1991) (Scalia, J., dissenting).

90. Alessio Avenanti, *Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018, 1020–21 (2010). Interestingly, both groups showed activity levels indicating empathy when viewing needles entering unfamiliar purple hands. *Id.* The researchers interpret this result as indicating that empathy was not simply inhibited by unfamiliarity but also by racial bias and stereotypes. *Id.*

91. Similarly, African-Italian participants showed more empathy-consistent brain activity levels when viewing a dark-skinned person experiencing pain than when viewing a light-skinned person experiencing pain. *Id.* Results also showed that participants’ empathic response was predicted by their implicit racial biases. *Id.*

not a bad person, for example—and thus a plea offer is more likely to follow. As we have well-covered by now, the opposite will be true when the prosecutor views a black defendant; the prosecutor's mind will likely trigger automatic associations between the defendant and the concepts of violence and hostility. On a related point, as the prosecutor attempts to determine the degree of remorse the defendant has displayed (for example, during plea negotiations), the stereotype that black citizens are less fully human might render the prosecutor less able to detect remorse from a defendant's body language or more likely to reject a black defendant's apology as self-serving or otherwise not genuine.⁹² So too might the stereotypes that black citizens are violent, hostile, and prone to criminality have an impact on the degree of remorse that the prosecutor is able to detect in a defendant.

C. Trial Strategy

1. Jury Selection

Lawyers selecting a jury in a criminal case are allocated a predefined number of peremptory challenges, which they can use to eliminate prospective jurors without justification. Under the Due Process Clause of the Fourteenth Amendment, these strikes cannot be used to eliminate jurors based on their race.⁹³ The prohibition against race-based strikes is clear, but policing the rule is far murkier. Courts routinely uphold peremptory challenges based on largely unverifiable race-neutral explanations, for example, those based on avoiding eye contact, possessing an apparent lack of intelligence, or showing signs of nervousness. Indeed, it is so difficult to detect conscious evasion of the prohibition against racially motivated strikes that Justice Powell noted in *Batson*, “[P]eremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’”⁹⁴

Striking black jurors used to be based on explicit racism. For instance, in *Miller-el v. Cockrell*, the U.S. Supreme Court discussed a trial manual (titled *Jury Selection in a Criminal Case*) used in the Dallas County District Attorney's Office in the 1960s and 70s.⁹⁵ Among the advice offered by the manual to trial prosecutors: “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no

92. See Philip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 304–05 (2008).

93. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

94. *Id.* at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

95. *Miller-el v. Cockrell*, 537 U.S. 322, 335 (2003).

matter how rich or how well educated.”⁹⁶ Even in the twenty-first century, prosecutors struggled to mask racially motivated strikes. For example, in one Louisiana capital case, the prosecutor explained that he struck one black juror because he was “the only single black male on the panel with no children.”⁹⁷ There is less reason to believe that the vast majority of prosecutors today strive to strike jurors on the basis of race. This does not mean that race-based strikes are not a problem. Indeed, Justice Breyer recently noted that “[he] was not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem.”⁹⁸

Implicit racial bias might help to explain why egalitarian-minded prosecutors nonetheless disproportionately strike black jurors.⁹⁹ In addition to the stereotype that black citizens are prone to criminality (and thus might sympathize more with those who commit crime), prosecutors might associate black citizens with lack of respect for law enforcement and opposition to the prosecution of drug crimes or use of the death penalty as a punishment.¹⁰⁰ If a prosecutor questions a prospective black juror, the simple act of even talking to that person might activate any of these negative stereotypes as well as more general negative implicit attitudes, causing the prosecutor to think or feel negative thoughts about the juror. The prosecutor might project this negativity through body language and gestures, which could, in turn, cause jurors to avoid eye contact, provide awkward or forced answers that make the juror appear less intelligent, or simply fidget and look nervous. Thus, even accurate race-neutral behavior descriptions might stem from racialized assessments (albeit, without conscious thought) of the characteristics of individual jurors.

2. Closing Arguments

Implicit racial bias can also have an impact on the content of a prosecutor’s closing argument and, in turn, on the manner in which the jury (or judge) views the evidence in the case. In *Darden v. Wainwright*, the prosecution referred to the defendant during closing arguments as an “animal”¹⁰¹ that “shouldn’t be out of his cell unless he has a leash on him

96. *Id.* (citation omitted).

97. *State v. Harris*, 820 So. 2d 471, 474 (La. 2002).

98. *Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J., concurring).

99. Antony Page has elegantly made this argument. See Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

100. Of course (and, in some cases, for good reason) these last two stereotypes, which likely derive from a more general mistrust in the criminal justice system, might be accurate.

101. *Darden v. Wainwright*, 477 U.S. 168, 180 n.11 (1986).

and a prison guard at the other end of that leash.”¹⁰² “In a recent Louisiana case, the prosecution referred to the black . . . defendant as ‘[a]nimals like that (indicating)’ and implored the jury to ‘be a voice for the people of this Parish’ and to ‘send a message to that jungle.’”¹⁰³ The use of animal imagery in reference to the accused can both depend on and perpetuate the negative effects of implicit race bias.

Referring to the accused in nonhuman terms dehumanizes the defendant in the eyes of the jurors and could potentially lead to harsher punishment. In a compelling empirical study that showed how people continue to mentally link blacks with apes, Philip Goff and colleagues asked participants to view a degraded image of an ape that came into focus over a number of frames.¹⁰⁴ When primed with a consciously undetectable image of a black face, participants were able to identify the ape in fewer frames; conversely, when primed with a consciously undetectable white face, participants required more frames to detect the ape than when they received no prime at all.¹⁰⁵ The study confirmed that people, most of who claimed not to have even heard of the stereotype linking blacks to apes, nonetheless implicitly associated blacks with apes, a finding that heightens the concern surrounding the use of animal imagery during prosecution.

In a related study that linked the animal-imagery study to criminal sentencing, Goff next explored the black–ape association by comparing the frequency of animalistic references to black defendants with that of similar references to white defendants in a dataset of 600 criminal cases prosecuted in Philadelphia between 1979 and 1999.¹⁰⁶ The study found that coverage from the *Inquirer*, Philadelphia’s major daily newspaper, of black defendants included, on average, nearly four times the number of dehumanizing references per article than articles covering white capital defendants.¹⁰⁷ Furthermore, the study found a strong correlation between the number of times an animalistic reference was made and the likelihood that the defendant received the most severe punishment available.¹⁰⁸

102. *Id.* at 180 n.12.

103. Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 403–04 (2012) (citing *State v. Harris*, 820 So. 2d 471 (La. 2002) (transcripts containing the prosecutor’s references are on file with the Louisiana Supreme Court and the authors)).

104. See Goff et al., *supra* note 92, at 303–05.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

D. Beyond the Trial: More Prosecutorial Discretion

This Part has provided a step-by-step account of the potential impact that implicit racial bias can have on prosecutorial discretion. We have focused narrowly on case-specific decisions ranging from the decision to charge a suspect to how the prosecutor maneuvers through the pretrial process to the decisions the prosecutor makes at the trial. This discussion remains incomplete, however. The idea that easily activated stereotypes of certain defendants can influence the decision-making process applies with equal force to other forms of prosecutorial discretion. For example, prosecutors must decide whether to join defense lawyers in urging for a conviction to be vacated in a case of actual innocence. Is a prosecutor convinced by a lower quantum of evidence in a case involving a white prisoner (who might or might not be a violent offender) than in a case involving a black or Latino prisoner? Perhaps the question is whether to recommend a defendant to drug counseling or to press instead for jail time—do implicit stereotypes of black citizens have an impact on the prosecutor’s assessment of the suitability of alternative sentencing?¹⁰⁹

Or consider office-wide decisions, such as on which crimes to concentrate prosecution efforts given limited resources.¹¹⁰ Is the decision to target street gangs—one recently made a top priority by the Department of Justice—influenced by the perceived explosion of Latino gangs and the conception of Latinos as drug dealers and “illegal aliens,” or is the decision based solely on the seriousness of the crime involved? Again, before we can answer that the seriousness of the crime drives the policy choice, are we able to gauge the seriousness of the crime without being influenced by our conception of the offenders? Indeed, the race of the defendant might infiltrate the prosecutor’s core beliefs about the justifications of punishment—do black defendants tend to activate the concep-

109. There is also emerging research suggesting that black citizens are viewed as possessing more static personality traits and thus as being less capable of change. This research would also be quite relevant to a prosecutor’s decision whether to recommend counseling or jail time for a black offender. See Jennifer Eberhardt, *The Ape and the Static Being: Two Views of Blacks in the Modern Era*, Panel at the Michigan State Law Review Symposium: Moving Beyond “Racial Blindsight”? The Influence of Social Science Evidence After the North Carolina Racial Justice Act (Apr. 8, 2011), available at <http://www.law.msu.edu/blindsight/media.html>.

110. See Davis, *supra* note 47, at 36.

[I]f a prosecutor deems a particular case to be more serious than others, she will tend to invest more time and resources in that case, both investigating and preparing for trial. Such an increased investment would consequently yield more evidence and stiffen prosecutorial resolve. The likelihood of conviction is also obviously increased by the additional investment in investigation. Thus, although the strength of the evidence and the likelihood of conviction are facially race-neutral factors, they may be influenced by an unconsciously racist valuation of a case involving a white victim.

Id.

tion that offenders deserve to be punished¹¹¹ whereas white defendants tend to activate other justifications for punishment, such as deterrence or rehabilitation?

We hope that we have conveyed a sense that the potential impact of implicit racial bias on prosecutorial discretion is broad and deep. In the remainder of this Article, we explore the ways in which we might build a body of proof to support our contention that implicit racial bias infects the decisions of prosecutors, and finally, we consider possible remedies for avoiding or minimizing the damage associated with the operation of such bias.

IV. ADDRESSING THE EFFECTS OF IMPLICIT RACIAL BIAS ON PROSECUTORIAL DISCRETION

As we have demonstrated, there are compelling reasons to believe that prosecutors unwittingly display implicit racial bias at a variety of decision points. One could expect that in the aggregate, the harms of these biases are quite substantial. It is important to note, however, that empirical studies have yet to test prosecutors directly or prove that prosecutors act automatically in bias-influenced ways. We therefore encourage researchers to take on the charge of pursuing our hypotheses empirically. Although we expect to pursue some of these hypotheses ourselves, the best science is collaborative, transparent, and forward-looking. We thus specifically encourage researchers to test precisely where and how implicit bias operates in the context of prosecutorial decision-making and provide here several examples of potential starting points.

For instance, testing our hypothesis regarding prosecutors' decisions whether or not to charge, researchers might examine whether participants subliminally primed with black and white faces make different decisions when deciding how to charge suspects (versus opting not to prosecute) in borderline cases. A similar research methodology could be used to test our hypothesis regarding implicit bias and plea-bargaining. One could, for example, measure whether participants primed with a black face are less likely (than those primed with a white face) to recommend a plea deal to a lesser charge in the context of a particular crime, such as forcible rape, which plays into black stereotypes of sexual aggression. Using a different methodology relating to our hypothesis regarding the use of animal imagery in closing arguments, researchers

111. See Goff et al., *supra* note 92, at 301–05. In one study, Goff and his colleagues had participants watch a video of police officers beating a black suspect. *Id.* at 302. Video participants had previously been primed with either words relating to apes or big cats. *Id.* at 301–02. Participants primed with the ape words were more likely to report that the police beating was “deserved” and “justified” than those participants primed with the big cat words. *Id.*

could perform a coding analysis on actual closing arguments made by prosecutors, counting references to animal imagery, and could then seek to test those prosecutors using an implicit bias measure such as the IAT. If such a participant group could be located and tested (of course, without knowing the exact purpose of the study), it might be possible to measure whether implicit bias levels predict prosecutors' use of animal imagery in closing arguments. We believe studies such as these would help to pinpoint the exact locations where implicit bias is most likely to infect prosecutorial decision-making.¹¹²

We also encourage researchers and policymakers to consider remedial possibilities for the problem of implicit racial bias in prosecutorial discretion. The most obvious remedies, unfortunately, are the least likely to succeed. For instance, raising claims that prosecutors are selectively prosecuting black defendants is not a promising avenue. We know of no defendant who has obtained relief on these grounds in the modern era,¹¹³ primarily because the U.S. Supreme Court has ruled that a defendant must demonstrate that similarly situated suspects of other races were not subjected to prosecution in order to even gain discovery on such a claim.¹¹⁴ Nor are Fourteenth Amendment Due Process or Eighth Amendment Cruel and Unusual Punishment claims destined to succeed. In *McCleskey v. Kemp*, the Court rejected a capital defendant's statistical offering that racial arbitrariness infected Georgia's capital sentencing process and ruled that a defendant must show that racial bias infected *his* case before he might prevail on Eighth or Fourteenth Amendment grounds.¹¹⁵

Nor do we believe that implicit racial biases are subject to easy eradication. The associations that are triggered when people view a person of a particular race are likely the product of extensive cultural and social learning.¹¹⁶ Some portion of our social learning is misinformed (e.g., "Black citizens are more hostile than white citizens."). Some por-

112. Of course, these suggestions are only a few examples of a range of possible studies.

113. See Bibas, *supra* note 44, at 970 (noting in this context that "[n]o race-based claim has succeeded for more than a century").

114. *United States v. Armstrong*, 517 U.S. 456, 458 (1996).

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

116. Researchers have considered various social-learning-related factors that lead to implicit biases. See, e.g., Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 79, 79–81 (2004) (indicating that both early life experiences and culturally held biases, as well as other factors, lead to implicit biases). Stereotypes more generally have been shown to be learned by extremely young children. See Page, *supra* note 99, at 203 (claiming to find that stereotypes arise when a person is as young as three years old and are usually learned from parents, peers, and the media); see also Frances E. Aboud & Maria Amato, *Developmental and Socialization Influences on Intergroup Bias*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES 65, 73–76 (Rupert Brown & Samuel L. Gaertner eds., 2001).

tion, however, is perhaps accurate, though built on the foundations of structural inequality. Consider the stereotype that black citizens have less respect for law enforcement or trust in the judicial system. These stereotypes accurately reflect most polling data and also reflect underlying realities about police-citizen relations in minority-concentrated urban areas.¹¹⁷ In order to undo this cultural and social learning, we would need to see fundamental changes in the political, economic, and social structures that undergird our country.¹¹⁸

But there are some promising shorter-term remedial avenues. Stephanos Bibas suggests that prosecution offices might collect and store comprehensive information on racial demographics at each stage of the charging process. The collected data would be made available internally and to a variety of external stakeholders, which would both allow for the review of “systemic patterns” and “create feedback loops and new metrics for prosecutorial success.”¹¹⁹ Prosecutors’ offices might also provide live or video trainings on implicit bias to attorneys and paralegals and could also include thoughtful discussions and explanations of implicit racial bias in training manuals that address each of the decision points where implicit racial bias is likely to infect the process. Although there is no guarantee that live or written trainings would necessarily reduce bias, those who are egalitarian-minded could use these explicit reminders to self-monitor.¹²⁰

Category-masking, the process of hiding racial demographic data until after the relevant decision is made, also holds some potential as a structural change that could reduce the effects of implicit bias. This process has previously been proposed as a possible remedy for race-based

117. See, e.g., U.S. DEP’T OF JUSTICE: CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT xix (2011), available at http://www.justice.gov/crt/about/sp1/nopd_report.pdf (“[C]ommunity members, especially members of racial, ethnic, and language minorities . . . expressed to us their deep distrust of and sense of alienation from the police.”); Smith & Sarma, *supra* note 103, at 391 (“Part of the discrepancy stems from first-hand encounters with law enforcement that the black citizen interpreted to be racist, either explicitly (e.g., use of terms with racial meaning, such as ‘nigger’ or ‘boy’) or vicariously (e.g., being stopped for ‘driving while black.’)” (citation omitted)).

118. See Levinson, *Forgotten Racial Equality*, *supra* note 3, at 420 (noting that short-term remedies for implicit bias should not obscure the need for long-term cultural change).

119. *Id.*

120. This suggestion is analytically similar to the use of an implicit bias jury instruction for criminal trials. See 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, 149–51 (2010) (suggesting the use of implicit bias jury instructions and revealing that—as a federal district court judge—“I now include a slide about implicit bias in the PowerPoint presentation that I show before allowing attorneys to question potential jurors”).

jury selection.¹²¹ In the jury selection context, litigants would exercise a first round of peremptory strikes based on answers to juror questionnaires that were scrubbed for demographic data.

A similar effort undergirds the decision to proceed under the federal death penalty statute—when the prosecutor receives the case file they are (theoretically)¹²² unaware of the race of either the victim or the defendant. Broadening this type of remedial effort beyond the situations of jury questionnaires and capital cases, one could imagine a process inside a district attorney's office whereby a case intake coordinator masks all demographic information on a computerized case file (including the defendant's name and mug shot) until after the assistant district attorney handling the case has made a nonbinding charging decision (and preliminary plea bargain eligibility assessment).¹²³ In addition, when office-wide data show significant disparities in charging or plea bargains in relation to a particular offense, any charging or bargaining decisions in those types of cases could be reviewed by a more senior prosecutor or a committee of prosecutors (with demographic data masked) regardless of the races involved. This process could continue until the office-wide data demonstrate that the disparity has been eliminated (or proven to be accounted for by legitimate nonracial variables).

Finally, we believe the hiring and promotion of a more diverse pool of assistant district attorneys might curb the operation of implicit racial bias and might even improve the quality of decision-making on an office-wide level. Research in the jury context, for example, has shown that diverse group decision-making is better than homogenous group decision-making.¹²⁴ Furthermore, research in other areas, such as the education arena, has found that students exposed to counter-stereotypical role models—for example, women engineering professors—actually harbored

121. See, e.g., Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 535 (2008) ("Research on orchestras, for example, demonstrates that female musicians are more likely to be hired when they audition behind a screen, effectively concealing their gender." (citing Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000))).

122. In reality, racial background is often easily predicted from other characteristics such as the name of the defendant or victim or the neighborhood where each resides. A truly colorblind process would exclude as much demographic data as possible without restricting the necessary case facts that the decision-maker must take into account.

123. Of course, true masking would require masking neighborhood demographics and even the names of the defendant and the victim, as these factors could easily "tip off" the prosecutor as to the racial background of the parties involved.

124. See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 597 (2006) (comparing all white juries to mixed juries, and finding that mixed juries performed better).

reduced implicit bias.¹²⁵ Based on these studies and others, we would expect that a diverse prosecutor's office might not only facilitate an atmosphere with less implicit bias but could perhaps also lead to even more thoughtful and efficient decision-making. A related proposal that is both more aggressive and also more targeted to prosecutorial discretion would be to help assistant district attorneys better understand the minority group population that they serve (both the victims and the defendants) by encouraging these lawyers (perhaps with housing or tax incentives) to live in neighborhoods disproportionately impacted by the charging decisions made by the district attorney's office.¹²⁶

Each of the potential remedies we discuss above would benefit from empirical testing, yet we do not believe, considering the likely ongoing harms, that waiting for a perfect scientific answer to the debiasing question is the best response. It is true that there are no easy answers for remedying the influence of implicit racial bias on prosecutorial discretion. Yet, justice should not wait, and the search for fairness in the criminal justice system must continue with both a moral compass and a thirst for emerging social-scientific knowledge.

125. Nilanjana Dasgupta & Shaki Asgari, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 642-45 (2004).

126. Of course, as one of the student editors who reviewed this piece noted, "Another suggestion is to lessen the workload of prosecutors so that they have more time to fully analyze and develop the facts of each case. Presumably, with more information and time spent analyzing what is going on, prosecutors will be more informed and rely less on their snap judgments or gut feelings."

