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## Crime and Punishment: An Empirical Study of the Effects of Racial Bias on Capital Sentencing Decisions

Matthew A. Gasperetti

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# **Crime and Punishment: An Empirical Study of the Effects of Racial Bias on Capital Sentencing Decisions**

MATTHEW A. GASPERETTI\*

*Racism has left an indelible stain on American history and remains a powerful social force that continues to shape crime and punishment in the contemporary United States. In this article, I discuss the socio-legal construction of race, explore how racism infected American culture, and trace the racist history of capital punishment from the Colonial Era to the present. After framing the death penalty in cultural and historical context, I report original empirical results from one of the largest studies ( $n = 3,284$ ) of mock juror capital sentencing decisions published to date. My results show that mock jurors who self-reported racial biases were 8.8% more likely to pass the death qualification and were 18.3% to 18.4% more likely to sentence a Black defendant to death than a White defendant with all other factors held constant. Death qualifying the mock jury increased the probability of empaneling one or more of these racially biased mock jurors*

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\* I completed a Ph.D. at the University of Cambridge in biological anthropology and a J.D. at Stanford Law School. My research focuses on the intersection of human biology, culture, and law. I am extremely grateful to professors Susan Sheridan, Jay Stock, Jeff Strnad, Erik Jensen, Debra Hensler, and the late John Henry Merryman for their mentorship. This article is dedicated to the late Joan Petersilia who inspired me to pursue this line of scholarship and the late Tripp Zanetis who inspired me to follow my dreams. I would like to thank the University of Miami Law Review for working with me on this article. This work originated from research funded by the John M. Olin Fellowship in Law and Economics at Stanford Law School. All views expressed, mistakes, and oversights in this article are my own.

by 8.4%. After reviewing these results in the context of previous research and Supreme Court jurisprudence, I argue that death qualifying a capital jury violates an African American defendant's Sixth Amendment right to an impartial jury because the death qualification increases the likelihood of empaneling racially biased, partial jurors. Finally, I argue that voir dire fails to provide an adequate safeguard to this threat, argue that the right to inquire into juror racial biases during voir dire should apply more broadly, and make recommendations to improve current voir dire practices.

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## INTRODUCTION

To understand capital punishment in the United States, which has been widely criticized for decades for being used disproportionately to punish African Americans, it is important to contextualize race, racism, and the death penalty in a cultural and historical perspective.<sup>1</sup> Racial groups, as they are conceptualized today, are pseudoscientific taxonomies that began to coalesce in their modern form between the sixteenth and eighteenth centuries.<sup>2</sup> Racism provided justification for colonization and the enslavement of indigenous populations.<sup>3</sup> In the centuries that followed, slavery became a major economic force in the American Colonies and later the United States.<sup>4</sup> Beginning in the seventeenth century, lawmakers passed statutes designed to keep the races separate, defined Whiteness and Blackness at law, maintained a White social hierarchy through bondage and violence, and executed Blacks for many offenses that did not carry the same penalty for Whites.<sup>5</sup> Judicial and extra-judicial executions frequently involved mutilation, dismemberment, and public display of the dead.<sup>6</sup>

After over 250 years of slavery and a war that cost more than 600,000 American lives, racism remained entrenched, continued to be codified into law, and continued to be propagated through legal

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<sup>1</sup> See, e.g., Lincoln Caplan, *Racial Discrimination and Capital Punishment: The Indefensible Death Sentence of Duane Buck*, THE NEW YORKER (Apr. 20, 2016), <https://www.newyorker.com/news/news-desk/racial-discrimination-and-capital-punishment-the-indefensible-death-sentence-of-duane-buck>.

<sup>2</sup> Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCH. 16, 19 (2005).

<sup>3</sup> *Id.* at 21–22.

<sup>4</sup> JAMES OLIVER HORTON & LOIS E. HORTON, *SLAVERY AND THE MAKING OF AMERICA* 1, 10–11 (2005).

<sup>5</sup> IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 81–86 (10th Anniversary ed. 2006).

<sup>6</sup> EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017), <https://lynchinginamerica.eji.org/report/> (“Southern lynchings of African Americans were distinct from lynchings of whites, and often featured extreme brutality such as burning, torture, mutilation, and decapitation of the victim.”); see also CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 26 (2016) (detailing the Supreme Court of the United States’ history of allowing capital punishment methods).

institutions to oppress and control large Black populations, particularly in the South.<sup>7</sup> In the nineteenth and early twentieth centuries, White society maintained racist social norms through violence, murder, and state-sanctioned capital trials that denied African Americans due process.<sup>8</sup> The Civil Rights Movement was instrumental in reforming these abuses.<sup>9</sup> After rebuffing numerous legal challenges to death penalty statutes, the Supreme Court, in the 1976 case *Furman v. Georgia*, struck down the capital sentences imposed in three cases.<sup>10</sup> In *Furman*, the Court implied that most, if not all, death penalty statutes nationwide were unconstitutional.<sup>11</sup> Following a brief moratorium, numerous states passed new capital sentencing statutes. For example, in *Gregg v. Georgia*, the Supreme Court upheld the constitutionality of the reformed statutes in three different states, thereby ushering in the modern era of the death penalty.<sup>12</sup>

The Civil Rights Movement effectively curtailed *de jure* segregation; however, *de facto* social and economic segregation continued, resulting in the concentration of African American populations in disadvantaged urban neighborhoods.<sup>13</sup> As industry moved overseas in the latter half of the twentieth century, White populations abandoned urban areas, which exacerbated segregation and further marginalized African American communities.<sup>14</sup> Heavy-handed policing, the War on Drugs, mass incarceration, and punitive sentencing policies compounded inner-city social problems and racial

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<sup>7</sup> David Theo Goldberg, *The New Segregation*, 1 RACE & SOC'Y 15, 20–21 (1998) (discussing what the author calls “Old Segregation”—“the classic variety emerging in the U.S. in the 1880s” of being “separate but equal”—and “New Segregation”—“the ideological rationalization of . . . ‘unequal and therefore (to be) separated’”).

<sup>8</sup> STEIKER & STEIKER, *supra* note 6, at 33–37 (using the example of Ed Johnson, “charged with the rape of a white woman,” who was convicted by an all-white jury in Tennessee; when the United States Supreme Court accepted review of his case, a mob removed Johnson from his cell and hanged and shot him—with the sheriff’s permission).

<sup>9</sup> Goldberg, *supra* note 7, at 17.

<sup>10</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

<sup>11</sup> *Furman*, 408 U.S. at 239–40.

<sup>12</sup> *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638, 1648–1650 (1998).

<sup>13</sup> Goldberg, *supra* note 7, at 16.

<sup>14</sup> *Id.* at 18–21.

discrimination.<sup>15</sup> These social forces destabilized African American communities and created conditions conducive to crime, violence, and murder.<sup>16</sup> Empirical research shows that crime is strongly correlated with economic disadvantage, not race.<sup>17</sup> Given this social reality and the intergenerational trauma caused by slavery, segregation, and discrimination, crime soared in African American communities in the late twentieth century.<sup>18</sup> Although there was a marked decline in violent crime in the early twenty-first century, large ethno-racial inequalities led to smaller relative declines in African American neighborhoods, suggesting the crime gap between White and Black neighborhoods is widening.<sup>19</sup>

In 2019, 51.2% of those arrested for murder and nonnegligent manslaughter were Black, as were 41.6% of death row inmates in 2020.<sup>20</sup> Yet, African Americans represent only 13.4% of the population.<sup>21</sup> Although many opponents of the death penalty view the per capita over-representation of African Americans on death row as

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<sup>15</sup> Graham Boyd, *The Drug War is the New Jim Crow*, NACLA REP. AM. (July/Aug. 2001), <https://www.aclu.org/other/drug-war-new-jim-crow>; Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

<sup>16</sup> See generally Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1557–76 (2004) (proposing that the “pernicious” role racism plays “has significant implications for the ways we estimate fairness (as opposed to parity) in our analyses of death sentencing”).

<sup>17</sup> Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. FORCES 619, 619–20 (1996).

<sup>18</sup> Rodney Andrews et al., *Location Matters: Historical Racial Segregation and Intergenerational Mobility*, 158 ECON. LETTERS 67, 70–71 (2017).