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Articles

***1587 IMPROVING PROSECUTORIAL DECISION MAKING: SOME LESSONS OF COGNITIVE SCIENCE**

Alafair S. Burke [FN1]

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***1588 Introduction**

Earl Washington Jr., a black mentally retarded farmhand, spent seventeen years in prison-nearly ten of them on death row-for the rape and murder of a white woman before DNA tests linked another man to the crimes. [FN1] The evidence originally implicating him was questionable. The victim provided little identifying information, indicating before her death only that a black man had attacked her. [FN2] Washington was convicted based largely on his own confession, even though he simultaneously provided factually inconsistent confessions to four other crimes and did not know the location of the crime scene, whether other people were present, or even the victim's race without the assistance of leading questioning from police. [FN3] When defense counsel sought postconviction relief based on the discovery of another man's DNA on a blanket linked to the crime, prosecutors resisted. [FN4] Even after Washington was pardoned because of exonerating evidence, prosecutors insisted that he remained a viable suspect. [FN5]

***1589** Earl Washington's case raises questions about the discretionary decisions his prosecutors made from the moment they received the case. Why did they look past apparent problems with the confession? Why did they resist the evidentiary testing that ultimately exonerated an innocent man? Why would they still not concede innocence after his exoneration? Traditionally, commentators have clothed the study of prosecutorial decision making in the rhetoric of fault, attributing normatively inappropriate outcomes to bad prosecutorial intentions and widespread prosecutorial misconduct. [FN6] From this perspective, Earl Washington's conviction, and his prosecutors' refusal to concede his innocence even after a gubernatorial pardon, result from prosecutorial overzealousness, [FN7] a culture that emphasizes winning, [FN8] the absence of "moral courage," [FN9] and the failure of prosecutors to act as neutral advocates of justice. [FN10]

***1590** This focus upon incentives, priorities, and values as potential taints upon the exercise of prosecutorial discretion reveals an implicit but important assumption about prosecutors: they are rational, utility-maximizing decision makers. Prosecutors choose to overcharge defendants, withhold exculpatory evidence, and turn a blind eye to claims of innocence; therefore, the traditional inference goes, they must value obtaining and maintaining convictions over "doing justice." [FN11] To ensure that prosecutors do not rationally opt for misconduct to maximize their conviction rates, the fault-based literature recommends reform through changes to the prosecutorial cost-benefit analysis. Common strategies include more stringent ethical rules, [FN12] increased disciplinary proceedings and sanctions against prosecutors, [FN13] and professional [FN14] and financial [FN15] rewards based on factors other than just obtaining convictions.

Consider, however, a different explanation for the failure of prosecutors always to make just decisions. Perhaps prosecutors sometimes fail to make decisions that rationally further justice, not because they fail to value justice, but because they are, in fact, irrational. They are irrational because they are human, and all human decision makers share a common set of information-processing tendencies that depart from perfect rationality. A *1591 compelling body of cognitive research demonstrates that people systematically hold a set of cognitive biases, rendering them neither perfectly rational information processors, nor wholly random or irrational decision makers. [FN16] Drawing on the cognitive literature, the growing literature of behavioral law and economics explores the limitations of cost-benefit rationality, challenging the assumption of traditional economists that people are perfect wealth maximizers. [FN17] From both the cognitive and behavioral economics literature emerges a theory of bounded rationality that seeks to explain how cognitive biases and limitations in our cognitive abilities distort perfect information processing in nonrandom, predictable ways. [FN18]

*1592 Others have suggested how cognitive bias and bounded rationality can affect juries, [FN19] judges, [FN20] the regulation of risk, [FN21] federal rulemaking, [FN22] corporate disclosures, [FN23] contract law, [FN24] consumer choice, [FN25] employment discrimination, [FN26] and group deliberations. [FN27] This Article seeks to explain how cognitive bias can affect the exercise of prosecutorial discretion. Viewing cases like Earl Washington's through a lens of human cognition, rather than fault, colors not only the description of the problem, but also the recommended solutions. When the underlying problem is human irrationality, rather than the malicious intentions of a single prosecutor or the indifference of a prosecutorial culture, the result is a far more complicated story about the criminal justice system. If prosecutors fail to achieve justice not because they are bad, but because they are human, what hope is there for change?

*1593 This Article explores the potential that even "virtuous," [FN28] "conscientious," [FN29] and "prudent" [FN30] prosecutors fall prey to cognitive failures. Part I summarizes four related aspects of cognitive bias that can affect theory formation and maintenance. Part II explores how these cognitive phenomena might adversely affect the exercise of prosecutorial discretion. Finally, Part III proposes a series of reforms that might improve the quality of prosecutorial decision making, despite the limitations of human cognition.

I. Cognitive Bias: Four Examples of Imperfect Decision Making

Decades of empirical research demonstrate that people's beliefs are both imperfect and resistant to change. Once people form theories, they fail to adjust the strength of their beliefs when confronted with evidence that challenges the accuracy of those theories. [FN31] Indeed, theory maintenance will often hold even when people learn that the evidence that originally justified the theory is inaccurate. [FN32] At the same time that people fail to consider information that disconfirms a theory, they tend both to seek out and to overvalue information that confirms it. [FN33]

This Article explores four related but separate aspects of cognitive bias that can contribute to imperfect theory formation and maintenance: confirmation bias, selective information processing, belief perseverance, and the avoidance of cognitive dissonance. Confirmation bias is the tendency to seek to confirm, rather than *1594 disconfirm, any hypothesis under study. [FN34] Selective information processing causes people to overvalue information that is consistent with their preexisting theories and to undervalue information that challenges those theories. [FN35] Belief perseverance refers to the human tendency to continue to adhere to a theory, even after the evidence underlying the theory is disproved. [FN36] Finally, the desire to avoid cognitive dissonance can cause people to adjust their beliefs to maintain existing self-perceptions. [FN37] This Part summarizes the empirical literature regarding each of these cognitive phenomena.

A. Confirmation Bias

When testing a hypothesis's validity, people tend to favor information that confirms their theory over disconfirming information. [FN38] Good evidence suggests that this information-seeking bias results because people tend to recognize the relevance of confirming evidence more than disconfirming evidence. [FN39] This is true even when an effort to disconfirm is an essential step towards confirmation of the hypothesis under test.

For example, in a classic study of confirmation bias in hypothesis testing, Peter Wason presented subjects with

four cards and told them that each card contained a letter on one side and a number on the other. [FN40] The revealed sides of the four cards displayed one vowel, one consonant, one even number, and one odd number. [FN41] Subjects were then asked which of the four cards needed to be *1595 turned over to test the following rule: If a card has a vowel on one side, then it has an even number on the other side. [FN42]

Proper scientific method requires that researchers seek to disprove their working hypotheses. [FN43] Accordingly, the rational test of Wason's "if vowel, then even number" card test is to turn over the vowel and odd number cards. The vowel card provides a relevant test because discovery of an odd number on its backside would disprove the tested rule. The odd number card provides an equally relevant test because the discovery of a vowel on the backside of the odd number card would disconfirm the proposed "if vowel, then even number" rule in the same way as any odd number on the other side of the vowel card.

However, to test the rule that all vowel cards had even numbers on the other side, subjects overwhelmingly selected from their four choices either just the vowel card, or the vowel and the even number cards. [FN44] They failed to select the odd number card that was necessary to test the rule properly. [FN45] Moreover, subjects who chose the even number card erred still further because that card's backside offered no probative value to the rule at hand. [FN46] The subjects' choice of cards demonstrated that the subjects failed to recognize the importance of disconfirming evidence and instead sought information that would tend to confirm the working rule. [FN47]

In another classic study, Mark Snyder and William Swann replicated confirmation bias in the context of social inference. [FN48] Subjects were asked to select questions from a list for the purpose of interviewing a target person. [FN49] Half of the subjects were instructed to choose questions that would test whether the target person was an extrovert, and half were told to test whether the *1596 target person was an introvert. [FN50] The results demonstrated a strong confirmation bias. [FN51] Subjects selected questions that could only prove, and never disprove, their working hypothesis. [FN52] For example, subjects testing for extroversion chose questions like "What would you do if you wanted to liven things up at a party?," while subjects testing for introversion chose questions like "In what situations do you wish you could be more outgoing?" [FN53]

The social science literature suggests that people demonstrate confirmation bias not only in seeking new information, but also in the recollection of stored information. In one study, subjects were given the same list of traits about a woman named Jane. [FN54] Some of the listed traits were characteristic of extroversion, some of introversion, and others neutral. [FN55] Two days later, subjects were asked to determine Jane's suitability for a job either as a real estate agent or as a librarian. [FN56] Even though all subjects were exposed to the same information about Jane, those subjects testing Jane's suitability for real estate work tended to recall more extroverted than introverted facts about her, whereas the reverse was true for subjects testing her suitability as a librarian. [FN57] The researchers concluded that subjects were searching their memories in a biased manner, preferring information that tended to confirm the hypothesis presented. [FN58]

B. Selective Information Processing

A good deal of empirical research demonstrates that people are incapable of evaluating the strength of evidence independent of their prior beliefs. People not only demonstrate search and recall preferences for information that tends to confirm their preexisting *1597 theories, they also tend to devalue disconfirming evidence, even when presented with it. As a result of selective information processing, people weigh evidence that supports their prior beliefs more heavily than evidence that contradicts their beliefs.

Charles Lord, Lee Ross, and Mark Lepper conducted what is perhaps the most well-known study demonstrating this bias against disconfirmation. [FN59] Based on prior questioning, the researchers knew that half of their subjects were proponents of the death penalty who believed that the death penalty deterred murder, while the other half were opponents who did not believe that the death penalty deterred. [FN60] Subjects were asked to evaluate two studies, one that supported a deterrent efficacy of the death penalty, and one that suggested the death penalty's inefficacy as a deterrent. [FN61] The researchers found that proponents of the death penalty judged the prodeterrence study as more convincing than the nondeterrence study, whereas opponents of the death penalty reached the opposite conclusion. [FN62] Even though the studies described the same experimental procedures but with differing results, subjects articulated detailed justifications to support their conclusion that the study supporting their preexisting view

was superior. [FN63] Moreover, as a result of the biased evaluation of the two studies, subjects became more polarized in their beliefs. In other words, even though all subjects read two contradictory studies on the death penalty, proponents of the death penalty reported that they were more in favor of capital punishment after reading the studies, while opponents reported that they were less in favor. [FN64]

Other researchers have replicated the phenomenon of selective information processing in a variety of contexts. [FN65] Social scientists *1598 have suggested that the mechanism for selective information processing is attributable at least in part to motivational factors. [FN66] As an initial matter, people choose to expose themselves to information that is consonant with their beliefs rather than dissonant. [FN67] Moreover, when exposed to dissonant information, they are motivated to defend their beliefs, giving more attention and heightened scrutiny to information that challenges those beliefs. [FN68] They will search internally for material that refutes the disconfirming evidence, and, once that material is retrieved from memory, a bias will exist to judge the disconfirming evidence as weak. [FN69] In contrast, when presented with information that supports *1599 prior beliefs, people allocate fewer resources to scrutinizing the information and are more inclined to accept the information at face value. [FN70]

At a general level, selective information processing may be normatively rational. [FN71] When new information is compatible with what we already know, it is probably accurate. Careful scrutiny and a search for contradictory material would expend cognitive resources unnecessarily. [FN72] On the other hand, information that is incompatible with existing information may be fallacious, and cognitive work to reveal the fallacy is well spent. [FN73] Of course, disconfirmation bias leads to effective decision making only when the prior beliefs that bias the assimilation of new information are themselves supported by accurate information. [FN74] In criminal cases, prosecutors enjoy no such guarantee, potentially basing their theories of guilt on retracted confessions, flawed eyewitness testimony, and false testimony from jailhouse informants. [FN75]

C. Belief Perseverance

Although selective information processing can prevent rational, incremental adjustments in response to new information, the phenomenon of belief perseverance describes the tendency to adhere to theories even when new information wholly discredits the theory's evidentiary basis. With belief perseverance, human cognition departs from perfectly rational decision making not through biased assimilation of ambiguous new information, but by failing to adjust beliefs in response to proof that prior information was demonstrably false.

*1600 In a well-known experiment by Lee Ross, Mark Lepper, and Michael Hubbard, subjects were asked to discern between fake and actual suicide notes. [FN76] By manipulating false feedback given to subjects as they performed the dummy task, the experimenters led subjects to believe that they had average performance, above average performance (success condition), or below average performance (failure condition). [FN77] Following their completion of the task, subjects were fully debriefed and learned that the feedback had been false, predetermined, and random. [FN78] Subjects were even shown the experimenters' instruction sheet, which preassigned subjects to each of the three performance conditions and stipulated the corresponding feedback to be delivered. [FN79]

After subjects were debriefed, they were asked to assess their actual performance on the task, to estimate the average performance, and to predict their probable performance if they were to repeat the task. [FN80] The researchers found considerable belief perseverance among subjects, despite the debriefing. Subjects assigned the "success condition" rated both their actual and future task performance more favorably than other subjects, while subjects assigned the "failure condition" showed the opposite pattern, continuing to rate their performance unfavorably. [FN81]

Moreover, the study found that belief perseverance was not limited to self-evaluation, but extended to perceptions of others. Observer subjects who watched both the feedback sessions and the subsequent debriefings from behind a one-way glass also continued to demonstrate belief perseverance after the debriefings. [FN82] In other words, observers tended to maintain their beliefs about the observed subject's ability to distinguish between fake and actual suicide notes, even after learning that the feedback was false. [FN83]

*1601 Similarly, in another study, Anderson, Lepper, and Ross presented subjects with purportedly authentic

histories of firefighters and asked the subjects to write an explanation of the relationship between risk preference and firefighting abilities observed in the case histories. [FN84] By manipulating the case histories, the experimenters led subjects to perceive either a positive or negative correlation between the two traits. [FN85] The researchers reported that, even after subjects were debriefed concerning the fictitious nature of the case histories, they continued to cling to the theories they formed from those histories. [FN86] In other words, the subjects adhered to their conclusions, even after the evidence underlying the conclusions was wholly discredited. As the researchers concluded, "[i]nitial beliefs may persevere in the face of a subsequent invalidation of the evidence on which they are based, even when this initial evidence is itself ... weak." [FN87]

D. The Avoidance of Cognitive Dissonance

Another phenomenon that can affect prosecutorial cognition is the desire to find consistency between one's behavior and beliefs. The social science evidence suggests that inconsistency between one's external behavior and internal beliefs creates an uncomfortable cognitive dissonance. To mitigate the dissonance, people will adjust their beliefs in a direction consistent with their behavior. [FN88]

For example, in a classic study, Leon Festinger and James Carlsmith paid subjects either one or twenty dollars to misinform another person, a confederate who was supposedly waiting to serve as a subject, that a long, boring task was actually interesting. [FN89] *1602 Even though subjects were all required to complete the same mundane task, the subjects who were paid only a dollar to deceive the confederate reported that they found the task more interesting than either the subjects who received the more substantial payment or the control subjects, who had performed the task but had not been asked to deceive the confederate. [FN90]

The researchers concluded that cognitive dissonance was created by the conflict between the subjects' beliefs that the task was boring and the subjects' behavior in telling someone that the task was interesting. [FN91] To reconcile this dissonance, subjects who were paid only a dollar to mislead adjusted their own beliefs about the task. [FN92] In contrast, those who were paid twenty dollars had an additional consonant cognition-"I was paid twenty dollars to lie"-and therefore had no need to adjust their beliefs to be consistent with their conduct. [FN93] Since Fester and Carlsmith's original study, other researchers have reported robust effects of cognitive dissonance in other settings. [FN94]

II. The Ethical Prosecutor and Cognitive Bias

No reason exists to believe that lawyers are immune from the documented bounds of rationality, and yet the literature on prosecutorial decision making continues to describe prosecutors as rational, wealth-maximizing actors who would make better, more just decisions if they only had better, more just values. [FN95] Through the lens of the cognitive phenomena summarized in Part I, a more *1603 complicated story is evident. That prosecutors should be motivated by justice, not conviction rates, should go without saying. The harder question to answer is whether good motives, both individually and institutionally, are enough. The implications of the cognitive literature suggest not.

The broad powers of the prosecutor are familiar. If brought into an investigation prior to a suspect's arrest, prosecutors can shape the investigation's direction and scope by, for example, determining whom to investigate and through what tactics. [FN96] Once an arrest is made, the prosecutor's full powers come into play as she determines whether to bring charges, what charges to bring, whether to drop charges once brought, whether to negotiate a plea and under what terms, whether to grant immunity, and what sentence to seek upon conviction. [FN97] This Part explores some of the potential ways that cognitive bias may taint the decision making of even ethical prosecutors when executing this broad discretion.

A. Investigation and Charging Decisions

The potential for cognitive bias to creep into prosecutorial decision making starts from the earliest case-screening stages, when prosecutors must determine whether sufficient evidence exists to proceed with a prosecution. In hypothesis testing terms, they are testing the hypothesis that the defendant is guilty. [FN98] The phenomenon of confirmation bias suggests a natural tendency to review the reports not for exculpatory evidence that might disconfirm the tested hypothesis, but instead for inculpatory, confirming evidence. [FN99] In Earl Washington's case, for example, the prosecutor might have been looking for the fact of the confession, *1604 not for the

surrounding circumstances that might undermine its reliability.

If the investigation is still ongoing, confirmation bias might cause law enforcement officers to conduct searches and to ask questions that will yield either further inculpatory evidence or nothing at all. Just as Snyder and Swann's subjects primarily asked suspected extroverts questions like "What would you do if you wanted to liven things up at a party?," [FN100] police eyeing an initial suspect might ask, "What were you and the victim fighting about the night before the murder?" Confirmation bias will reduce the likelihood that the investigation will be directed in a manner that would yield evidence of innocence. [FN101]

Recent attention to the risks of wrongful convictions [FN102] has brought to light the influence of "tunnel vision," whereby the belief that a particular suspect has committed the crime might obfuscate an objective evaluation of alternative suspects or theories. [FN103] In Illinois, a special commission on capital punishment identified tunnel vision as a contributing factor in many of the capital convictions of thirteen men who were subsequently exonerated and released from death row. [FN104] Similarly, in Canada, a report issued *1605 under the authority of federal, provincial, and territorial justice ministers concluded that tunnel vision was one of the eight most common factors leading to convictions of the innocent. [FN105] In cognitive terms, the tunnel vision phenomenon is simply one application of the widespread cognitive phenomenon of confirmation bias. Law enforcement fails to investigate alternative theories of the crime because people generally fail to look for evidence that disconfirms working hypotheses.

B. Sticky Presumptions of Guilt

If the prosecutor decides to pursue charges, the potential of cognitive bias to taint decision making only worsens. Prosecutorial reluctance to revisit a theory of guilt is difficult to explain when prosecutors are viewed as rational actors. Attempts to do so often rely on accounts of either individual or institutional indifference to the truth. [FN106] However, widespread prosecutorial skepticism of innocence claims is wholly understandable, and in fact predictable, in light of disconfirmation bias, belief perseverance, and cognitive consistency. Although some have argued to the contrary, [FN107] many commentators believe that the ethical prosecutor brings charges only when she is sufficiently certain in her own mind of the accused's guilt. [FN108] Accordingly, if charges are brought, the prosecutor *1606 has presumably made a personal determination about the defendant's guilt. If additional evidence arises, selective information processing comes into play. The prosecutor will accept at face value any evidence that supports the theory of guilt and will interpret ambiguous evidence in a manner that strengthens her faith in the case. [FN109] Should any potentially exonerative evidence arise, she will scrutinize it carefully, searching for an explanation that undermines the reliability of the evidence or otherwise reconciles it with the existing theory of guilt. [FN110] As a result of selective information processing, she will continue to adhere to her initial charging decision, regardless of the new information.

Indeed, even if the inculpatory evidence that initially supported the charges is wholly undermined, belief perseverance suggests that the theory of guilt will nevertheless linger. Others have noted the large number of cases, such as Earl Washington's, in which prosecutors continue to insist that a released defendant remains a suspect. [FN111] Although prosecutorial resistance to claims of factual *1607 innocence is often attributed to a prosecutorial culture tainted by politics and an indifference to justice, [FN112] sticky beliefs about guilt may simply be the result of belief perseverance.