<sup>19</sup> Robert J. Sampson, *Neighbourhood Effects and Beyond: Explaining the Paradoxes of Inequality in the Changing American Metropolis*, 56 URB. STUD. 3, 4–6 (2019); Lauren J. Krivo et al., *The U.S. Racial Structure and Ethno-Racial Inequality in Urban Neighborhood Crime, 2010–2013*, SOCIO. RACE & ETHNICITY 350, 350 (2021).

<sup>20</sup> *Estimated Number of Arrests by Offense and Race, 2019*, U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS, [https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table\\_in=2](https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=2) (last visited Nov. 10, 2021); DEBORAH FINS, *DEATH ROW U.S.A.: FALL 2020*, at 1 (2020) <https://www.naacpldf.org/wp-content/uploads/DRUSAFall2020.pdf> (a quarterly report by the NAACP Legal Defense and Educational Fund, Inc.).

<sup>21</sup> *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Dec. 7, 2021).

*prima facie* evidence that the criminal justice system is racially biased, this overrepresentation may also be attributable to unrelated structural racism, economic marginalization, and elevated crime rates in disadvantaged neighborhoods.<sup>22</sup> Convincingly demonstrating that disparities in capital trial outcomes are racially motivated requires showing that a Black defendant is more likely to receive the death penalty than a White defendant *ceteris paribus*.<sup>23</sup>

Empirical research provides a powerful means of studying racial bias, while controlling for other factors, and provides compelling evidence that racism infects capital trials by influencing juror decision-making. In fact, research shows that a capital defendant is much more likely to receive a death sentence if he or she is convicted of killing a White victim.<sup>24</sup> Such race-of-victim bias is one of the most consistent findings in empirical death penalty research.<sup>25</sup> On the contrary, identifying race-of-defendant bias, which is a more powerful indicator of individualized bias, has proven more elusive.<sup>26</sup> Several meta-analyses of mock juror behavior report conflicting results with authors generally agreeing that race-of-defendant bias is likely moderated by crime type, juror characteristics, methodological variation between studies, and other variables.<sup>27</sup>

This study reports the results of a large-scale survey of 3,284 jury-eligible Americans conducted in November 2020.<sup>28</sup> I randomly

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<sup>22</sup> Baldus et al., *supra* note 12, at 1650–54.

<sup>23</sup> *Id.*

<sup>24</sup> Frank R. Baumgartner et al., #BlackLivesDon'tMatter: Race-of-Victim Effects in U.S. Executions, 1976–2013, 3 POL. GROUP. & IDENTITIES 209, 209 (2015).

<sup>25</sup> *Id.* at 210.

<sup>26</sup> See Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 515–16 (2014).

<sup>27</sup> See Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 190–92 (1992); see also Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCH. 1315, 1335–36 (1994); Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. & HUM. BEHAV. 621, 624–26 (2005); Dennis J. Devine & David E. Caughlin, *Do They Matter? A Meta-Analytic Investigation of Individual Characteristics and Guilt Judgments*, 20 PSYCH., PUB. POL'Y, & L. 109, 112 (2014).

<sup>28</sup> See *infra* Appendix A.



assigned mock jurors to treatment groups with the race of the defendant and victim varied in a  $3 \times 3$  experimental design, yielding nine defendant-victim combinations. I described the defendant as White in the first defendant treatment and Black in the second and third defendant treatments. I also depicted the defendant with a “police sketch” of a man with his complexion and eye color darkened across treatment groups. For the victim treatments, I either omitted the victim’s race, described him as White, or described him as Black. After mock jurors answered disqualifying questions and provided demographic information, I death qualified the mock jury. Finally, I presented jury-eligible respondents with a description of a homicide that occurred during a robbery and asked them to determine sentencing before answering a series of voir-dire-like screening questions designed to assess racial bias. In contrast to an actual trial, I asked my voir dire questions after mock jurors determined sentencing to avoid alerting respondents the study was about race.