Consider, for example, the government's much criticized spy charges against Ahmad Al Halabi, an Air Force translator at the U.S. naval base at Guantanamo Bay. [FN113] The initial evidence appeared damning. Al Halabi had stored nearly two hundred detainee notes in his personal laptop, had taken prohibited photographs of the base's guard towers, and had plans to travel to Syria. [FN114] A computer analyst concluded from an inspection of Al Halabi's laptop that he had already e-mailed some of the stored documents over the Internet. [FN115]

Within weeks, a different computer investigator concluded that the initial analysis of the laptop was flawed and that Al Halabi had not sent any material over the Internet. [FN116] Nevertheless, for nearly four months prosecutors continued to seek additional analysis from the "best places." [FN117] Even when prosecutors concluded that absolutely no evidence existed to show that Al Halabi e-mailed any materials, the government dismissed only those charges that alleged the transmittal of classified information; sixteen charges, including espionage,

remained. [FN118]

Still, the government's case had problems. The supposedly secret documents on Al Halabi's laptop were innocuous communications, such as letters from detainees to parents. [FN119] Moreover, he had an explanation for their presence on his laptop: translators, including himself, had been asked to alleviate a shortage of computers on the *1608 base by using their personal computers. [FN120] Al Halabi did admit to photographing the base, but only to remember his military service there, not to conduct espionage. [FN121] He also offered a justification for his anticipated travel to Syria-his upcoming wedding. [FN122] Nevertheless, prosecutors persisted, arguing that the wedding was a ruse to conceal Al Halabi's true intentions of delivering secret information to an enemy. [FN123]

Ultimately, the government conceded that only one of the nearly two hundred documents on Al Halabi's computer was classified as secret. [FN124] Nearly all charges were dropped, and Al Halabi agreed to plead guilty to relatively minor charges relating to the mishandling of a document, the prohibited photographs of the camp, and his false statements concerning the photographs. [FN125] What was once a death penalty case ended with a discharge and demotion, but no additional jail time. [FN126]

Some have suggested that Al Halabi was the victim of an anti-Muslim witch hunt at Guantanamo. [FN127] Although Al Halabi's Muslim faith undoubtedly contributed to the government's willingness to believe that he was a spy, belief perseverance may have played a larger role in the government's unwillingness to yield that belief. After the evidence of e-mailing was demonstrated to be inaccurate, the theory of guilt continued to taint the prosecutor's evaluation of the remaining evidence. [FN128] Indeed, even after the government's case *1609 unraveled, Al Halabi's prosecutor insisted, "He was engaged in suspicious behavior. He took prohibited photographs." [FN129]

C. The Disclosure of Exculpatory Evidence

The fallibility of human cognition raises especially disturbing questions about a prosecutor's ability to determine whether evidence is exculpatory. Under *Brady v. Maryland* [FN130] and its progeny, prosecutors must disclose materially exculpatory evidence to the defense. [FN131] The problem lies in the Court's definition of "materiality." Borrowing from the Court's standard in *Strickland v. Washington* for granting a new trial based on ineffective assistance of counsel, [FN132] the Court held in *United States v. Bagley* that evidence is material and therefore required to be disclosed to the defense "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [FN133] The Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." [FN134] The Court subsequently made clear that the materiality standard is not whether the trial's outcome would more likely than not have *1610 been different with the evidence at issue, but whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." [FN135]

Because Brady's materiality standard turns on a comparison of the supposedly exculpatory evidence and the rest of the trial record, applying the standard prior to trial requires that prosecutors engage in a bizarre kind of anticipatory hindsight review. They must anticipate what the other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence at issue would place "the whole case" [FN136] in a different light. [FN137] Others have previously criticized Brady for relying on prosecutors to determine the materiality of evidence in their own files. [FN138] Prosecutors, some say, are in a poor position to evaluate the materiality of evidence because they are unaware of the planned defense strategy [FN139] and are, in any event, conflicted by their desire to win. [FN140] Moreover, if a prosecutor wrongly decides to withhold materially exculpatory evidence, the misapplication of the standard may never be detected, and there will never be judicial review of the prosecutor's decision. [FN141]

The point about Brady made in this Article is a slightly different one. This Article does not dispute that a prosecutor's review of her own file for exculpatory evidence might be biased; rather, this Article sees cognitive psychology as providing a potential basis for explaining the mechanism underlying the prosecutor's bias. From *1611 this perspective, the prosecutor's application of Brady is biased not merely because she is a zealous advocate engaged in a "competitive enterprise," [FN142] but because the theory she has developed from that enterprise might trigger cognitive biases, such as confirmation bias and selective information processing. [FN143]

Brady requires a prosecutor who is determining whether to disclose a piece of evidence to the defense to speculate first about how the remaining evidence will come together against the defendant at trial, and then about whether a reasonable probability exists that the piece of evidence at issue would affect the result of the trial. [FN144] During the first step, a risk exists that prosecutors will engage in biased recall, retrieving from memory only those facts that tend to confirm the hypothesis of guilt. [FN145] Moreover, because of selective information processing, the prosecutor will accept at face value the evidence she views as inculpatory, without subjecting it to the scrutiny that a defense attorney would encourage jurors to apply. [FN146]

Cognitive bias would also appear to taint the second speculative step of the Brady analysis, requiring the prosecutor to determine the value of the potentially exculpatory evidence in the context of the entire record. [FN147] Because of selective information processing, the prosecutor will look for weaknesses in evidence contradicting *1612 her existing belief in the defendant's guilt. [FN148] In short, compared to a neutral decision maker, the prosecutor will overestimate the strength of the government's case against the defendant and underestimate the potential exculpatory value of the evidence whose disclosure is at issue. As a consequence, the prosecutor will fail to see materiality where it might in fact exist.

D. Stickier Presumptions of Guilt Postconviction

A further barrier to prosecutorial neutrality arises upon the defendant's conviction. Just as the majority of commentators believe that prosecutors should bring charges only when they are personally convinced of an accused's culpability, prosecutors also have an obligation to seek postconviction redress if they believe that an innocent person has been convicted. [FN149] Even if prosecutors do not seek the defendant's release sua sponte, one would at least expect a conscientious prosecutor not to oppose relief for an innocent person who requests it. [FN150] The problem, of course, is convincing the prosecutor that the defendant is, in fact, innocent.

Whether the conviction was obtained through a jury verdict or the defendant's own guilty plea, the prosecutor will view the conviction as further evidence confirming the accuracy of her initial theory of guilt. [FN151] The prosecutor's strengthened belief in her theory will continue to taint her analysis of any new evidence submitted by the defense postconviction. [FN152]

Moreover, cognitive dissonance will further hinder the prosecutor's ability to conduct a neutral evaluation of potentially *1613 exculpatory evidence. [FN153] The conviction of an innocent person is inconsistent with the ethical prosecutor's belief that charges should be brought only against suspects who are actually guilty. [FN154] To avoid cognitive dissonance, an ethical prosecutor might cling to the theory of guilt to reconcile her conduct with her beliefs, especially after the defendant has been convicted. From this perspective, prosecutorial bias against postconviction exculpatory evidence is not an indication of corrupt ethics at all; rather, it may indicate a deep but biasing adherence to the edict that prosecutors should only do justice. A prosecutor may give short shrift to claims of innocence, in other words, not because she is callous about wrongful convictions, but because she cannot bring herself to believe that she has played a part in one.

III. Improving Prosecutorial Decision Making

Prosecutorial shortcomings such as tunnel vision, failures to disclose exculpatory evidence, and stubborn adherence to theories of guilt are often categorized as "prosecutorial misconduct," [FN155] suggesting a culpable mental state in the wrongdoing prosecutors. Not surprisingly, then, commentators who seek to prevent these prosecutorial shortcomings look for reform through improvements in prosecutorial values. [FN156] Common reform suggestions include, *1614 for example, increases in both the frequency and severity of sanctions against unethical prosecutors and a transformation of a prosecutorial culture that is described as valuing conviction rates above justice. [FN157] If only prosecutors cared about claims of innocence, the story seems to go, we might trust their decision making.

Without disputing the suggestion that some prosecutors-both individually and institutionally-could give more weight to doing justice, this Article has tried to suggest that the story is a more complicated one. This Article seeks to add a cognitive dimension to the traditional explanation of "misconduct," not because all prosecutors are well intentioned, but because suggesting that only bad-intentioned prosecutors are at risk of poor decision making is simply too easy. Prosecutors sometimes make biased decisions, this Article has argued, because people generally are

biased decision makers. A cognitive explanation for prosecutorial bias suggests that improving the values of prosecutors is not enough; an improvement in the cognitive process is required. This Part attempts to set forth some initial suggestions for reform, aimed at reducing the influence of cognitive bias upon sound prosecutorial decision making.

A. Improving the Initial Theory of Guilt

Confirmation bias, selective information processing, and belief perseverance are all triggered by the decision maker's existing beliefs. In the context of prosecutorial decision making, the biasing theory is the prosecutor's belief that the defendant is guilty. Once that belief is formed, confirmation bias causes her to seek information that confirms the theory of guilt; selective information processing causes her to trust information tending to confirm the theory of guilt and distrust potentially exculpatory evidence; and belief perseverance causes her to adhere to the theory of guilt even when the evidence initially supporting that theory is undermined. [FN158]

Because the theory of guilt triggers sources of cognitive bias, prosecutorial neutrality should be at its peak prior to the prosecutor's *1615 charging decision, before she has formed a theory of guilt that will taint subsequent information processing. [FN159] Accordingly, the accuracy of a prosecutor's decision making would be maximized if she had access to all relevant evidence gathered by the police prior to making the initial charging decision. Early access to all relevant evidence could be improved in two ways. First, prosecutors could be involved in investigations prior to initiating formal charges, as they often are in the federal system or in major crime investigations at the state level. [FN160] Second, in less serious cases in which resources would not feasibly permit prosecutorial involvement in the cases's investigative stage, police should record, preserve, and disclose to the prosecutor all evidence collected during their investigation, both inculpatory and exculpatory. [FN161]

Because police agencies act independently of prosecutors' offices in most jurisdictions, prosecutors have no guarantee that police will give them the information they need to make a fully informed evaluation of a case. [FN162] Although Brady provides defendants a right of access to material exculpatory evidence, it does so through a trial right that governs the conduct of prosecutors, not the police. [FN163] And although the Supreme Court has extended prosecutors' Brady obligations to all exculpatory evidence known to law enforcement agencies "acting on the government's behalf in the case," [FN164] no *1616 doctrinal basis exists for assuring prosecutorial access to this information.

Professor Fisher has suggested that prosecutorial access to exculpatory information gathered by the police could be increased either directly through legislation or indirectly through changes to the ethical rules that govern prosecutors. [FN165] This Article seeks only to offer an additional reason for ensuring the police's full disclosure of information to prosecutors and does not explore the best doctrinal basis for doing so. Prosecutorial access to all information gathered by police during their investigation is essential not only to the ability of prosecutors to comply with Brady but also to the accuracy of their initial charging decisions, which the cognitive literature suggests are hard to shake. [FN166]

Of course, no process can assure one hundred percent accuracy in a prosecutor's decision making. However, improving prosecutorial access to investigatory information prior to the initial charging decision improves decision-making outcomes in two related ways. First, it maximizes the availability of prosecutorial neutrality, ensuring that the prosecutor's initial theory about the case is based upon all available information. Second, to the extent that the prosecutor's initial charging decision will bias her subsequent decisions in the case, improving the accuracy of the prosecutor's initial theory of guilt will mitigate from a normative perspective the adverse effects of cognitive bias upon the prosecutor's ultimate decisions.

B. Educating Prosecutors and Future Prosecutors

Another possible method of improving prosecutorial decision making is to train prosecutors and future prosecutors about the sources of cognitive bias and the potential effects of cognitive bias upon rational decision making. Commentators often look to *1617 education to improve prosecutorial decision making, [FN167] but they tend to emphasize education about good prosecutorial values. They have argued, for example, that prosecutors should be admonished to approach cases with "a healthy skepticism" and "to assume an active role in confirming the truth of

the evidence of guilt and investigating contradictory evidence of innocence." [FN168] To the virtuous prosecutor, these obligations are apparent. What is less apparent are the cognitive biases that may taint the decision making of even ethical prosecutors.

With increased academic attention to the effects of cognitive bias on legal theory, doctrine, and practice, there has been some movement toward teaching law students about the limits of their own rationality. [FN169] Additionally, recent responses to wrongful convictions have included the recommendation that prosecutors learn about cognitive bias and its effects upon prosecutorial decision making. [FN170] Some empirical evidence suggests that self-awareness of cognitive limitations can improve the quality of individual decision making. [FN171] For example, recall that in their well-known experiment involving the fake suicide note task, Ross, Lepper, and Hubbard found that both the actors who performed the task and the observers who watched maintained their beliefs about the actors' ability to perform the task, even after being told that the experimenters provided false feedback. [FN172] As part of the study, experimenters also exposed some subjects to a further "process debriefing," which provided a detailed discussion of the belief *1618 perseverance phenomenon. [FN173] The experimenters found that process debriefing eliminated the effects of the false feedback, at least among the subjects who completed the task themselves. [FN174]

However, some social science evidence suggests that self-awareness is not enough to prevent cognitive bias. For example, although Ross, Lepper, and Hubbard found that "process debriefing" about the phenomenon of belief perseverance eliminated belief perseverance among subjects concerning their own performance on the suicide note task, they also found continued perseverance effects among observer subjects, despite process debriefing. [FN175] In other words, observer subjects continued to view an actor's ability as consistent with the discredited feedback. [FN176] Similarly, Wason found that alerting subjects to their errors in the card-selection task did little to improve their accuracy in selecting the appropriate cards for hypothesis testing. [FN177] Accordingly, although education about cognitive bias may hold some potential to improve prosecutorial decision making, it is doubtful that education alone will assure prosecutorial neutrality.

C. The Practice of "Switching Sides"

One possible method for the ethical prosecutor to avoid cognitive bias would be to act as her own neutralizing adversary by generating pro-defense counterarguments to her own prosecutorial interpretations of the evidence against the defendant. Cognitive research suggests that the generation of explanatory arguments plays a role in belief perseverance, and that generating explanatory counterarguments can mitigate belief perseverance. For example, recall Anderson, Lepper, and Ross's study, in which subjects were led to believe through fictionalized case histories that either a negative or positive correlation existed between risk preference and *1619 firefighting abilities. [FN178] The study replicated the basic belief perseverance phenomenon, with subjects continuing to adhere to beliefs about the perceived relationship even after learning that the case histories were fictional. [FN179] Importantly though, the researchers asked subjects prior to the debriefing to generate possible explanations for the perceived relationship. [FN180] Those subjects who generated a plausible theory to support the observed correlation displayed more perseverance than subjects whose explanations simply restated the existence of an observed correlation. [FN181]

One suggested mechanism for belief perseverance, then, is that once a theory is formed to explain a data set, it exists apart from the data and may continue to be treated as the most plausible theory even after the underlying data is discredited. [FN182] Such a mechanism suggests that generating countertheories should mitigate perseverance effects, and the cognitive literature does provide some support for counterexplanation as a debiasing technique. [FN183] Anderson and Sechler, for example, found that *1620 subjects who were asked to generate arguments to support an assigned position shifted their attitudes toward the assigned position. [FN184] However, when the experimenters asked subjects to generate arguments to support the opposite position, the belief perseverance effects were reversed. [FN185] Similarly, Lord, Lepper, and Preston found a corrective effect when subjects were induced to consider opposing possibilities, either upon explicit instruction or through exposure to materials that made the opposing possibility more salient. [FN186]

In lawyer terms, a prosecutor seeking to avoid cognitive bias through counterexplanation would simply switch litigation sides and play the role of her own devil's advocate, a practice she probably learned her first year of law

school. The mental exercise of switching sides could help mitigate cognitive bias in two separate contexts. [FN187] First, as evidence is evaluated on an ongoing basis during a case's pendency, the prosecutor could try to generate plausible explanations of both guilt and innocence for each piece of incoming evidence. This procedure might serve as inoculation against unwarranted belief perseverance by preventing the prosecutor's theory of guilt from becoming disconnected from the evidence underlying it. Second, if an early piece of evidence is subsequently discredited, a prosecutor who had formed an opinion of guilt based in part on the discredited evidence could imagine alternative explanations for any remaining evidence. This counterexplanation exercise of switching sides would assist the prosecutor in an unbiased evaluation of the prosecution's remaining case without the discredited evidence.

***1621 D. Second Opinions and Committee Input**

Another possible method to mitigate the influence of cognitive bias on prosecutorial decision making is to involve additional, unbiased decision makers in the process. The reduction of bias might be achieved internally within a prosecutor's office by establishing a process for "fresh looks" of a file by a lawyer or a committee of lawyers whose evaluation would not be tainted by earlier developments in the case. [FN188] For example, such a process might be helpful when the prosecuting attorney learns of a new piece of potentially exonerating evidence and the initial theory of guilt might cause her to undervalue its importance. [FN189] A fresh look might also be helpful when the credibility of a piece of evidence that contributed to the prosecutor's initial charging decision is undermined. A separate attorney would be able to comment on the strength of existing evidence against the defendant without the taint of a preexisting theory of guilt. [FN190] Similarly, a fresh look attorney would not be biased by the desire to avoid the cognitive dissonance associated with having charged an innocent person with a crime. [FN191]

Limitations exist, however, in another prosecutor's ability to provide a neutral evaluation of a coworker's case. Herbert Packer observed long ago the operational "presumption of guilt" that allows the fast-paced case screening process in most district attorneys' offices to function. [FN192] At least some prosecutors might open each ***1622** new file assuming that police would not have arrested the suspect and referred him for charges if they did not have their man. [FN193] Accordingly, a prosecutor serving as a fresh look attorney may be tainted by an initial theory of guilt even before reading a police report. Moreover, a fresh look attorney may be reluctant to dissent from her colleague's initial case evaluation. The social science literature demonstrates the difficulty decision makers have in resisting the power of their peers. [FN194] For example, in Solomon Asch's classic studies on conformity, he found that large percentages of subjects could be induced to reach erroneous conclusions in a simple line-matching task if a number of the researchers' confederates first answered incorrectly. [FN195]

Accordingly, a more meaningful fresh look process might involve an advisory committee that includes nonprosecutors. Asch's research on conformity demonstrated the power of even one lone dissenting voice to encourage people to depart from group opinion and assess a problem independently. [FN196] Judges, defense attorneys, and civil practitioners would be less likely to apply a presumption of guilt and would feel less pressure to conform their views to other prosecutors; accordingly, they may be more likely to provide a true fresh look. [FN197]

***1623** Some prosecutors might resist the involvement of outsiders in the case-evaluation process as an unwarranted intrusion into prosecutorial discretion. However, the full scope of prosecutorial discretion could be preserved if the fresh look committee served solely in an advisory capacity and the district attorney's office retained ultimate decision-making authority. Moreover, the committee's advisory capacity could be limited to specific questions, such as the strength of a case or the potential value of exonerating evidence. [FN198] Such a limited consulting role would not involve the committee in the broader policy questions that generally justify deference to prosecutorial discretion, such as the jurisdiction's enforcement priorities or where a single case fits within those priorities. [FN199]

With limited responsibilities, a diversely constituted fresh look committee could be modeled loosely after the civilian review boards that increasingly monitor police. [FN200] Most of those boards participate in the oversight of police departments in narrow ways, such as resolving complaints against individual police officers, without interfering in broader questions about the department's policing ***1624** strategies. [FN201] Although police departments initially balked at even minimal civilian involvement in their affairs, at least some role for external monitoring of police is increasingly acceptable. [FN202] If prosecutors' offices could survive a similar cultural adjustment, they could have the benefits of neutral fresh looks without sacrificing the autonomy brought by

prosecutorial discretion. [FN203]

E. Prosecutorial Involvement in Innocence Projects

Another proposal for reform is increased prosecutorial involvement in the organizations that govern and address professional ethics among lawyers generally and prosecutors specifically, such as state and local bar committees, innocence projects, and groups concerned with providing quality defense representation in criminal cases. Currently, prosecutors are underrepresented in bar and pro bono oriented activities. [FN204] Apart from the benefits that might inure to these organizations from increased and diversified participation, prosecutorial involvement in such groups would provide prosecutors with a venue for behavior demonstrating their commitment to protecting innocent defendants. That objective behavioral commitment could in turn assist prosecutors in their own internal decision making by mitigating the biasing effects of cognitive dissonance.

Part II.D suggested that cognitive dissonance might prevent prosecutors from neutrally evaluating defendants' claims of innocence because ethical prosecutors may not want to believe that they have convicted, or even charged, an innocent person of a crime. Accordingly, to resist dissonance, the prosecutor might underestimate *1625 the merits of a claim to innocence. [FN205] However, recent research on dissonance suggests that dissonance resistance can be mitigated when people are given an alternative method of affirming their own values and self-perceptions. For example, Claude Steele has theorized that cognitive dissonance results from people's desire to affirm their own sense of integrity. [FN206] According to Steele's self-affirmation theory, a person changes her beliefs in the face of dissonant conduct because the act implies that the person is not "morally adequate" and challenges the person's self-adequacy. [FN207] To affirm her own image, the person adjusts her beliefs in response to the dissonance. [FN208] Steele's theory is consistent with this Article's suggestion that prosecutors may resist reevaluating a defendant's guilt in an attempt to preserve their own sense of professional integrity.

Steele's research provides some support not only for the theorized mechanism underlying the reaction to dissonance, but also for its corollary that belief adjustment in response to dissonance can be mitigated if people are provided an alternative mechanism for self-affirmation. For example, Steele and Liu asked subjects to write an essay supporting increases in tuition, even though the subjects opposed the hikes. [FN209] Subjects were also asked to complete a questionnaire about politics and economics. [FN210] Replicating the classic finding of cognitive dissonance, subjects generally demonstrated a change in their beliefs, reporting less opposition to tuition increases after writing essays favoring them. [FN211] However, the researchers found that subjects who valued politics and economics, and who had affirmed their values by completing the required questionnaire, demonstrated less belief change as a result of the forced counterattitudinal essay. [FN212] The researchers construed the *1626 data as suggesting that salient, self-affirming cognitions might help people respond objectively to information that challenges their self-image. [FN213]

Similarly, in another study, researchers found that subjects who were asked to write an essay opposing state funding for the construction of handicapped facilities demonstrated less change in their beliefs about the appropriateness of such facilities if they expected to have an opportunity to personally assist the handicapped after the experiment. [FN214]

These studies suggest that prosecutors could mitigate the effects of dissonance resistance on decision making by creating alternative mechanisms to support their own self images as ethical prosecutors committed to the pursuit of justice. Personal involvement in professional organizations that value legal and prosecutorial ethics might increase the prosecutor's own confidence in her commitment to protecting the innocent and may therefore decrease the likelihood of bias in evaluating claims of innocence.

F. Repairing Brady

This Article's final suggestion for reform concerns a prosecutor's disclosure of evidence to the defense under *Brady v. Maryland*. [FN215] The previously suggested reforms of increased prosecutorial access to information, prosecutorial training about cognitive bias, the practice of switching litigation sides, internal fresh look reviews, and prosecutorial involvement in professional organizations all carry some potential to improve a prosecutor's application of the *Brady* standard because they all seek to mitigate cognitive bias and will therefore increase the

likelihood of an accurate assessment of the exculpatory value of a piece of evidence. Additional improvement*1627 in prosecutorial disclosure, however, requires a rethinking of Brady's materiality standard.

As explored in Part II.C, limiting a prosecutor's constitutional disclosure obligation to evidence that poses a "reasonable probability" [FN216] of affecting a case's outcome invites decision making that is biased against disclosure. Because the prosecutor has already formed a theory of guilt, she will overestimate the value of inculpatory evidence, underestimate the value of the exculpatory evidence, and ultimately undercount instances of materiality. [FN217] The problem with the Court's Brady doctrine is its use of a harmless error standard not just in determining whether the reversal of a conviction is warranted based on the nondisclosure of exculpatory evidence, but also in determining whether disclosure is required in the first place.

This flaw results from the Court's misplaced reliance in the Brady context on the standard established in *Strickland v. Washington* [FN218] for granting a new trial based on ineffective assistance of counsel. [FN219] Importantly, unlike Brady's materiality standard, the Court's test under *Strickland* is a two-prong test that separates the standard for attorney performance from the question of the defendant's entitlement to a new trial should counsel fail to meet that standard. [FN220] The first prong makes clear that the standard for attorney performance is that of "reasonably effective assistance." [FN221] The second prong of *Strickland* applies as a harmless error standard, asking whether the deficiency of counsel's performance affected the trial's outcome. [FN222] In light of the two *1628 prongs separating the standard for attorney performance from the standard for a defendant's remedy, a defense attorney who looked to *Strickland* for guidance about her duties of performance would be hard pressed to argue that she was professionally, ethically, and legally entitled to provide an incompetent, unreasonable defense as long as her client was a lost cause. [FN223]

Unlike *Strickland*'s two-prong test, the Court's prosecutorial disclosure jurisprudence establishes a single standard for determining both counsel's obligations and the defendant's entitlement to relief if those obligations go unmet. [FN224] As a standard for determining the availability of postconviction relief, Brady's materiality requirement may be a sensible method of ensuring that convictions are not lightly reversed when undisclosed evidence could not have affected a case's disposition. It is not, however, a helpful pretrial standard for prosecutors trying to determine at the outset whether to disclose evidence to the defense.

The standard governing prosecutors' disclosure to the defense should be separate from the standard that determines whether a defendant's conviction should be reversed due to a failure to disclose. Importantly, to mitigate cognitive bias, the standard for disclosure should require prosecutors to evaluate the potential exculpatory value of evidence from the defense's perspective, not through the lens of their preexisting theory of guilt. For example, Professor Capra suggested long ago that prosecutors should be required to disclose any evidence "favorable to the defendant's preparation or presentation of his defense." [FN225]

Model Rule of Professional Conduct 3.8(d), the ethical rule governing prosecutors' disclosure of evidence, is a step in the right direction because it requires prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor *1629 that tends to negate the guilt of the accused or mitigates the offense." [FN226] Although the rule primarily codifies prosecutors' constitutional obligations under Brady, the provision does not contain the limitation of materiality found in the Court's due process jurisprudence. [FN227]

Unfortunately, an ethical rule that governs prosecutorial disclosure is unlikely to alter the psychology of prosecutors trained to apply the well-known, constitutionally based Brady standard. As an initial matter, prosecutors receive far more training about the constitutional rules of criminal procedure than about ethical rules. [FN228] Accordingly, they may not even be aware that Model Rule 3.8(d) requires broader disclosure than Brady. Even if aware of the gap between the Model Rule and Brady's materiality standard, prosecutors may feel an obligation as an advocate to violate Model Rule 3.8(d) and to pursue all constitutional means of convicting a defendant they believe is guilty. [FN229] Because prosecutors, unlike private attorneys, are members of law enforcement, empowered by the executive branch, it is not uncommon for them to think of their obligations only as law enforcement officers governed by constitutional and statutory rules, not as lawyers governed by the rules of professional conduct. [FN230]

*1630 The failure of bar authorities to inject ethical rules into the daily practice of prosecutors does little to alter

this psychology. Even prosecutors who violate their constitutional disclosure obligations are rarely disciplined. [FN231] Thus, prosecutors who fail to disclose evidence that falls under Model Rule 3.8(d), but not Brady, are unlikely to be disciplined. [FN232] In short, the rejection of the materiality requirement by Model Rule 3.8(d), standing alone, is unlikely to alter the decision-making process of a prosecutor evaluating the exculpatory value of evidence.

Critics of Brady have suggested a variety of alternative reforms. Professor Capra has argued for a right to in camera inspection of the prosecutors' files so that a judge can fully effectuate the defendants' Brady rights. [FN233] Still others have argued for the "open file" policies already adopted by several jurisdictions in capital prosecutions. [FN234] This Article's purpose is not to explore fully the *1631 relative strengths and weaknesses of all possible reforms. Rather, this Article's intention is to demonstrate that the Brady rule should be modified to separate the standard that governs the disclosure requirement from the harmless error standard that determines the availability of a remedy if required discovery is withheld. Moreover, in light of what we know about cognitive bias, the governing standard for prosecutorial disclosure should attempt to avoid the recipe for cognitive disaster that is inherent in the current Brady standard. Broadening the Brady standard to include all favorable information, rather than just materially favorable information, would be a helpful move in the right direction. A standard turning on the favorability of the evidence instead of its materiality invites reviewing the file from the defense's perspective and therefore mitigates the influence of the prosecutor's preexisting theory of guilt on the decision-making process.

Conclusion

I wanted to write this Article to explore questions I have carried in my own mind since my first weeks as a prosecutor. Fresh out of my judicial clerkship, I was asked to help draft the papers required to obtain the release of two people who had been convicted of murder five years earlier. Police suspected that the woman whom the defendants supposedly killed, Tanya Bennett, was in fact the victim of a self-named, self-confessed serial killer. But even after the so-called Happy Face Killer included Bennett on his list of victims and provided detailed information about her murder, the prosecutors in my office who had obtained the original convictions remained doubtful. The Happy Face Killer must have known one of the convicted defendants, they speculated, or perhaps read the details in the newspaper. Only when the man led police to Bennett's long-abandoned purse, buried beneath half a decade's growth of blackberry bushes near the Columbia River Gorge, did the state agree to release the previously convicted defendants.

*1632 As a new lawyer reviewing the reports only with the benefit of hindsight, I could see potential problems with the prosecution's original case. Like Earl Washington's, [FN235] the defendants' convictions rested largely upon a retracted confession, obtained after repeated police questioning and corroborated by little other evidence. Nevertheless, I wondered as I drafted a memorandum summarizing the events leading to the erroneous convictions, would I have done anything differently? I do not purport to have the answer to that question today, but I do know that it was a valid question to ask myself then and, more importantly, a question that ethical prosecutors themselves need to raise in daily practice.

This Article has attempted to explore how cognitive bias might trigger poor decision making by prosecutors who intend to do justice. By doing so, this Article seeks to complement rather than supplant the vast literature that treats prosecutors as rational actors who choose to engage in misconduct. Adding a cognitive dimension to the current discussion of prosecutorial decision making is important in two different ways.

First, it shapes the direction of reform. Although sanctions and other alterations of the prosecutorial cost-benefit analysis may deter wrongful conduct in prosecutors who are not motivated to do justice, a cognitive explanation for how even virtuous prosecutors might contribute to wrongful convictions suggests that good values are not enough. As an admittedly introductory effort, this Article sets forth a few suggestions for enhancing neutral decision making by ethical prosecutors.

Moving beyond fault-based rhetoric to include a cognitive view of prosecutorial decision making also establishes a necessary discursive shift in the important, ongoing study of wrongful convictions. Using only the language of fault in the discussion invites an adversarial relationship between prosecutors and advocates for the innocent, because prosecutors naturally resist their depiction as wrongdoers. By antagonizing prosecutors and creating an opposing political force, the language of fault impairs the chances for meaningful prosecutor-initiated reforms, such

as internal review *1633 committees [FN236] or office guidelines to improve the exercise of prosecutorial discretion. [FN237]

In contrast, a cognitive explanation for faulty prosecutorial decision making creates the potential to fold ethical prosecutors into the dialogue. This discursive shift may encourage ethical prosecutors to examine the danger that they might personally contribute to wrongful convictions. Only when that happens can ethical prosecutors improve the quality of their own decisions and attempt to implement reforms that might improve the prosecutorial decision making of others.

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[FN1]. Maria Glod, *DNA Not Enough To Charge Va. Rapist: Authorities Kept Identity a Secret*, Wash. Post, Mar. 11, 2004, at B4.

[FN2]. *Id.*

[FN3]. *Washington v. Murray*, 952 F.2d 1472, 1478 n.5 (4th Cir. 1991) (noting the questionable circumstances surrounding Washington's interrogation); Eric M. Freedman, *Earl Washington's Ordeal*, 29 Hofstra L. Rev. 1089, 1091-94 (2001) (detailing the history of the Washington "confessions").

[FN4]. See *Washington v. Murray*, 4 F.3d 1285, 1286 (4th Cir. 1993); see also Editorial, *Justice Begrudged*, N.Y. Times, Apr. 10, 2004, at A14 (advocating "an honest vetting of the judicial process that allowed [Washington's] name to be sullied in the first place").

[FN5]. See Glod, *supra* note 1 ("There are several people who are potential suspects, and I cannot rule out Earl Washington." (quoting prosecuting attorney)). The current county prosecutor, who assumed office after Washington was convicted, was perhaps even more insistent about his guilt, telling a local paper after Washington's exoneration, "It has been my position all along that Earl Washington is guilty, and that is still my position." Complaint ¶ 117, *Washington v. Buraker*, 322 F. Supp. 2d 692 (W.D. Va. 2004) (No. 3:02-CV-00106) (civil suit filed by Earl Washington against several Virginia officials); see also Margaret Edds, *An Expendable Man: The Near-Execution of Earl Washington Jr.* 181 (2003) ("No one, it seemed, was more convinced of Washington's guilt than [the county's prosecuting attorney]."). Washington's civil suit is still pending. See *Washington v. Wilmore*, 407 F.3d 274, 275-76 (4th Cir. 2005) (affirming the district court's denial of summary judgment on one of Washington's claims).

[FN6]. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 890 (1995) ("Prosecutorial misconduct is readily apparent to any lawyer who keeps abreast of appellate review of criminal convictions.").

[FN7]. See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197, 204-13 (1988) (describing factors that cause prosecutors to pursue cases "overzealously"); Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 458 (1992) (arguing that "the present ethos of overzealous prosecutorial advocacy" is "ingrained"); Judith L. Maute, *"In Pursuit of Justice" in High Profile Criminal Matters*, 70 Fordham L. Rev. 1745, 1747 (2002) (noting that "[o]verzealous prosecutors may become too closely aligned with ... witnesses who are willing to shade or falsify their testimony in order to obtain a conviction").

[FN8]. See Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 Geo. J. Legal Ethics 537, 541 (1996) (decrying prosecutors who "keep personal tallies ... for self-promotion"); Meares, *supra* note 6, at 882 (describing the "desire to 'win'" as "a central characteristic of prosecutorial culture"); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 134 (2004) (attributing the lack of prosecutorial support for postconviction claims of innocence in part to "the

emphasis district attorneys' offices place on conviction rates").

[FN9]. Bennett L. Gershman, The Prosecutor's Duty to Truth, 14 *Geo. J. Legal Ethics* 309, 350 (2001); see also Anthony V. Alfieri, Prosecuting Race, 48 *Duke L.J.* 1157, 1242-45 (1999) (discussing prosecutorial discretion guided by "moral norms"); Bruce A. Green, The Role of Personal Values in Professional Decisionmaking, 11 *Geo. J. Legal Ethics* 19, 59-60 (1997) (advocating ad hoc invocation of moral judgment).

[FN10]. Prosecutors are not only obligated to act as advocates to enforce the law but are also entrusted to ensure that justice is met. See Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2001) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); cf. Steven K. Berenson, Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?, 41 *B.C. L. Rev.* 789, 792-94 (2000) (discussing the public interests served by prosecutors).

[FN11]. See generally Bruce A. Green, Why Should Prosecutors "Seek Justice"?, 26 *Fordham Urb. L.J.* 607, 636 (1999) (emphasizing a prosecutor's unique "duty to avoid the public perception that criminal proceedings are unfair"); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 *Vand. L. Rev.* 45, 107-09 (1991) (describing the psychological factors that limit the effectiveness of "do justice" provisions).

[FN12]. Bruce A. Green, Prosecutorial Ethics as Usual, 2003 *U. Ill. L. Rev.* 1573, 1587.

[FN13]. Kenneth Rosenthal, Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence, 71 *Temp. L. Rev.* 887, 889 (1998) (noting an "absence of disciplinary sanctions against prosecutors, even in the most egregious cases"); Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 *N.C. L. Rev.* 721 (2001) (assessing the lack of discipline for prosecutorial misconduct).

[FN14]. Berenson, *supra* note 10, at 846 (recommending that professional advancement in prosecutors' offices "should be based on richer measures of compliance with the 'do justice' standard, rather than simply on conviction rates"); Erwin Chemerinsky, The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles, 8 *Va. J. Soc. Pol'y & L.* 305, 320-21 (2001) (suggesting that prosecutors be rewarded with promotion opportunities for identifying police misconduct); Medwed, *supra* note 8, at 172 (advocating incentives for prosecutors to respond to postconviction claims of innocence).

[FN15]. Meares, *supra* note 6, at 873-74 (proposing the reduction of overcharging by rewarding prosecutors financially for obtaining convictions on charges initially pursued).

[FN16]. See Ziva Kunda, Social Cognition: Making Sense of People 211-63 (1999); Richard Nisbett & Lee Ross, Human Inference: Strategies and Shortcomings of Social Judgment 17-42 (1980); Steven Pinker, How the Mind Works 175 (1997); see also Cass R. Sunstein, Behavioral Analysis of Law, 64 *U. Chi. L. Rev.* 1175, 1175 (1997) (noting that although "[c]ognitive errors ... may press behavior far from the anticipated directions," human decision making is not "unpredictable, systematically irrational, random, rule-free, or elusive to social scientists"). See generally Daniel Kahneman, Paul Slovic & Amos Tversky, Judgment Under Uncertainty: Heuristics and Biases (1982).

[FN17]. Traditional law and economics assumes that actors make utility-maximizing decisions about their behavior, weighing with perfect rationality the benefits of a behavior against its costs, assessed by the likely sanction and probability of detection. See, e.g., A. Mitchell Polinsky, An Introduction to Law and Economics 77-78 (2d ed. 1989).

[FN18]. See generally Cass R. Sunstein, Behavioral Law and Economics (2000); Christine Jolls, Cass R. Sunstein & Richard H. Thaler, Theories and Tropes: A Reply to Posner and Kelman, 50 *Stan. L. Rev.* 1593, 1594-96 (1998); Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 *Cal. L. Rev.* 1051, 1075 (2000). For example, reliance on the "availability heuristic" causes people to overestimate the occurrence of events that are easily imagined. Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequency and Probability, 5 *Cognitive Psychol.* 207, 208 (1973). As a result,

they may be more fearful of and more willing to devote resources to prevent highly salient and unlikely occurrences, such as airplane crashes, than less salient and more likely events, such as automobile accidents. See generally Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 *Stan. L. Rev.* 683, 685 (1999). Similarly, the "endowment effect" describes the overvaluation of property that is already owned, which can distort efficient bargaining. See generally Russell Korobkin, The Endowment Effect and Legal Analysis, 97 *Nw. U. L. Rev.* 1227, 1232-35 (2003).

[FN19]. Rebecca Hollander-Blumoff & Matthew T. Bodie, The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act, 90 *Iowa L. Rev.* 1361, 1375-88 (2005) (discussing the effects on jury decision making of disclosing the cap on jury awards); Saul M. Kassin, The American Jury: Handicapped in the Pursuit of Justice, 51 *Ohio St. L.J.* 687, 697 (1990) (noting that cautionary instructions and cross-examination may not cure damage of misleading witness testimony because early impressions are resistant to change); Edward J. McCaffery et al., Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards, 81 *Va. L. Rev.* 1341, 1354-73 (1995) (considering how the use of cognitive theory in the framing of jury instructions can affect monetary awards for pain and suffering).

[FN20]. Dan Simon, A Psychological Model of Judicial Decision Making, 30 *Rutgers L.J.* 1, 121-23 (1998).

[FN21]. Kuran & Sunstein, *supra* note 18, at 711-23.

[FN22]. Stephanie Stern, Cognitive Consistency: Theory Maintenance and Administrative Rulemaking, 63 *U. Pitt. L. Rev.* 589, 620-30 (2002).

[FN23]. Donald C. Langevoort, Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms), 146 *U. Pa. L. Rev.* 101, 130-48 (1997).