The results showed that mock jurors who were more racially biased (as assessed by the voir dire questions), more politically conservative, and wealthier were more likely to pass the death qualification.<sup>29</sup> The death qualification also reduced the representation of Black mock jurors and religious mock jurors in the death-qualified venire.<sup>30</sup> Female respondents were more likely than male respondents to pass the death qualification, but death-qualified male respondents were significantly more likely to sentence a defendant to death, as were mock jurors in older age groups.<sup>31</sup> Mock jurors who failed the voir dire screening and those who identified as politically moderate or conservative were not only over-represented in the

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<sup>29</sup> Demographic groups that were significantly more likely to pass the death qualification included those who failed voir dire (8.8%,  $p < 0.001$ ) relative to those who passed; moderates (10.9%,  $p < 0.001$ ) and conservatives (13.7%,  $p < 0.001$ ) relative to liberals; and those making \$25,000–\$49,999 (5.1%  $p = 0.023$ ), \$50,000–\$74,999 (5.4%,  $p = 0.024$ ), and \$75,000 in annual income (6.7%,  $p = 0.007$ ) relative to those reporting less than \$25,000.

<sup>30</sup> Black mock jurors were significantly less likely to pass the death qualification than White mock jurors (-7.3%,  $p = 0.018$ ), as were religious mock jurors relative to non-religious mock jurors (-7.6%,  $p < 0.001$ ).

<sup>31</sup> Males were significantly less likely to pass the death qualification than females (-5.1%,  $p = 0.001$ ), but were more likely to recommend a death sentence (5.4%,  $p = 0.008$ ) as were mock jurors in the 35–44 age group (10.8%,  $p = 0.007$ ), the 45–54 age group (11.4%,  $p = 0.008$ ), and the older than 55 age group (12.1%,  $p = 0.006$ ) relative to the 18–24 age group.

death-qualified venire but were also significantly more likely to recommend a death sentence.<sup>32</sup>

My statistical results did not show evidence of race-of-defendant bias or race-of-victim bias in the full death-qualified venire.<sup>33</sup> In contrast to previous research, I also found no evidence that darkening the Black defendant's complexion and eye color led to more punitive sentencing recommendations.<sup>34</sup> However, my results do provide compelling evidence of race-of-defendant bias among the 10.1% of death-qualified mock jurors who failed the voir dire questions inquiring into racial bias. These mock jurors were 18.3% to 18.4% more likely to sentence a Black defendant to death than a White defendant *ceteris paribus*.<sup>35</sup> Monte Carlo simulations revealed that the death qualification increased the likelihood of empaneling at least one of these racially biased jurors on a petite jury by 8.4%.

In Part I of this study, I define race, examine how racism infiltrated American culture, explore how legal institutions reinforced and formalized racist social norms, and discuss the effects of *de jure* and *de facto* discrimination on the evolution of capital punishment in the United States. I review empirical research on juror decision-making in Part II, outline my methodology in Part III, and report my empirical results in Part IV. Accepting the results of this study as true and generalizable to jury-eligible adults *arguendo*, in Part V, I

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<sup>32</sup> Mock jurors who failed voir dire were more likely to sentence a defendant to death relative to those who passed (13.9%,  $p < 0.001$ ) as were moderates (11.7%,  $p < 0.001$ ) and conservatives (25.6%,  $p < 0.001$ ) relative to liberals.

<sup>33</sup> See generally Levinson et al., *supra* note 26, at 521 (discussing finding that measures of racial bias predicted race-of-defendant and race-of-victim-effects, but finding no overall effect).

<sup>34</sup> See generally Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 385 (2006) (reporting that defendants perceived as more stereotypically Black were significantly more likely to receive a death sentence when their victim was white). See *infra* Table D-2 of Appendix D. The simple effects calculated showed no significant differences between the Black defendant treatments (Black (Dark) – Black (Light)) when the victim's race was ambiguous (2.7%,  $p = 0.504$ ), White (-3.1%,  $p = 0.459$ ), or Black (Black: -1.8%,  $p = 0.666$ ).