[FN24]. Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 *Stan. L. Rev.* 211, 225-58 (1995).

[FN25]. Norman I. Silber, Observing Reasonable Consumers: Cognitive Psychology, Consumer Behavior and Consumer Law, 2 *Loy. Consumer L. Rep.* 69, 71 (1990).

[FN26]. Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 *Stan. L. Rev.* 1161, 1186-217 (1995).

[FN27]. Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 *Yale L.J.* 71, 88-90 (2000).

[FN28]. H. Richard Uviller, Commentary, The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA, 71 *Mich. L. Rev.* 1145, 1155-59 (1973) (discussing ethical problems unique to prosecutors).

[FN29]. Monroe H. Freedman, Understanding Lawyers' Ethics 219 (1990) (speaking of the charging obligations of "conscientious prosecutors").

[FN30]. Leslie C. Griffin, The Prudent Prosecutor, 14 *Geo. J. Legal Ethics* 259, 261 (2001) (discussing the moral and legal discretion held by prosecutors in performing their jobs).

[FN31]. Nisbett & Ross, *supra* note 16, at 169.

[FN32]. *Id.*

[FN33]. See Charles G. Lord, Lee Ross & Mark R. Lepper, Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 *J. Personality & Soc. Psychol.* 2098 (1979); Mark Snyder & William B. Swann, Jr., Hypothesis-Testing Processes in Social Interaction, 36 *J. Personality & Soc. Psychol.* 1202 (1978).

[FN34]. See *infra* Part I.A.

[FN35]. See *infra* Part I.B.

[FN36]. See *infra* Part I.C.

[FN37]. See *infra* Part I.D.

[FN38]. P. C. Wason & P. N. Johnson-Laird, *Psychology of Reasoning: Structure and Content* 210-11 (1972).

[FN39]. *Id.* at 202-17; see also Kunda, *supra* note 39, at 112-17 (describing hypothesis confirmation when evaluating other people); Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 *Psychol. Rev.* 211 (1987) (arguing that confirmation bias is better understood as a positive test strategy).

[FN40]. P. C. Wason, *Reasoning About a Rule*, 20 *Q. J. Experimental Psychol.* 273, 273 (1968).

[FN41]. *Id.*

[FN42]. *Id.* at 273-75.

[FN43]. See generally Karl R. Popper, *The Logic of Scientific Discovery* 32- 33 (1968).

[FN44]. Wason, *supra* note 40, at 273-77.

[FN45]. *Id.* at 276-77.

[FN46]. *Id.* at 280-81. To discover a vowel on the other side of the even number card would simply provide an example consistent with the "if vowel, then even number" rule. However, to discover a consonant on the other side would do nothing to disprove the "if vowel, then even number" rule, which says nothing about the reverse side of consonant cards. *Id.* at 280.

[FN47]. *Id.*

[FN48]. Snyder & Swann, *supra* note 33, at 1202.

[FN49]. *Id.* at 1203.

[FN50]. *Id.* at 1203-04.

[FN51]. *Id.* at 1202-12.

[FN52]. *Id.*

[FN53]. *Id.* at 1204.

[FN54]. See Mark Snyder & Nancy Cantor, *Testing Hypotheses About Other People: The Use of Historical Knowledge*, 15 *J. Experimental Soc. Psychol.* 330 (1979).

[FN55]. *Id.* at 330-33.

[FN56]. *Id.* at 333.

[FN57]. *Id.* at 334-35.

[FN58]. *Id.* at 341-42.

[FN59]. Lord, Ross & Lepper, *supra* note 33, at 2098.

[FN60]. *Id.* at 2100.

[FN61]. *Id.*

[FN62]. *Id.* at 2101-02.

[FN63]. *Id.* at 2103.

[FN64]. *Id.* at 2103-04.

[FN65]. See, e.g., Craig A. Anderson et al., Argument Availability as a Mediator of Social Theory Perseverance, 3 *Soc. Cognition* 235, 244-48 (1985) (argument availability); Peter H. Ditto & David F. Lopez, Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions, 63 *J. Personality & Soc. Psychol.* 568 (1992) (information evaluation); Kari Edwards & Edward E. Smith, A Disconfirmation Bias in the Evaluation of Arguments, 71 *J. Personality & Soc. Psychol.* 5 (1996) (argument evaluation); Charles G. Lord, Mark R. Lepper & Elizabeth Preston, Considering the Opposite: A Corrective Strategy for Social Judgment, 47 *J. Personality & Soc. Psychol.* 1231 (1984) (social judgment); Arthur G. Miller et al., The Attitude Polarization Phenomenon: Role of Response Measure, Attitude Extremity, and Behavioral Consequences of Reported Attitude Change, 64 *J. Personality & Soc. Psychol.* 561, 563-64 (1993) (attitude polarization among research participants with a broad range of preexisting attitudes); Geoffrey D. Munro & Peter H. Ditto, Biased Assimilation, Attitude Polarization, and Affect in Reactions to Stereotype-Relevant Scientific Information, 23 *Personality & Soc. Psychol. Bull.* 636 (1997) (biased assimilation and attitude polarization in the processing of stereotype-relevant scientific information); Norbert Schwarz et al., Interactive Effects of Writing and Reading a Persuasive Essay on Attitude Change and Selective Exposure, 16 *J. Experimental Soc. Psychol.* 1, 5-9 (1980) (reporting that subjects found sample letters to the editor more convincing and less biased when the letters supported their own positions). But see Miller et al., *supra*, at 561-69 (replicating the study by Lord, Ross, and Lepper, but finding no attitude polarization when subjects' positions were directly assessed by asking the same questions presented prior to the administration of the opposing studies).

[FN66]. See Ziva Kunda, The Case for Motivated Reasoning, 108 *Psychol. Bull.* 480, 493-95 (1990); Tom Pyszczynski & Jeff Greenberg, Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model, in 20 *Advances in Experimental Social Psychology* 297, 333 (Leonard Berkowitz ed., 1987); Tom Pyszczynski, Jeff Greenberg & Kathleen Holt, Maintaining Consistency Between Self-Serving Beliefs and Available Data: A Bias in Information Evaluation, 11 *Personality & Soc. Psychol. Bull.* 179, 186-88 (1985).

[FN67]. See Tom Pyszczynski, Jeff Greenberg & John LaPrelle, Social Comparison After Success and Failure: Biased Search for Information Consistent with a Self-Serving Conclusion, 21 *J. Experimental Soc. Psychol.* 195, 206-11 (1985) ("In both studies failure subjects showed a high level of interest in acquiring additional information when they expected it to reveal that most other students performed poorly and very little interest in acquiring additional information when they expected it to reveal that most others performed well.").

[FN68]. See Ditto & Lopez, *supra* note 65, at 580-82 (suggesting a mechanism by which motivational factors affect judgment processes); Edwards & Smith, *supra* note 65, at 18 (summarizing the values that supposedly underlie the motivation to defend prior beliefs).

[FN69]. See Edwards & Smith, *supra* note 65, at 18 (proposing a model to account for disconfirmation bias).

[FN70]. *Id.*

[FN71]. Nisbett & Ross, *supra* note 16, at 171 (addressing the normative status of disconfirmation bias); Edwards &

Smith, supra note 65, at 22 (same).

[FN72]. Edwards & Smith, supra note 65, at 22.

[FN73]. Id.

[FN74]. Nisbett & Ross, supra note 16, at 171.

[FN75]. See Darryl K. Brown, Rationing Criminal Defense Entitlements: An Argument from Institutional Design, 104 Colum. L. Rev. 801, 822-25 (2004) (discussing sources of wrongful convictions); Stanley Z. Fisher & Ian McKenzie, A Miscarriage of Justice in Massachusetts: Eyewitness Identification Procedures, Unrecorded Admissions, and a Comparison with English Law, 13 B.U. Pub. Int. L.J. 1, 3-15 (2003) (same).

[FN76]. Lee Ross, Mark R. Lepper & Michael Hubbard, Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm, 32 J. Personality & Soc. Psychol. 880, 882 (1975).

[FN77]. Id. at 882-83.

[FN78]. Id. at 883.

[FN79]. Id.

[FN80]. Id.

[FN81]. Id. at 883-84.

[FN82]. Id. at 884-87.

[FN83]. Id.

[FN84]. Craig A. Anderson, Mark R. Lepper & Lee Ross, Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information, 39 J. Personality & Soc. Psychol. 1037, 1039-40 (1980).

[FN85]. Id.

[FN86]. Id. at 1040-42.

[FN87]. Id. at 1045.

[FN88]. See generally Leon Festinger, A Theory of Cognitive Dissonance 1-31 (1957) (explaining that individuals seek to reduce dissonance and achieve consonance between their beliefs and behavior, and that individuals will often avoid situations that give rise to dissonance).

[FN89]. Leon Festinger & James M. Carlsmith, Cognitive Consequences of Forced Compliance, 58 J. Abnormal & Soc. Psychol. 203, 204-07 (1959).

[FN90]. Id. at 207-08.

[FN91]. Id. at 209-10.

[FN92]. Id.

[FN93]. Id.

[FN94]. See, e.g., Robert B. Cialdini, Influence: Science and Practice 73- 92 (3d ed. 1993) (stating that people are

more likely to agree to substantial requests after first agreeing to small ones); Elliot Aronson & Judson Mills, *The Effect of Severity of Initiation on Liking for a Group*, 59 *J. Abnormal & Soc. Psychol.* 177, 177-81 (1959) (reporting that subjects who were required to undergo an embarrassing initiation to join a group subsequently evaluated the group as more interesting than did control subjects); Robert E. Knox & James A. Inkster, *Postdecision Dissonance at Post Time*, 8 *J. Personality & Soc. Psychol.* 319, 319 (1968) (finding that racetrack bettors upgraded the likelihood of their horses winning after placing a bet).

[FN95]. See *supra* notes 7-16 and accompanying text.

[FN96]. Griffin, *supra* note 30, at 266-68.

[FN97]. For a discussion of the powers of the prosecuting attorney, see generally Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *Iowa L. Rev.* 393, 432-38 (2001) (describing prosecutorial abuse of the charging power); Green, *supra* note 12, at 1587-88 (describing prosecutorial discretion); Griffin, *supra* note 30, at 263-303 (discussing the various aspects and restrictions on prosecutorial discretion as well as recommending standards that should guide it).

[FN98]. See Popper, *supra* note 43, at 32-33.

[FN99]. See *supra* Part I.A for a discussion of confirmation bias.

[FN100]. Snyder & Swann, *supra* note 33, at 1204.

[FN101]. See *supra* notes 48-57 and accompanying text.

[FN102]. Much of this attention has come from postconviction exonerations of innocent defendants, often in the form of DNA evidence, and even in a startling number of capital cases. See, e.g., Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* 262-67 (2000) (providing statistics on DNA exonerations); Death Penalty Information Center, *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (listing 123 death-row exonerations since 1973) (last visited Mar. 12, 2006).

[FN103]. See Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 *Crim. L. Bull.* 550, 559 (1987) ("The natural inclination is not to see inconsistent or contradictory evidence for what it is, but to categorize it as irrelevant or a petty incongruity."); James McCloskey, *Commentary, Convicting the Innocent*, 8 *Crim. Just. Ethics* 2, 56 (1989) (noting that "[o]nce [the police] come to suspect someone as the culprit [e]vidence or information that does not fit the suspect or the prevailing theory of the crime is dismissed as not material or is changed to implicate the suspect"); Medwed, *supra* note 8, at 140-41 (discussing prosecutorial deference to police with tunnel vision); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *Fordham L. Rev.* 917, 945 (1999) (noting that prosecutors "get wedded to their theory and things inconsistent with their theory are ignored" (citation omitted)).

[FN104]. *Comm'n on Capital Punishment, State of Ill., Report of the Governor's Commission on Capital Punishment 19-22* (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_02.pdf.

[FN105]. FPT Heads of Prosecutions Comm. Working Group, *Report on the Prevention of Miscarriages of Justice* 3, 34-41 (2005), available at <http://canada.justice.gc.ca/en/dept/pub/hop/PreventionOfMiscarriagesOfJustice.pdf>.

[FN106]. See McCloskey, *supra* note 103, at 56.

[FN107]. Commonly cited for this proposition is Professor Uviller, who wrote, "[W]hen the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury." Uviller, *supra* note 28, at 1159; see also Fisher, *supra* note 7, at 230 n.144 (noting that the "prevailing view, at least in the world of practice, surely" does not require prosecutors to have a personal belief in the defendant's guilt); Zacharias, *supra* note 11, at 94

(asserting that "prosecutors need not act as judges of their witness's testimony unless they are sure the witness is falsifying facts"). The limited scope of Uviller's oft-quoted approval of the agnostic prosecutor is apparent. More recently, Uviller explained, "The prosecutor should be assured to a fairly high degree of certainty that he has the right person." H. Richard Uviller, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit, 68 Fordham L. Rev. 1695, 1703 (2000) [hereinafter Uviller, The Neutral Prosecutor].

[FN108]. See, e.g., Freedman, *supra* note 29, at 219 ("[C]onscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty."); Gershman, *supra* note 9, at 309 (noting from experience that it was "accepted ethos" that prosecutors should not take a case to trial unless personally convinced of the defendant's guilt); Green, *supra* note 12, at 1588 ("[P]rosecutors are expected to bring prosecutions only when the guilt of the accused is sufficiently certain."); John Kaplan, The Prosecutorial Discretion-A Comment, 60 Nw. U. L. Rev. 174, 178-79 (1965) (noting from his own experience that "[t]he great majority, if not all, of the assistants felt that it was morally wrong to prosecute a man unless one was personally convinced of his guilt"); Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 BYU L. Rev. 669, 700 ("Prosecutors do not serve the interests of society by pursuing cases where the prosecutors themselves have reasonable doubts as to the factual guilt of the defendants."); Whitney North Seymour, Jr., Why Prosecutors Act Like Prosecutors, 11 Rec. Ass'n B. City N.Y. 302, 312-13 (1956) (noting that charging decisions are made "only after [prosecutors] have satisfied [themselves] of the defendant's actual guilt").

[FN109]. See *supra* Part I.B for a summary of selective information processing and disconfirmation bias.

[FN110]. See *supra* Part I.B.

[FN111]. See Freedman, *supra* note 3, at 1100-01, for a discussion of the government's reaction to exculpatory evidence presented by Washington's defense counsel. A released defendant's celebration will be commonly coupled with a prosecutor's statement that the defendant has not been exonerated. See Glod, *supra* note 1 (quoting Earl Washington's prosecutor as saying that he "cannot rule out" Washington as a suspect); Sara Rimer, DNA Testing in Rape Cases Frees Prisoner After 15 Years, N.Y. Times, Feb. 15, 2002, at A12 (reporting that a defendant was released after fifteen years based on exonerating DNA; prosecutor insists there is "no reason to doubt the validity of [the defendant's] confession" but that "there is [in]sufficient evidence to convict him beyond a reasonable doubt, and in this business a tie goes to the defendant"). In at least one case, the prosecution decided to retry the defendant after new DNA evidence led to his release. Bruce Lambert, Prosecutor Will Retry Man Freed by DNA in L.I. Rape-Murder, N.Y. Times, Sept. 12, 2003, at B5 (announcing prosecutor's decision to retry released defendant based on his retracted confession).

[FN112]. See, e.g., Medwed, *supra* note 8, at 132-69 (discussing the institutional and political barriers to prosecutorial recognition of postconviction claims of innocence).

[FN113]. For a summary of the investigation of a supposed spy ring at Guantanamo, see Nicole Guadiano, Case Closed? Not Yet; Spy Charges Have Been Dropped in Guantanamo Trials, but Many Questions Remain Unanswered, A.F. Times, Oct. 11, 2004, at 22.

[FN114]. 60 Minutes: Spy Ring at Gitmo? (CBS television broadcast Nov. 24, 2004) (transcript available at <http://www.cbsnews.com/stories/2004/11/24/60minutes/main657704.shtml>).

[FN115]. *Id.*

[FN116]. *Id.*

[FN117]. *Id.*

[FN118]. See Guadiano, *supra* note 113.

[FN119]. 60 Minutes: Spy Ring at Gitmo?, *supra* note 114.

[FN120]. *Id.*

[FN121]. *Id.*

[FN122]. *Id.*

[FN123]. *Id.*

[FN124]. Guadiano, *supra* note 113.

[FN125]. *Id.*

[FN126]. *Id.*

[FN127]. See *id.*; Elizabeth Mehren, Translator Pleads Guilty to Taking Documents, *L.A. Times*, Jan. 11, 2005, at A12 (quoting a spokesperson for the Council on American-Islamic Relations as saying that the case against Al Halabi "seemed to be based more on anti-Muslim hysteria than ... on the actual facts"); 60 Minutes: Spy Ring at Gitmo?, *supra* note 114.

[FN128]. An attorney for a similarly situated defendant described the problem: "I think the people who are responsible at Guantanamo Bay created in their minds the notion there was a spy ring of people who were all Muslims and they were basically in cahoots with one another." 60 Minutes: Spy Ring at Gitmo?, *supra* note 114 (quoting Eugene Fidell, defendant James Yee's attorney).

[FN129]. *Id.*

[FN130]. 373 U.S. 83 (1963).

[FN131]. *Id.* at 87. Although the Court recognized in *Brady* that prosecutorial suppression of evidence could amount to a due process violation, it later restricted the scope of this due process right to the discovery of evidence that was material either to guilt or punishment. In *Brady*, the Court held that a prosecutor's failure to disclose a cooperating witness's statement, which the defense requested and which revealed that the witness was the principal actor in the charged murder, violated due process. *Id.* at 84- 87. In *United States v. Agurs*, the Court distinguished specific requests for information, like the one at issue in *Brady*, from vague requests for exculpatory evidence and cases in which defense counsel made no request at all. 427 U.S. 97, 106-07 (1976). In the latter cases, the Court held that the prosecutor's constitutional obligation to disclose extended only to exculpatory evidence that met a "standard of materiality." *Id.* at 107. Later, in *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Court held that a single standard of materiality governed all cases involving nondisclosed exculpatory evidence.

[FN132]. 466 U.S. 668 (1984). In *Strickland*, the Court held that a trial counsel's incompetence warrants a new trial only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The *Strickland* Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.*

[FN133]. *Bagley*, 473 U.S. at 682.

[FN134]. *Id.*

[FN135]. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

[FN136]. *Id.*

[FN137]. See *Green*, *supra* note 12, at 1592 n.101 (noting the difficulty of assessing the materiality of evidence prospectively).

[FN138]. See, e.g., Daniel J. Capra, Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review, 53 *Fordham L. Rev.* 391, 393-97 (1984); Tom Stacy, The Search for the Truth in Constitutional Criminal Procedure, 91 *Colum. L. Rev.* 1369, 1393 (1991).

[FN139]. Stacy, *supra* note 138, at 1393.

[FN140]. Capra, *supra* note 138, at 394-95; Stephen A. Saltzburg, Perjury and False Testimony: Should the Difference Matter So Much?, 68 *Fordham L. Rev.* 1537, 1578-79 (2000) ("In our adversary system, any limitation like 'materiality' invites prosecutors and their law enforcement assistants to make their own biased judgments about materiality."); Stacy, *supra* note 138, at 1393.

[FN141]. Capra, *supra* note 138, at 396 n.35; Saltzburg, *supra* note 140, at 1579 (noting that, in most cases, "withheld evidence will never see the light of day," thereby preventing judicial review); Stacy, *supra* note 138, at 1393.

[FN142]. Capra, *supra* note 138, at 395.

[FN143]. This Article does not attempt to tackle the difficult question of whether courts are themselves immune to heuristics that might taint rational decision making. For example, a number of scholars have posited that courts may favor decisions made by their predecessors, leading to information cascades. See generally Andrew F. Daughety & Jennifer F. Reinganum, Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts, 1 *Am. L. & Econ. Rev.* 158, 159 (1999) (analyzing the "informational cascades" that occur among courts "when their decisions are decreasingly determined by their own information and increasingly determined by the actions of others"); Eric Talley, Precedential Cascades: An Appraisal, 73 *S. Cal. L. Rev.* 87, 192 (1999) (evaluating "whether a cascade theory of precedent represents a cogent description of legal evolution, focusing principally on information cascades"). Reviewing courts may thus also be subject to a bias in favor of what prior courts have already done.

[FN144]. United States v. Bagley, 473 U.S. 667, 682 (1985); Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

[FN145]. See *supra* notes 53-57 and accompanying text for a discussion of confirmation bias's effect on recall.

[FN146]. See *supra* Part I.B for a summary of selective information processing.

[FN147]. See *supra* notes 135-39 and accompanying text.

[FN148]. See *supra* notes 66-69 and accompanying text for a discussion of people's tendency to scrutinize information that is dissonant with existing theories.

[FN149]. Green, *supra* note 11, at 637-42; Uviller, The Neutral Prosecutor, *supra* note 107, at 1704-05 (arguing that prosecutors have an obligation to investigate any "firmly based charge" that an innocent defendant has been convicted and, if the claim is substantiated, "to urge immediate remedy to assist the court in righting the wrong").

[FN150]. See generally Young v. United States, 315 U.S. 257, 258 (1942) ("The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent.").

[FN151]. See *supra* Part I.A for a discussion of selective information processing.

[FN152]. See *supra* notes 83-86 and accompanying text for a discussion of how belief perseverance can affect a prosecutor's evaluation of potentially exculpatory evidence.

[FN153]. See *supra* Part II.B for a discussion of postconviction belief perseverance.

[FN154]. See *supra* note 108 for citations to the many scholars who have concluded that an ethical prosecutor does not bring charges unless she personally believes that the defendant is guilty.

[FN155]. See Roberta K. Flowers, What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors, 63 Mo. L. Rev. 699, 734 (1998); Bennett L. Gershman, Mental Culpability and Prosecutorial Misconduct, 26 Am. J. Crim. L. 121, 133-35 (1998); Peter J. Henning, Prosecutorial Misconduct in Grand Jury Investigations, 51 S.C. L. Rev. 1, 14-20 (1999); Andrew M. Hetherington, Prosecutorial Misconduct, 90 Geo. L.J. 1679 (2002); Medwed, *supra* note 8, at 174.

[FN156]. Another model of reform is the limitation of prosecutorial discretion. See, e.g., Davis, *supra* note 97, at 460-64; Robert Heller, Comment, Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion, 145 U. Pa. L. Rev. 1309, 1325-28 (1997). The judiciary is typically loathe to intrude upon the broad discretion of prosecutors, in part out of respect for the separation of powers. See United States v. Armstrong, 517 U.S. 456, 464 (1996) (invoking separation of powers concerns in setting a high standard for scrutinizing the charging decisions of federal prosecutors). For purposes of this Article, the lessons of cognitive psychology are used to suggest methods of improving the quality of decisions made within the scope of a prosecutor's discretion, but the proper breadth of that discretionary authority is not addressed.

[FN157]. See *supra* notes 12-16 and accompanying text.

[FN158]. See *supra* Part I.A-C for a summary of confirmation bias, selective information processing, and belief perseverance.

[FN159]. See *supra* Part II.A.

[FN160]. The prosecutor's participation during investigations is a relatively recent but increasingly common role. See Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 Fordham L. Rev. 723, 733-36 (1999) (discussing the twentieth-century development of the prosecutorial role in investigations).

[FN161]. Of course, full disclosure from police to prosecutors does not resolve flaws that exist in the investigation stage, such as the investigating officers' tunnel vision and other cognitive biases. See, e.g., McCloskey, *supra* note 103, at 56. That is why recent reform suggestions in the context of wrongful convictions have included training police officers to continue to investigate all alternative theories. See, e.g., Comm'n on Capital Punishment, *supra* note 104, at 20-21. Moreover, even if flaws exist in the police investigation, full disclosure by police officers to prosecutors, coupled with enhanced disclosure duties of prosecutors to defense attorneys, see *infra* Part III, would likely increase the probability that those flaws might be detected prior to conviction.

[FN162]. The State of Illinois Commission on Capital Punishment recently attempted to resolve this problem in the context of preserving the integrity of capital offense investigations. See Comm'n on Capital Punishment, *supra* note 104, at 22.

[FN163]. See United States v. Bagley, 473 U.S. 667, 682 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963).

[FN164]. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[FN165]. See Stanley Z. Fisher, The Prosecutor's Ethical Duty To Seek Exculpatory Evidence in Police Hands: Lessons from England, 68 Fordham L. Rev. 1379, 1385 (2000); see also Lissa Griffin, The Correction of Wrongful Convictions: A Comparative Perspective, 16 Am. U. Int'l L. Rev. 1241, 1251-55 (2001) (comparing the Brady regime to the English requirement that police record and disclose to prosecutors all relevant information).

[FN166]. See *supra* Part II.A.

[FN167]. See, e.g., Ellen S. Podgor, The Ethics and Professionalism of Prosecutors in Discretionary Decisions, 68 Fordham L. Rev. 1511, 1513 (2000).

[FN168]. Gershman, *supra* note 9, at 342, 348.

[FN169]. See Joseph W. Rand, Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making, 9 *Clinical L. Rev.* 731, 734 (2003) (illustrating the use of case studies in clinical education to teach students about cognitive bias).

[FN170]. Comm'n on Capital Punishment, *supra* note 104, at 111 (suggesting that all prosecutors and defense lawyers who try capital cases should receive periodic training on the dangers of tunnel vision or confirmation bias, and other factors contributing to wrongful convictions); FPT Heads of Prosecutions Comm. Working Group, *supra* note 105, at 40-41 (recommending educating prosecutors about tunnel vision).

[FN171]. See Nisbett & Ross, *supra* note 16, at 191 ("The effectiveness of a variety of procedures for discrediting information also may depend on their capacity to make subjects aware of some of the processes underlying the perseverance of their beliefs.").

[FN172]. See Ross, Lepper & Hubbard, *supra* note 76, at 880-87.

[FN173]. *Id.* at 885.

[FN174]. *Id.* at 887-88.

[FN175]. *Id.* at 888.

[FN176]. *Id.*

[FN177]. See Wason & Johnson-Laird, *supra* note 38, at 194-97 (summarizing evidence demonstrating the difficulty subjects had with the card-selection task even when fully informed about the correct response).

[FN178]. See Anderson, Lepper & Ross, *supra* note 84, at 1039. The study is summarized in notes 183-86 *infra* and accompanying text.

[FN179]. Anderson, Lepper & Ross, *supra* note 84, at 1045.

[FN180]. *Id.* at 1039.

[FN181]. *Id.* at 1045; see also Anderson et al., *supra* note 65, at 244-48 (finding that subjects who produced causal arguments to support their beliefs were more likely to show a perseverance of belief after the presentation of evidence that explicitly disconfirmed their initial beliefs); Lee Ross et al., *Social Explanation and Social Expectation: Effects of Real and Hypothetical Explanations on Subjective Likelihood*, 35 *J. Personality & Soc. Psychol.* 817, 825-26 (1977) (finding that subjects who generated an explanation for purely hypothetical data demonstrated greater belief perseverance than subjects who had not generated an explanation).

[FN182]. Anderson, Lepper & Ross, *supra* note 84, at 1047; see also Nisbett & Ross, *supra* note 16, at 183-86 (attributing belief perseverance to misplaced adherence to causal explanations); Craig A. Anderson, *Inoculation and Counterexplanation: Debiasing Techniques in the Perseverance of Social Theories*, 1 *Soc. Cognition* 126, 128 (1982) [hereinafter Anderson, *Inoculation*] (suggesting a possible mechanism for the perseverance enhancing effect of explanation). Some have suggested that confirmation bias and the availability heuristic may play a role in the mechanism for belief perseverance. If people search their memories for confirming evidence to support a theory while they are forming it, that retrieved information remains available and therefore influential to decision making, even after the initial evidence that led to the theory is undermined. See Kunda, *supra* note 16, at 100 (suggesting a link between belief perseverance and the availability heuristic).

[FN183]. See Nisbett & Ross, *supra* note 16, at 190 ("It seems probable that attempts to discredit beliefs may have relatively greater impact when they prompt the use of plausible theories or 'scripts' that encompass both the initial information and the subsequent challenge to that information.").

[FN184]. Craig A. Anderson & Elizabeth S. Sechler, *Effects of Explanation and Counterexplanation on the*

Development and Use of Social Theories, 50 J. Personality & Soc. Psychol. 24, 27-28 (1986).

[FN185]. *Id.* at 29.

[FN186]. Lord, Lepper & Preston, *supra* note 65, at 1239. The researchers found that both strategies for inducing subjects to consider the opposite had greater corrective effects than instructions for subjects to be fair and unbiased. *Id.*

[FN187]. These examples are based upon psychologist Craig Anderson's examples of how perseverance-reducing procedures can be used generally. See Anderson, *Inoculation*, *supra* note 182, at 129.

[FN188]. The establishment of internal "fresh look" procedures would resemble committees formed in some district attorneys' offices to review cases resting upon the testimony of a single eyewitness. See Medwed, *supra* note 8, at 127 & n.6; Robin Topping, Panel Puts Justice Before Prosecution, *Newsday*, Jan. 8, 2003, at A21 (describing such a committee in Nassau County, New York).

[FN189]. See *supra* Part II.A for a discussion of how a prosecutor's initial charging decision may cause her to underestimate the exculpatory value of subsequently discovered evidence.

[FN190]. See *supra* Part II.B for a discussion of how belief perseverance can cause a prosecutor to adhere to her theory of guilt even after critical evidence against the defendant is undermined.

[FN191]. See *supra* Part II.D for a discussion of how the avoidance of cognitive dissonance can prevent prosecutors from acknowledging that they have charged or convicted an innocent person of a crime.

[FN192]. Herbert L. Packer, *The Limits of the Criminal Sanction* 160 (1968) ("The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands.").

[FN193]. See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 Sw. U. L. Rev. 98, 112 (1975) (describing the phenomenon of "pre-conviction" as the tendency of prosecutors to presume the guilt of the accused).

[FN194]. See, e.g., Leonard Berkowitz & Nigel Walker, *Laws and Moral Judgments*, 30 *Sociometry* 410, 418 (1967) (finding that subjects' approval of conduct conformed to their peers' opinions).

[FN195]. Specifically, subjects were asked to choose which of three lines was the same length as a comparison line. See Solomon E. Asch, *Social Psychology* 450-59 (1952) [hereinafter Asch, *Social Psychology*]; Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 *Psychol. Monographs* 1 (1956); see also Richard S. Crutchfield, *Conformity and Character*, 10 *Am. Psychologist* 191, 196 (1955) (replicating Asch's study with female subjects).

[FN196]. Asch demonstrated the power of a lone dissenting voice in his line-matching studies. When experimenters varied the research design to include one accurate confederate among the inaccurate peers, subjects deviated from majority opinion and chose the correct line. Asch, *Social Psychology*, *supra* note 195, at 477-79; see also Cass R. Sunstein, *Why Societies Need Dissent* 21 (2003) (noting that the lone person with knowledge of the truth may not want to risk her reputation by insisting that she is correct).

[FN197]. See Nisbett & Ross, *supra* note 16, at 291 (suggesting that collective and institutional judgments are most capable of improvement because of the potential to formalize decision-making procedures to account for cognitive barriers to effective evaluations).

[FN198]. Professor Freedman has suggested a similar process in which a panel acting like a grand jury would review postconviction innocence claims in capital cases. See Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 *N.Y.U. Rev. L. & Soc. Change* 315, 322-23 (1990).

[FN199]. The judiciary has typically deferred to prosecutorial discretion, reasoning that its exercise calls for decisions that the judiciary is ill-equipped to make. These include decisions about law enforcement priorities, the appropriateness of a single prosecution as a part of those priorities, the allocation of prosecutorial resources, and the individualization of justice in a single case. See Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) (noting that the prosecutor, not the judiciary, must evaluate the merits of the case, allocation of resources, and enforcement objectives); Wayte v. United States, 470 U.S. 598, 607 (1985) ("Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.").

[FN200]. See generally David H. Bayley, Community Policing: A Report from the Devil's Advocate, in Community Policing: Rhetoric or Reality 225, 236-37 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (arguing that external monitoring of police is an essential component of implementing community policing); Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 575-78 (1997) (discussing the increase in the use of civilian oversight boards in the policing context).

[FN201]. Livingston, *supra* note 200, at 665.

[FN202]. *Id.* at 664-66.

[FN203]. Professor Davis has advocated the creation of prosecution review boards to review complaints against prosecutors and their discretionary decisions. Davis, *supra* note 97, at 463-64. This Article's proposal differs by recommending the participation of outsiders to improve the quality of prosecutorial decisions as they are being made.

[FN204]. See, e.g., The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 53 (1999) (statement of John Smietanka, former prosecutor) (testifying that "[t]ime, money and, to some unfortunate extent, a cultural chasm" prevent prosecutors from "meaningful participation" in bar activities); cf. Lisa G. Lerman, Public Service by Public Servants, 19 Hofstra L. Rev. 1141 (1991) (noting obstacles that prevent government lawyers from undertaking pro bono work).

[FN205]. See *supra* Part II.D.

[FN206]. Claude M. Steele, The Psychology of Self-Affirmation: Sustaining the Integrity of the Self, in 21 Advances in Experimental Social Psychology 261, 277 (Leonard Berkowitz ed., 1988).

[FN207]. *Id.* at 278.

[FN208]. *Id.*

[FN209]. Claude M. Steele & Thomas J. Liu, Dissonance Processes as Self-Affirmation, 45 J. Personality & Soc. Psychol. 5, 7-8 (1983).

[FN210]. *Id.*

[FN211]. *Id.*

[FN212]. *Id.*

[FN213]. *Id.*

[FN214]. Claude M. Steele & Thomas J. Liu, Making the Dissonant Act Unreflective of Self: Dissonance Avoidance and the Expectancy of a Value-Affirming Response, 7 Personality & Soc. Psychol. Bull. 393, 396-97

(1981). Subjects demonstrated reduced attitude change as a result of writing the essay if they were led to believe that they would provide study assistance for blind students after the experiment. *Id.* at 393.

[FN215]. See Part II.C, *supra*, for a discussion of Brady v. Maryland, 373 U.S. 83 (1963), and the potential of cognitive bias to affect its application.

[FN216]. United States v. Bagley, 473 U.S. 667, 682 (1985).

[FN217]. See *supra* Part II.C.

[FN218]. 466 U.S. 668 (1984). In *Strickland*, the Court held that the demonstration of trial counsel's incompetence warrants a new trial only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The *Strickland* Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.*

[FN219]. See Bagley, 473 U.S. at 682 (relying on Strickland, 466 U.S. at 694-95, in defining the "materiality" of evidence subject to disclosure).

[FN220]. Strickland, 466 U.S. at 687.

[FN221]. *Id.* Trial counsel's performance is measured by an objective standard and is reasonably effective if her services fall within the range of competence demanded in a criminal case. *Id.* at 687-88.

[FN222]. *Id.* at 694.

[FN223]. *Strickland* does permit a court reviewing trial counsel's performance after the fact to apply the second prong first, thereby avoiding any ruling on the attorney's performance by ruling instead that any proven incompetence would have been harmless. *Id.* at 697. Accordingly, *Strickland* does permit attorney incompetence to go unaddressed absent separate civil or disciplinary proceedings against counsel. Nevertheless, as a decision providing prospective guidance to defense counsel, *Strickland* does make clear that the standard for attorney performance is reasonably effective assistance. *Id.* at 687.

[FN224]. Brady v. Maryland, 373 U.S. 83, 87 (1963).

[FN225]. *Capra*, *supra* note 138, at 428.

[FN226]. Model Rules of Prof'l Conduct R. 3.8(d) (1998). With respect to sentencing, the rule goes on to require disclosure to the defense and the court of "all unprivileged mitigating information known to the prosecutor" *Id.*

[FN227]. See *Gershman*, *supra* note 9, at 328 (noting that prosecutors' constitutional obligations are narrower than their ethical obligations under Rule 3.8(d)); Lisa M. Kurcias, Note, Prosecutor's Duty To Disclose Exculpatory Evidence, 69 *Fordham L. Rev.* 1205, 1205-06, 1216 (2000) (discussing the difference between prosecutors' obligations under *Brady* and Model Rule 3.8(d)).

[FN228]. See *Melilli*, *supra* note 108, at 686 (explaining that young lawyers entering into service as prosecutors are inexperienced and given little or no education in prosecutorial ethics).

[FN229]. See John M. Burkoff, Prosecutorial Ethics: The Duty Not "To Strike Foul Blows." 53 *U. Pitt. L. Rev.* 271, 274-75 (1992) (noting that prosecutors' groups and especially the Department of Justice have been critical of the American Bar Association's attempts to regulate the unethical conduct of prosecutors).

[FN230]. See *Zacharias*, *supra* note 13, at 761 (noting that bar authorities often operate under the power of the judiciary and may be reluctant to discipline prosecutors because of concerns about the separation of powers). When Richard Thornburgh was Attorney General, for example, he accused "[t]he defense bar, with ABA sponsorship, [of] attempting to use rules of professional conduct to stymie criminal investigations and prosecutions." Press Release,

U.S. Dept of Justice, National Association of Attorneys General, and National District Attorneys Association (Aug. 6, 1991). He argued that the enforcement of ethical rules against prosecutors amounted to

an undisguised effort by the defense bar to undo what both Congress and the Supreme Court have declared to be the law We find it curious and inappropriate that the ABA, in which the interests of the defense bar are well-represented, should be in the business of making rules for the government's conduct of criminal prosecutions, particularly in areas where the courts and legislatures have already acted. This is the business of Congress and the courts.

Id.

[FN231]. See Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. Rev. 693, 697 (1987); Joseph R. Weeks, No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence, 22 Okla. City U. L. Rev. 833, 898 (1997) ("[T]he disciplinary process has been almost totally ineffective in sanctioning even egregious Brady violations."); Zacharias, *supra* note 13, at 755.

[FN232]. See Green, *supra* note 12, at 1593 (reporting that "courts and disciplinary authorities do not sanction prosecutors for failing to disclose evidence as required by the rule but not by other law").

[FN233]. Capra, *supra* note 138, at 426-30.

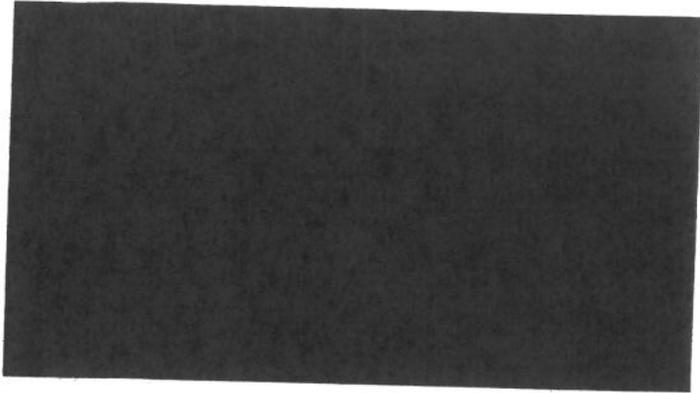
[FN234]. James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2145-56 (2000) (calling for open file access in capital cases); Jenny Roberts, Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases, 31 Fordham Urb. L.J. 1097, 1153-54 (2004) (arguing in favor of open file discovery as a prophylactic rule to protect Brady rights); Victor Bass, Comment, Brady v. Maryland and the Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 113 (1972) ("[T]he prosecutor's entire file should, except in special cases, be open to defense inspection."). But see John G. Douglass, Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining, 50 Emory L.J. 437, 460-61 (2001) (arguing that open file and other informal discovery processes have shortcomings); Steven Alan Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1462-64 (1987) (arguing that open file policies deter prosecutors from seeking out additional information that might benefit the defendant).

[FN235]. See *supra* text accompanying notes 1-10 for a discussion of the Earl Washington case.