<sup>35</sup> See *infra* Table 7. Mock jurors who failed voir dire were significantly more likely to sentence both the Black defendant of lighter complexion (Black (Light): 18.3%,  $p = 0.012$ ) and darker complexion (Black (Dark): 18.4%,  $p = 0.012$ ) to death than the White defendant.

argue that the death qualification violates an African American's Sixth Amendment right to an impartial jury by increasing the probability of empaneling partial jurors who make racially biased sentencing decisions. I also argue that any legitimate state interest in removing nullifiers in capital trials is countervailed by evidence that the same process increases the likelihood of empaneling racist jurors. Continuing to death qualify juries in capital trials of African American defendants is especially troubling because the death qualification not only appears to overrepresent racist jurors, it appears to simultaneously underrepresent African American's on death qualified venires. Striking prospective African American jurors based on an ideological belief tied to their racial identity, like opposition to the death penalty, is synonymous with striking Black jurors because of their racial identity and should be critically reevaluated.<sup>36</sup>

Many scholars believe that modern racism is largely unconscious and screening for racial bias during voir dire would be "minimally useful," "patronizing," and unlikely to elicit truthful responses.<sup>37</sup> The fact that 10.1% of the mock jurors who participated in this study openly admitted to racial bias suggests otherwise. However, it is important to remember that voir dire is a safeguard, not a panacea, voir screening methods are highly idiosyncratic, and current voir dire practices encourage dishonesty.<sup>38</sup> I conclude this article by arguing that voir dire inquiry into racial bias should be an absolute right in capital trials. Finally, I advocate for increased use of questionnaires in voir dire, providing jury instructions on explicit and implicit bias, closer scrutiny of prospective jurors who self-report biases, ending the practice of rehabilitating jurors who give assurances they can be impartial after admitting to bias, and striking jurors when racial bias can reasonably be implied.

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<sup>36</sup> See Levinson et al., *supra* note 26, at 568.

<sup>37</sup> Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 156, 160–62 (1989) (describing voir dire inquiry into racial bias as "patronizing" and "minimally useful"); Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 846 (2015) (discussing Albert Alschuler's criticisms of voir dire); Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 193–245 (2018) (discussing studies of implicit bias).

<sup>38</sup> Alschuler, *supra* note 37, at 154.

## I. RACE, RACISM, AND THE DEATH PENALTY IN PERSPECTIVE

Racist ideologies began to coalesce in their modern form in many parts of the world, including the Americas, in the sixteenth through eighteenth centuries.<sup>39</sup> Prior to the publication of the *Origin of Species* in 1859, scientists viewed the world through a Linnaean lens and grouped living beings, including people, into taxonomies based on phenotypic characteristics, behavioral traits, and geographic dispersal.<sup>40</sup> Scientists believed these traits were the immutable product of divine creation and were passed from generation to generation unchanged.<sup>41</sup>

As European colonialists encountered new populations, they defined racial groups, ranking them based on their alleged proximity to God with those of European descent at the top and those of African descent at the bottom.<sup>42</sup> Colonial powers used religion and pseudoscience, particularly the supposed immutability of physical and behavioral characteristics, to justify racial hierarchies, separation of the races, social and legal enforcement of racist norms, subjugation, slavery, and genocide.<sup>43</sup> Even with the emergence of Darwinism and broad acceptance of evolutionary theory, scientists rebranded racial classification systems as the product of a dynamic process of natural selection, rather than divine creation, and justified racial hierarchies by classifying Europeans as “more evolved” than non-European populations.<sup>44</sup> In the absence of scientific evidence of a European epicenter of human origins, it was famously fabricated to fit a racist, Eurocentric narrative.<sup>45</sup>

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<sup>39</sup> Smedley & Smedley, *supra* note 2, at 19.

<sup>40</sup> George J. Armelagos & Alan H. Goodman, *Race, Racism, and Anthropology*, in *BUILDING A NEW BIO-CULTURAL SYNTHESIS: POLITICAL-ECONOMIC PERSPECTIVES ON HUMAN BIOLOGY* 359, 360–61 (Alan H. Goodman & Thomas L. Leatherman eds., 1998).

<sup>41</sup> *Id.* at 360–61.

<sup>42</sup> *Id.*

<sup>43</sup> Smedley & Smedley, *supra* note 2, at 19.

<sup>44</sup> Armelagos & Goodman, *supra* note 40, at 361.

<sup>45</sup> See generally Sheela Athreya & Rebecca Rogers Ackermann, *Colonialism and Narratives of Human Origins in Asia and Africa*, in *INTERROGATING HUMAN ORIGINS: DECOLONISATION AND THE DEEP PAST* 72, 74–76 (Martin Porr & Jacqueline Matthews eds., 2019) (discussing the Piltdown Hoax and scientific efforts to promote Europe as the “epicenter of human origins”).