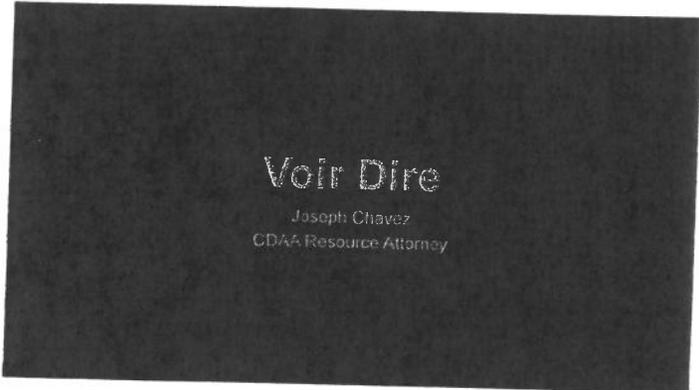
[FN236]. See *supra* notes 188-95 and accompanying text for a discussion of the power to improve the exercise of prosecutorial discretion through review committees within district attorneys' offices.

[FN237]. Many have suggested that internal guidelines may be one of the most effective methods of improving the exercise of prosecutorial discretion. See, e.g., Norman Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. Rev. 1, 57 (1971); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1562 (1981).

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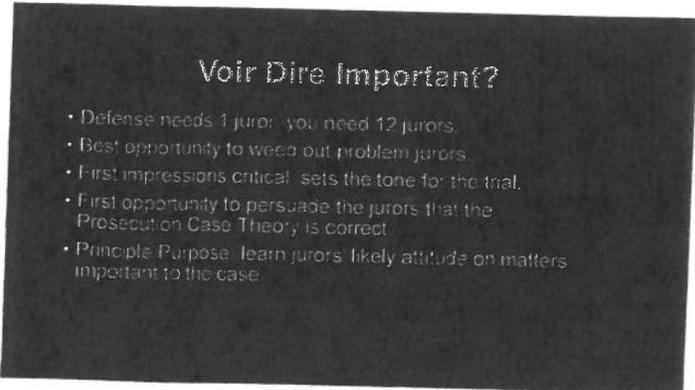


1



Voir Dire
Joseph Chavez
CDA& Resource Attorney

2



Voir Dire Important?

- Defense needs 1 juror, you need 12 jurors.
- Best opportunity to weed out problem jurors.
- First impressions critical, sets the tone for the trial.
- First opportunity to persuade the jurors that the Prosecution Case Theory is correct.
- Principle Purpose: learn jurors' likely attitude on matters important to the case.

3

Topics Covered

- General voir dire law and approaches
 - Current *Wheeler* practice
 - AB 3070 – CCP 231.7
 - Challenges For Cause
- Submit questions and we will address them at the end.

4

When to Start Thinking About Voir Dire?

- While developing your Case Theory, including Theme.
 - What are the factual issues?
 - What are the legal issues?
 - What kind of person would be good/bad juror based on the case specific issues?
- Keep list of potential questions/topics & add/delete as trial approaches

5

Voir Dire

- Should focus on identifying prospective jurors who can not deliberate fairly & impartially over the prosecution case theory
- Opportunity to explore & examine commonalities between the potential jurors and the prosecution & defense case theories – including witnesses & themes.
- Should be a springboard for important points & concepts related to the trial, such as legal principles.

6

The Law

The procedures for jury selection are set out in:

- California Rules of Court §§ 4.200 et seq.
- California Code of Civil Procedure §§ 223 et seq.
 - AB 3070/CCP 231.7 – January 1, 2022 effective date.
- Case Law.

7

CA Rule of Court § 4.200(a)

- The Court must conduct a conference with counsel to discuss:
- A brief outline of the case.
- Names of witnesses.
- Plaintiff's theory of culpability.
- Defense theory (though the defense can decline to reveal their theory).

8

CA Rule of Court § 4.200(a)

- The procedures for deciding hardships and challenges for cause
- Areas of inquiry during voir dire by the court and counsel and any time limits that the court is setting on voir dire.
- Number of alternates and the method of selection (traditional vs. six pack, etc.)
- Procedure for making Wheeler/Batson objections.

9

CCP § 223 and CA Rule of Court § 4.201

- The Court *shall* conduct an initial examination of prospective jurors
- This examination may be conducted:
 - Orally
 - By written questionnaire, or
 - By both methods

10

Judicial Voir Dire

- Judges usually do minimum questioning
 - Charge related.
 - General background:
 - Occupations, other adults live with, number of children, prior jury service.
 - "Can you be fair and impartial?"

11

Attorney Questioning

- Time limits
 - Court can control time (CCP § 223)
 - The judge *shall* permit liberal & probing examination calculated to discover bias or prejudice with regard to the case/parties
 - The judge *shall not* establish an inflexible time limit policy.
 - The judge *shall* permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror.

12

Attorney Questioning

- Who goes first?
 - CCP silent.
 - A attorney should go first - Our burden.
 - Allows prosecution to react to their questions.

13

Attorney Questioning

- CCP § 223 (d). Determine grounds for challenges for cause.
 - Effective date Jan. 1, 2018
- "Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause."
- Improper question: A question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury.
- Sometimes done by asking the prospective jurors to prejudge the evidence.

14

Attorney Questioning

- Challenges for cause must be exercised before peremptory challenges
- CCP § 226 Defense is required to use first for cause challenge.
- No limit on number of for cause challenges.

15

Voir Dire Goals

1. Persuade the jury to like & trust you;
2. Persuade the jury to accept your view of the problem issues in the case, and
3. Persuade individual jurors to honestly express their views, so informed decisions can be made about which persons to excuse.

16

Voir Dire Goals

- Hollywood Movie clip

17

Voir Dire Goals

1. Persuade the jury to like & trust you;
2. Persuade the jury to accept your view of the problem issues in the case, and
3. Persuade individual jurors to honestly express their views, so informed decisions can be made about which persons to excuse.

18

Other Benefits of Voir Dire

- Start educating potential jurors about the preconceptions regarding crimes, such as domestic violence, stalking, sexual assault.
- Get the potential jurors reactions to the problem parts of your case. i.e. recanting/minimizing victim, large male victim with petite female defendant, minor injuries, victim permitted contact after getting a restraining order, etc.
- Get information from the jurors that you can refer to later in argument.
- Start getting them invested in the result of the case.

19

First Impressions

- Watch their reaction to the introduction of the defendant.
- Watch their reaction when the charges are read for the first time.
- Watch the potential jurors' expressions and body language when they are taking the oath to tell the truth.
- Continue to watch their behavior during questioning.

20

Voir Dire

- Have a system to take down notes and be sure those notes anticipate any *Wheeler / Batson* or AB 3070 / CCP 231.7 challenges

21

Voir Dire

- Effective voir dire requires juror self-disclosure.
- Create a comfortable & relaxed atmosphere.
- Let the panel know that you simply want to discuss some principles of law with them & learn their views.
- Let them know that it is vital to the entire jury selection process to volunteer their feelings & attitudes.

22

Voir Dire

- Explain up front that you are not looking for any particular answers & that there are no right or wrong answers.
- Let the jurors know that it's okay to disagree with you or with the law, just be truthful about it.
- You will get more responses & a higher degree of honesty, if the jurors know that you are simply looking for an accurate picture of how they feel.

23

Voir Dire

- Addressing these introductory concepts should take no more than 5 minutes.
- But they may be the most important 5 minutes of the trial.
- You will be emphasizing the importance of truthful answers... that should have a positive carry over effect for the jurors chosen.
- Juror's initial impressions will likely influence their reaction to you & the People's case throughout the trial.

24

Voir Dire

- Speak to each juror, if possible.
 - If not, be sure to ask the quiet prospective jurors questions.
- Use basic persuasive communication approaches, such as maintaining eye contact & addressing each juror formally.
- Important to actively listen to each juror's answers, so you can follow-up appropriately.
- How jurors answer questions is as important as what they say; so observing how jurors react to your questions is essential.
- Body language/ demeanor should be placed on the record, in part based on your questioning.

25

Voir Dire

- Crucial to elicit potential jurors' views & attitudes about the primary issues affecting the prosecution case theory.
- Questions should be designed to probe juror's bias & predispositions that could affect how they will listen to witnesses and evidence.
- The goal is to find out if there is anything about the jurors that will keep them from listening to the victim with an open mind or prevent them from accepting the prosecution's case theory.

26

Voir Dire

- When addressing substantive issues affecting your case theory, be organized & develop a cohesive order.
- Since prosecutors are the last party to ask questions, plan in advance which jurors will be asked to discuss particular topics.
- Forecast through your questions, the primary issues affecting the prosecution's case theory – safest approach is by referring to jury instructions.

27

How to Probe Effectively

- Ask open non-leading questions.
 - Open ended questions encourage jurors to talk.
 - "What...", "how...", "could you..." "would you..."
 - "Do you agree or disagree'?... "Why"?
 - "How many of you..." rather than "Do any of you..."
- If jurors don't respond to group questions, start calling on individual jurors: "What do you think about that..."

28

How to Probe Effectively

- Repeat the words the juror uses.
- An effective way to get jurors to talk is to use the same phrases in your question that they used in their answer.
- Example: juror says "Sometimes the police in my city don't do things right."
 - In your question, repeat the juror's words. "Could you tell me what you mean when you say that sometimes the police in my city don't do things right?"

29

How to Probe Effectively

- Resist the temptation to rescue the juror by interpreting what the juror means by finishing an unfinished sentence.
- Give the juror the time and space to reveal himself/herself to you.
- Mindset: Follow your jurors rather than leading them.

30

How to Probe Effectively

- Acknowledge validity & compare.
- "Thank you for your honesty and sharing your personal experience. It is understandable that you feel the way that you do. Has anyone else had violence in their home?"

31

How to Probe Effectively

- Build rapport between jurors by using the answers from one juror as the starting point for dialogue with another.
- Ms. Jones said that ... How do you feel about the issue, Mr. Smith?
- Ms. Jones, how was your experience similar or dissimilar to that of Mr. Smith?

32

Areas to Address

- Case issues
 - Unsympathetic victims
 - Recanting victims
 - Weak ID
 - Affirmative defenses
- Defendant related issues
 - Young, female, elderly, sympathetic
- Juror specific issues
 - Based on their previous answers
- CSI Effect / evidentiary issues: single witness, B of P, Circ Evid.

33

Voir Dire Goals

- Strive to know the strength with which the jurors hold their attitudes.
 - i.e. Police Officer key witnesses:
 - Important to know how jurors feel about police and police officer testimony.
 - Makes a difference if juror has a mild distrust of police testimony because of general attitudes about the police; or
 - A strong distrust of the police based on personal experience or experience of close friend or family member.

34

Areas to Address: Bias

- "Have you ever been in a courtroom for any reason?"
- This question uncovers the potential juror who:
 - attended her boyfriend's murder trial.
 - attended his father's molestation trial.
 - testified as a character witness for defense.
 - was prosecuted for a minor crime years ago.
 - was wrongfully arrested & arraigned for murder.
 - who fought a traffic ticket.
 - was in juvenile court with their "innocent" son.

35

Areas to Address: Bias

- "Please describe any contact you have had with law enforcement?"
- This question uncovers the potential juror who:
 - was misidentified for a crime and later released.
 - was stopped and questioned at a protest.
 - had a juvenile child brought home by the police.
 - was harassed by the police.
 - went with her boyfriend to register as sex-offender.

36

Areas to Address: Bias

- "Have you or anyone you know ever been in custody?"
- This question uncovers the potential juror who:
 - Is upset with police because he/she was arrested & not charged
 - Is a woman who becomes pen pals with death row inmates, (not her, not her family, just a friend).
 - Arrested for participating in any protest, but not charged.
 - Brother doing time because he took a plea bargain, but he is not good for the crime, (i.e. juror feels he was railroaded by system).

37

Areas to Address: DV cases

- Does anyone think that Domestic Violence is a personal family issue that the government should stay out of?
- Do you think Domestic Violence cases should be prosecuted even if the victim does not want it prosecuted?
- How many of you agree that the community has a responsibility through its police, prosecutors, and courts to prosecute people who commit domestic violence, even when the victim does not want to testify against the person?
- Has anyone here been *accused* of domestic violence or know someone else who has?

38

Burden of Proof

- Common problem is jurors perception and misunderstanding of the Burden of Proof.
- May influence how they respond to issues such as one-witness testimony, circumstantial evidence, & conflicts in testimony
- Remind jurors of the B of P by reading essential elements of the reasonable doubt jury instruction – the case does not need to be proven "beyond all doubt" or "to an absolute certainty."
- After establishing the reasonable doubt law, ask the panel how many of them would require a higher level of proof.

39

Burden of Proof

- "How many of you feel that before you could return a guilty verdict, you would have to be convinced of the defendant's guilt beyond all doubt?"
- After identifying and addressing the potential jurors who would require more than "reasonable doubt," go back & commit the remaining panel members to applying the "reasonable doubt" standard and not the "all doubt" standard.
- Can follow this approach with any legal principle/jury instruction.

40

CSI Effect

- How many of you watch CSI, Law and Order, or other courtroom and police shows where the crime happens and is solved in an hour...
- How many of you think that a real crime lab works that way?
- Do you understand that DNA and other forensic testing is not done in every criminal case?

41

CSI Effect

- How many of you would think that the People have failed to prove its case because the only evidence is the testimony from an eye-witnesses?
- Could you follow an instruction from the judge that tells you that the testimony of a single witness, if believed, can be sufficient to prove the People's case beyond a reasonable doubt?

42

Fair to Both Sides

- Important to encourage jurors to think in terms of giving both the People and defense a fair trial:
- "Will you promise to give the People and its witnesses just as fair of a trial as the defendant?"
- "Can you promise me that each time you think of the defendant and think of being fair to [him or her], that you will also think of the victim and be fair to [him or her]?"
- At end of voir dire, some prosecutors like to ask questions that call for the jurors to provide a commitment to rendering a fair decision.

43

Group Dynamics

- Remember a jury verdict is a product of both individual & group decision making.
- Individual juror decisions are influenced by the dynamics of group decision making.
- Group dynamics do not involve an even exchange among members of the jury.
- Some jurors will have more influence on the jury than others.

44

Group Dynamics

- Can be helpful to classify prospective jurors as persuaders, participants, or non-participants.
- Persuaders: make assertive statements about the evidence, freely express their opinions, & actively build coalitions supporting their views.
- They have the most influence & dominate deliberation discussions.

45

Group Dynamics

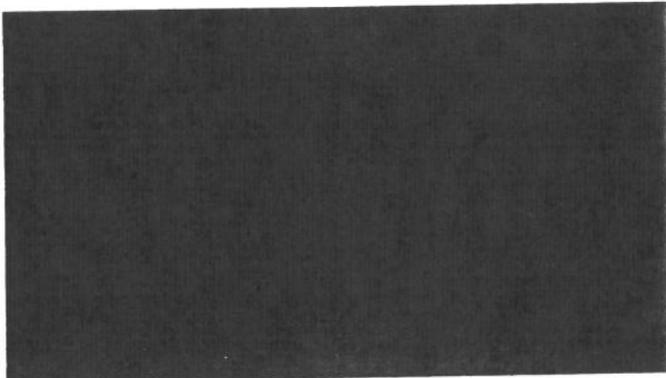
- Participants: Engage in group discussions; followers, not leaders, value social approval & acceptance by others.
- Readily join coalitions, since the coalition validates their decisions, but they do not lead them.

46

Group Dynamics

- Non-Participants: Rarely engage in group discussions; rarely become involved in deliberations other than to express agreement with a particular view or vote.
- Peremptory challenges normally should be used first to strike unfavorable persuaders.
- Note: consider striking a favorable persuader if they have an overbearing personality that may have a tendency to alienate other jury members during deliberations.

47



48

Peremptory Challenges

- Prosecution goes first.
- "The People would like to thank and excuse juror number 6, Mrs. Jones."
- Must be exercised for a genuine, reasonably specific, protected group neutral reason related to the case.
 - See *Hernandez v. New York* (1991) 500 U.S. 352.

49

Wheeler Challenges

- *People v. Wheeler* (1978) 22 Cal.3d 258
 - The use of peremptory challenges to remove prospective juror on sole basis of group bias violates Cal. Constitution Article I, § 16 (right to jury drawn from representative cross-section of the community).
- Batson: federal version of Wheeler.
 - Violation of Equal Protection.

50

Cognizable Groups CCP § 231.5 & GC 11135 (2016)

- | | |
|----------------------|-----------------------|
| • Sex | • Marital status |
| • Sexual orientation | • Religion |
| • Race | • Age |
| • Color | • Mental disability |
| • Ancestry | • Physical disability |
| • National Origin | • Medical condition |
| • Ethnic Group | • Genetic information |

51

Wheeler: Procedure

- A timely objection outside the jury's presence.
- **Prong 1:** opponent must make a prima facie case that totality of circumstances raises an inference that peremptory challenge is exercised based on group bias.
- **Prong 2:** Burden shifts to proponent to give permissible reasons for challenge(s).
- **Prong 3:** Trial Court decides whether opponent has proven discriminatory purpose.

52

Prong 1: Making a Prima Facie Case

- A defendant establishes a prima facie case of discrimination by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

53

Prong 1: Making a Prima Facie Case

- Party has struck most or all of the members of a cognizable group.
- Party has used a disproportionate number of challenges against a cognizable group.
- Party has not engaged in significant questioning of those jurors.
- Def. is a member of the cognizable group, although not a requirement.
- Victim is a member of the group of the majority of the remaining jurors.
- Comparative juror analysis: how other similarly-situated jurors were treated.

• *People v. Rhodes* (2019) 8 Cal.5th 393, 429.

54

Prong 2: Burden shifts to give permissible reasons

- Successful showing shifts burden
- Burden = to show that peremptory challenges were NOT on grounds of group bias but made on permissible group neutral reasons relevant to particular case or it's parties/witnesses.
- Mere denials of discriminatory motive alone are insufficient to rebut a prima facie showing.
- NOTE: that is why you should keep good notes during voir dire, so you can pull out facts or issues or observations re: excused jurors.

55

Prong 3: Judge decides whether opponent has proven discriminatory purpose

- Judge makes a credibility determination.
- It "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the proffered race-neutral reason." (Cognizable group / class neutral reasons).

People v. Hall (1983) 35 Cal.3d 161, 167.

56

New Wheeler Case

- *People v. Collins* F076883, filed 2/2/21.
- Def. convicted of implied malice murder based on a high-speed, PCP-fueled traffic collision that killed two.
- The DCA conditionally reversed based on a prospective juror who is the same race as the Def. being excused, concluding that raised a reasonable inference of discrimination.
- The juror was a "psych tech" for the CDCR, she was "charged with" a petty theft when she was young, and she has 2 cousins who had been committed to prison.

57

New Wheeler Case

- Employing a "comparative juror analysis" DCA rejected the proffered race-neutral reasons as "defy[ing] logic or support in the record."
- "The prosecutor directly asked other jurors if they were treated fairly by law enforcement and accepted seven jurors with some connection to criminal charges including two jurors personally convicted of DUI."

58

New Wheeler Case

- By comparison: "[T]he prosecutor did not directly ask [the juror] a single meaningful question."
 - She was never asked how her petty theft was resolved.
 - She was never asked if she was treated fairly.
 - She was never asked if her experience was negative or positive.
 - She was never asked any questions about her cousins' experiences.
- The DCA noted: Certainly, her experiences did not prevent her from pursuing a career at CDCR.

59

New Wheeler Case

- The DCA noted: The fact that the prosecutor accepted another juror who is the same race as the Def. and excused juror was probative, but not dispositive.
- On remand the trial court must accept that a prima facie case was established (Batson/Wheeler prong 1), allow the prosecutor to explain further (prong 2), and substantively rule (prong 3).

60

New Wheeler Case

- [Note: AB 3070 was not a basis for the *Collins* ruling, but the court discussed this new legislation and its "presumptively invalid justifications" in footnote 6.]
- FN 14 referenced *People v. Miles* (2020) 9 Cal.5th 513, 543

61

New Wheeler Case (Miles)

- *People v. Miles* (2020) 9 Cal.5th 513, 541-544
- Comparative analysis is a form of circumstantial evidence that is relevant on the issue of purposeful discrimination.
- A party legitimately may challenge one prospective juror but not another to whom the same particular concern applies [because] the risk posed by one panelist might be offset by other answers, behaviors, attitudes, or experiences that make one juror, on balance, more or less desirable.

62

New Wheeler Case (Miles)

- Bec the ultimate question concerns the prosecutor's motivations in exercising the challenge in question, we must ask whether there were any material differences among the jurors – differences other than race, [cognizable group] that we can reasonably infer motivated the prosecutor's pattern of challenges.
- In determining whether there were any material differences among the jurors, we note the differences among the jurors generally will be more probative if they closely relate to reasons the prosecutor has stated for a peremptory challenge.

63

Result of Wheeler Challenge

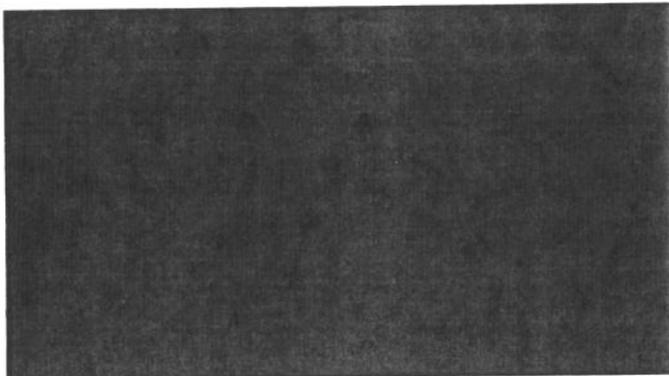
- The objecting party may waive the right to dismissal of the panel & consent to less severe alternatives:
 - Re-seating offended juror (Willis);
 - Give extra peremptory challenges.

64

Result of Wheeler Challenge

- Monetary sanctions for violation of lawful court order pursuant to CCP 177.5.
 - After an "admonition"; see *People v. Muhammad* (2003) 108 Cal.App.4th, 313, 324-326.
 - BP § 6068 (o) (3) judicial sanctions \$1000 or more triggers a self-reporting requirement to state bar.

65



66

AB 3070: Legislative Findings

- Peremptory challenges frequently used to exclude jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation or perceived membership in any of those groups.
- This has disproportionately harmed African Americans, Latinos, and other people of color.

67

AB 3070: Legislative Findings

- Existing procedure for determining if challenge done due to impermissible reason(s) has failed to eliminate discrimination.
- Requiring proof of intentional bias ineffective.
- Many routine reasons for challenges are associated with "stereotypes" or based on "unlawful discrimination".

68

AB 3070: Legislative Findings

- Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both "conscious" and "unconscious" bias in the use of peremptory challenges.
- It is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias in the use of peremptory challenges.

69

CCP § 231.7 / AB 3070

- CCP 231.7 (a):
- Adds cognizable groups / classes to those referenced in CCP 231.5 and GC 11135:
 - Gender Identity
 - Or the perceived membership of the prospective juror in any such group.

70

CCP § 231.7 / AB 3070

- CCP 231.7 (b):
- A party or the trial court on its own motion, may object to the improper use of peremptory challenges.
- After objection is made, further discussion shall be conducted outside of the jury panel's presence.
- Timing: The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

71

CCP § 231.7 / AB 3070

- Eliminates Wheeler prong one of establishing a prima facie case.
- Prong 1: opponent must make a prima facie case that totality of circumstances raises an inference that peremptory challenge is motivated by group bias.
- CCP 231.7 (c): Upon objection to the exercise of a peremptory challenge...the party exercising the peremptory challenge shall state the reasons the challenge has been exercised.

72

CCP § 231.7 / AB 3070

- Also institutes a new court standard to evaluate peremptory reasons.
- CCP 231.7 (d) (1): The court shall consider only reasons given & may not speculate on other possible justifications.
- If substantial likelihood that an objectively reasonable person would view race, [cognizable group/class] as a factor in the challenge, then the objection shall be sustained.
- The court need not find purposeful discrimination to sustain an objection.

73

CCP § 231.7 / AB 3070

- CCP 231.7 (d) (2) (B): "Substantial likelihood" means more than a mere possibility but less than a standard of more likely than not.
- CCP 231.7 (d) (2) (A): An "objectively reasonable person" is aware that unconscious bias has resulted in unfair exclusion of jurors.
- CCP 231.7 (d) (2) (C): "Unconscious bias" includes implicit & institutional bias.

74

CCP § 231.7 / AB 3070

- CCP 231.7 (d) (3) Circumstances for court to consider:
- CCP 231.7 (d) (3) (A) (i): Is objecting party member of same cognizable group as challenged juror.
- CCP 231.7 (d) (3) (A) (ii): Is "alleged victim" NOT a member of that group.
- CCP 231.7 (d) (3) (A) (iii): Are witnesses NOT members of that group.
- CCP 231.7 (d) (3) (B): Does cognizable class/group or perceived membership of a cognizable class/group bear on case facts – i.e. cross racial identification.

75

CCP § 231.7 / AB 3070

- CCP 231.7 (d) (3) Circumstances for court to consider:
- CCP 231.7 (d) (3) (C) Number & Types of questions posed to challenged juror:
 - (i) No questioning.
 - (ii) Cursory questioning.
 - (iii) Differential questioning of cognizable class jurors (*Miller-EI*).
- CCP 231.7 (d) (3) (D) Comparative analysis.

76

CCP § 231.7 / AB 3070

- CCP 231.7 (d) (3) Circumstances for court to consider:
- CCP 231.7 (d) (3) (E): Is a reason for challenge "disproportionately associated" with a cognizable group or perceived membership of a cognizable class/group.
 - *New & Vague*.
- CCP 231.7 (d) (3) (F): Is reason for the challenge contrary to or unsupported by the trial record?

77

CCP § 231.7 / AB 3070

- CCP 231.7 (d) (3) Circumstances for court to consider:
- CCP 231.7 (d) (3) (G): Has counsel/that office used peremptory challenges disproportionately in past against a given cognizable group or perceived membership of a cognizable class/group.
 - Including whether Counsel or Counsel's office who made the challenge has a history of prior violations under *Batson* or *Wheeler*, or this section.

78

CCP § 231.7 / AB 3070

- CCP 231.7 (e) Peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to the prospective juror's membership or perceived membership in a cognizable class and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

79

CCP § 231.7 / AB 3070

- Reminder:
- CCP 231.7 (d) (2) (A): An "objectively reasonable person" is aware that unconscious bias has resulted in unfair exclusion of jurors.
- CCP 231.7 (d) (2) (C): "Unconscious bias" includes implicit & institutional bias.

80

CCP § 231.7 / AB 3070

- CCP 231.7 (f): "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias.
- To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

81

CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.
- (2) Expressing a belief that LE officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
- (3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.
- (4) A prospective juror's neighborhood.

82

CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (5) Having a child outside of marriage.
- (6) Receiving state benefits.
- (7) Not being a native speaker.
- (8) The ability to speak another language.
- (9) Dress, attire, or personal appearance.

83

CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members or a group or groups listed in subdivision (a). (New & Vague)
- CDAA video clip

84

CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.
- (12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

85

CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (13) Any justification that is similarly applicable to a questioned prospective juror or jurors who are not members of the same cognizable group as the challenged prospective juror but were not the subject of a peremptory challenge by that party.
 - The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be presumptively invalid.
 - Comparative analysis.

86

CCP § 231.7 / AB 3070

- Reminder:
- CCP 231.7 (e) Peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to the prospective juror's membership or perceived membership in a cognizable class and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

87

CCP § 231.7 / AB 3070

- Reminder:
- CCP 231.7 (d) (2) (A): An "objectively reasonable person" is aware that unconscious bias has resulted in unfair exclusion of jurors.
- CCP 231.7 (d) (2) (C): "Unconscious bias" includes implicit & institutional bias.

88

CCP § 231.7 / AB 3070

- CCP 231.7 (f): "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias.

89

CCP § 231.7 / AB 3070

- CCP 231.7 (f) continued:
- To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.
- This is the standard to determine that a presumption of invalidity has been overcome.
- Juror specific and case specific reasons.

90

CCP § 231.7 / AB 3070

- CCP 231.7 (g) (1):
- The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:
- (A) The prospective juror was inattentive, staring, or failing to make eye contact.
- (B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
- (C) The prospective juror provided unintelligent or confused answers.
- Additional findings required...

91

CCP § 231.7 / AB 3070

- CCP 231.7 (g) (2):
- The reasons set forth in paragraph (g) (1) are presumptively invalid unless:
- the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or;
- the observations of counsel for the objecting party.
- Even with that observation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner matters to the case.

92

CCP § 231.7 / AB 3070

- Next juror looks better. *People v. Cisneros* 234 CA 4th 111.
- Must state on the record the reason(s) the person was excused.
- Limited life experience – keep in mind that age is a protected class/group pursuant to CCP 231.5.

93

CCP § 231.7 / AB 3070

- Past hung jury. *People v. Farnam* (2002) 28 Cal 4th 107, 138.
- Remember distrust or negative experience with the criminal legal system presumptively invalid reasons.

94

CCP § 231.7 / AB 3070

- CCP 231.7 (h):
- Remedies if objection is granted, one or more of the following options:
 - (1) Quash the venire and start jury selection anew. This remedy shall be provided if requested by the objecting party. (*Wheeler*)
 - (2) if motion granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant; (new).
 - Double Jeopardy? Did prosecutor intentionally commit misconduct to trigger a mistrial?
 - (3) Seat the challenged juror. (*Willis*)

95

CCP § 231.7 / AB 3070

- CCP 231.7 (h): Remedies cont.
- (4) Provide the objecting party additional challenges.
- (5) Provide another remedy as the court deems appropriate; (new).
 - Fines?

96

CCP § 231.7 / AB 3070

- CCP 231.7 (j):
- A denial of an objection shall be reviewed by the appellate court de novo, with the trial courts express factual findings reviewed for substantial evidence.
- The appellate court:
- Shall not impute findings that trial court did not expressly state on the record, including demeanor.
- May only consider reasons for challenge given on the record and not speculate on other unstated reasons.

97

CCP § 231.7 / AB 3070

- CCP 231.7 (j):
- If appellate court determines that the objection was erroneously denied, the error will be prejudicial, the judgement shall be reversed, and the case remanded for a new trial.

98

CCP § 231.7 / AB 3070 Recap .

- Defense will no longer need to make a prima facie case to advance their objection; the mere making of an objection will trigger our justifications.
- Justifications will no longer be presumed constitutional; instead, no purposeful discrimination will be required and if an "objectively reasonable person" would view the challenge in part based on a cognizable group (by a showing less than a preponderance) the objection prevails.

99

CCP § 231.7 / AB 3070 Recap

- Most case-based categories of valid justifications will become presumptively invalid.
- Prosecutors will have to show by "clear & convincing" evidence, (i.e. highly probable) that a "reasonable person" would view the justification unrelated to a cognizable group; and
- Such justification bears on juror's ability to be fair.

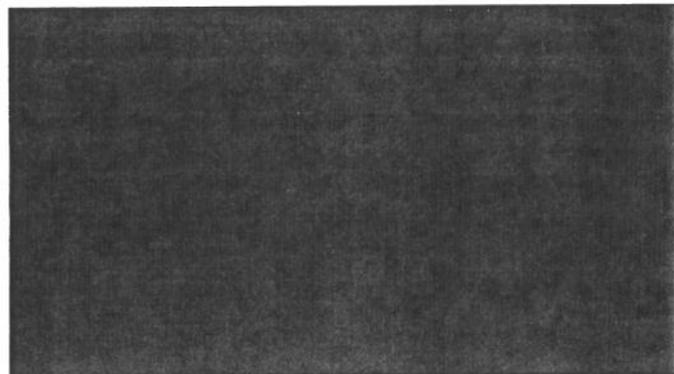
- CCP 231.7 (d) (3) (E): No definition or guidelines regarding "disproportionately" associated with a cognizable class.

100

CCP § 231.7 / AB 3070 Recap

- CCP 231.7 (l) (small L):
 - It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

101



102

Attorney Questioning

- Determine grounds for challenges for cause CCP § 223 (d).
- "Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause."
- Effective date: January 1, 2018.

103

Grounds to Challenge a Juror for Cause

- General Disqualification, CCP §§ 228 & 225 (b)(1)(A)
- Actual Bias, CCP § 225(b)(1)(C)
- Implied Bias, CCP § 225(b)(1)(B)
- CCP § 225 (a) allows a challenge against the entire panel.

104

General Disqualification

- Code of Civ Pro § 228; (see CCP 203):
 - Non- U.S. citizen
 - Under 18
 - Not domiciled in California
 - Non-resident of County
 - Convicted of malfeasance in office & civil rights not restored.
- Impaired Judgment
- Non-English speaker
- Already serving on as a Grand / trial juror.
- Subject of a Conservatorship.

105

Felons Can Now Serve as Jurors

- Code of Civ Pro § 203 (a) (9-11) eff. 1/1/20.
- Unless: still incarcerated, still on post-conviction supervision or registered sex offender based on a felony conviction...
 - What was the felony or felonies you were convicted of?
 - How long were you incarcerated?
 - When?
 - Did you successfully complete parole or probation without a violation?
 - Did you plead guilty or have a jury trial?
 - Were you guilty?
 - How did the police, prosecutor, court system, treat you?

106

General Disqualification

- Code of Civ Pro § 228 (b), catch-all reason:
 - The existence of any incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party. i.e.)
 - Perceiving & considering evidence;
 - Determining witness credibility by a uniform standard;
 - Following the judge's instructions;
 - Putting aside outside considerations;
 - Deliberating with other jurors.

107

General Disqualification

- Code of Civ Pro § 228 (b), catch-all reason:
- Inability to comprehend English Language.
 - *People v. Elam* (2001) 91 Cal.App. 4th 298, 316
- Bias against legal system.
 - *People v. Thompson* (2010) 49 Cal.4th 79, 100-101
- Refusal to follow the courts instructions and the law.
 - *People v. Williams* (2001) 25 Cal.4th 441, 448
 - *People v. Collins* (1976) 17 Cal.3d 687, 690
 - *People v. Daniels* (1991) 52 Cal. 3d 815, 865

108

General Disqualification

- Code of Civ Pro § 228 (b), catch-all reason:
- Prejudging officer / witness credibility (anti-LE bias).
 - *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484
- Inability / Refusal to deliberate.
 - *People v. Lomax* (2010) 49 Cal.4th 530, 589
- Inability to disregard outside information.
 - *In Re Malone* (1996) 12 Cal.4th 935, 963

109

General Disqualification

- Code of Civ Pro § 228 (b), catch-all reason:
- Medical / Mental Health / Personal issues interfering with perception of evidence:
 - Medical condition causing pain.
 - Family or work commitments that would distract the prospective juror.

110

Actual Bias

- Code of Civ Pro § 225(b)(1)(C)
- Defined as "the existence of the state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."
- In other words, they can't be fair on the type of case you are prosecuting, or they can't be fair to the District Attorney's Office.

111

Actual Bias

- Examples:
 - Opinion as to Δ's guilt (Police only arrest guilty people).
 - Under no circumstances would believe a police officer.
 - Bias based on nature of the charge, i.e. child molestation.
 - Bias based on attending the same church as Δ.
 - Prior jury service causing a bias against D.A.'s office.

112

Implied Bias

- Code of Civ Pro § 225(b)(1)(B)
 - Eight exclusive grounds, examples (see CCP 229):
 - Relationship/affinity to party, witness, or victim.
 - Having unqualified opinion of case merits based on outside knowledge of material facts.
 - Having a particular interest in party or outcome.
 - State of mind evincing enmity (actively opposed or hostile) against or bias towards either party.
 - Death Penalty case: entertaining conscious opinions that would preclude a finding of guilty.

113

For Cause Challenges

- "Would the juror's issue/perceived notion/bias/distracted/anxiety prevent or substantially impair the performance of the juror's duties in accordance with the court's instructions & the juror's oath?"
- This approach taken from the death penalty qualification standard captures the elements needed for an actual bias and general disqualification for cause challenge.
- Having a bias, strong opinion, or incapacity is a necessary condition, but insufficient by itself.
- Inability to put aside bias, strong opinion, or incapacity is what disqualifies a juror.

114

For Cause Challenges

- Setting up For-Cause challenges:
- Key is to expose the juror's desire or potential to nullify a verdict.
- Specific phrasing is required to show an inability to follow the law.
- Questions must be structured so that a wrong answer means a PER SE violation of the law.
 - i.e) Assume each element of the charged crimes are proven beyond a reasonable doubt, what would be your vote, guilty or not guilty?

115

For Cause Challenges

- For example:
- "If the judge instructs you that you have to evaluate all witnesses by the same standard, are you saying that you won't be able to treat the officers the same based on what happened to your brother?"
- "So, are you saying that if the judge instructs you that you can't consider_____, are you saying you won't be able to set aside your feelings?"

116

For Cause Challenges

- For example:
- "If you are picked as a juror, will you be able to sit and listen to the evidence / witnesses, and focus on this trial, or do you think that you may be distracted by your family/work situation?"
- "Would your illness prevent you from being able to listen to the evidence / witnesses, and focus on this trial?"..."Do you think that it may distract you from fulfilling your duties?"

117

For Cause Challenges

- For example: Concrete hypotheticals.
- "If an officer testified one way on a point, and a civilian testified differently on the same point, would you *automatically* be inclined to believe the civilian because of your views and prior experience?"

118

For Cause Challenges

- Using hyperbolic hypotheticals to test potential jurors' resolve.
- Makes it easier to expose possible impairment, i.e)
 - What if the defendant had stage 4 cancer?
 - What if the defendant only stole a candy bar from Bill Gates?

119

For Cause Challenges

- Once the bias/impairment is exposed, you must show it will disqualify the juror:
- "I think I can follow the law."
- Respond with concern over "I think I can..." and provide examples of important situations: i.e)
 - Babysitter – "I think I can keep your kids safe tonight."
 - Pilot landing airplane – "I think I can land this plane."
- The goal is to get them to state their position more unequivocally, leaving no doubt.

120

For Cause Challenges

- Defending/Rehabilitating against a challenge:
- Distinguish this case from their own past experiences:
 - "Do you understand the Def. has nothing to do with what happened to your house?"
 - "Are you going to treat the Def. unfairly because someone else broke into your house 5 years ago?"

121

For Cause Challenges

- Defending/Rehabilitating against a challenge:
- Use concrete examples to test if they can be fair:
 - "If you don't believe the People proved BRD the def is the shooter, would you still find him guilty because the victim suffered serious injuries?"
 - "Can you listen to the evidence and make a decision as to whether you think the case has proven BRD that the def committed the crime?"

122

For Cause Challenges

- Defending/Rehabilitating against a challenge:
- Analogize to experiences in their lives where they essential carry out a juror's role.
- Ask if juror has acted as a parent, manager, neutral arbitrator in a friend dispute.
 - Were they able to listen to both sides and make a decision?
 - That's what we are asking them to do as jurors here.

123

For Cause Challenges

- Defending/Rehabilitating against a challenge:
- Remind jurors they do not decide punishment, only guilt.
 - “Do you understand, your job is to just to decide if the evidence shows BRD that the Def. did it? You do not have to decide the punishment if he is found guilty.”
 - E.G. “No one likes robbery.”
 - E.G. “No one like kidnapping.”
- Morality variation: Remind jurors their job is not to decide whether the defendant is a good or bad person.

124

Final Advice

- Ideally, the jury should consist of people you are personally comfortable with & who you think your case theory will resonate with.
- Remember, the process by which we find a “fair & impartial jury” includes trial attorneys representing opposing parties trying to identify & eliminate those jurors most likely to favor the other party.
- So focus on striking jurors who will not follow the law & keeping jurors you believe will keep an open mind about your case theory.

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CDAA Resources

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