A. *Race and Racism in Historical and Cultural Context*

Race is a pseudoscientific construct.<sup>46</sup> Modern humans share 99.9% percent of DNA in common with small variations between populations.<sup>47</sup> Phenotypic differences in hair and skin color, which provide the arbitrary bases of racial classifications, are adaptations moderated by a small number of atypical genes that vary geographically in the frequency of their distribution.<sup>48</sup> Humans evolved too recently and populations lived in geographic isolation too briefly for enough genetic divergence to occur to biologically justify racial taxonomies.<sup>49</sup>

Race is socially, not biologically, defined.<sup>50</sup> Someone considered “Black” in American society may find he or she is perceived differently in Chadian society, for example.<sup>51</sup> The U.S. Census Bureau has also consistently changed race and ethnicity questions to conform to evolving social norms.<sup>52</sup> Although race has failed to explain biological and human variation in a scientifically meaningful way, it has provided a powerful means of devaluing human beings and maintaining existing power structures.<sup>53</sup> Racism has had a powerful influence on American socio-legal institutions historically and continues to affect crime and punishment in the United States today.<sup>54</sup>

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<sup>46</sup> Smedley & Smedley, *supra* note 2, at 16–26.

<sup>47</sup> Francis S. Collins & Monique K. Mansoura, *The Human Genome Project: Revealing the Shared Inheritance of all Humankind*, 91 *CANCER* 221, 222 (2001).

<sup>48</sup> *Id.*; Marcus W. Feldman et al., *Race: A Genetic Melting-Pot*, 424 *NATURE* 374, 374 (2003).

<sup>49</sup> Collins & Mansoura, *supra* note 47, at 222.

<sup>50</sup> See Smedley & Smedley, *supra* note 2, at 16.

<sup>51</sup> Alexander Hurst, *‘I Felt Like an Impostor’: A Mixed-Race American in Africa*, *THE GUARDIAN* (Dec. 14, 2018, 1:00 PM), <http://www.theguardian.com/news/2018/dec/14/i-felt-like-an-impostor-a-mixed-race-american-in-africa>.

<sup>52</sup> Kay Deaux, *Ethnic/Racial Identity: Fuzzy Categories and Shifting Positions*, 677 *ANNALS AM. ACAD. POL. & SOC. SCI.* 39, 39–43 (2018).

<sup>53</sup> See Armelagos & Goodman, *supra* note 40, at 359.

<sup>54</sup> See generally Zinzi D. Bailey et al., *How Structural Racism Works — Racist Policies as a Root Cause of U.S. Racial Health Inequities*, 384 *NEW ENGL. J. MED.* 768, 768–771 (2021).

### B. *Legally Defining Blackness and Whiteness*

As Europeans brought slaves to the American Colonies, they enforced a racial hierarchy through bondage and violence.<sup>55</sup> As early as the seventeenth century, lawmakers began to legally define Whiteness and Blackness to reflect social biases.<sup>56</sup> In many jurisdictions, Blacks faced mandatory death sentences for murder, rape, and several other enumerated crimes that did not carry the same sentences for Whites.<sup>57</sup> Capital punishment and extrajudicial murder often involved torture, dismemberment, mutilation, and public display of the dead as a warning to others.<sup>58</sup> In the seventeen and eighteenth centuries, brutal forms of execution—typically reserved for slaves—included “beheading, pressing to death, drawing and quartering, breaking on the wheel, drowning, and burning at the stake.”<sup>59</sup>

Beginning in the seventeenth century, colonial lawmakers passed strict anti-miscegenation laws to maintain racial separation.<sup>60</sup> Despite these laws, there was significant gene flow between people of African and European descent, and the arbitrary distinctions between White and Black began to blur.<sup>61</sup> Definitions of Blackness ranged from “one-drop” rules that classified anyone with “Negro blood” as “Negro” to more subjective “appreciable admixture” rules and one-eighth rules that relied on the races of an individual’s grandparents.<sup>62</sup> The geographic and temporal variability of these categorizations underscores their arbitrary nature.<sup>63</sup>

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<sup>55</sup> LÓPEZ, *supra* note 5, at 81–86; *see generally* Kevin Mumford, *After Hugh: Statutory Race Segregation in Colonial America, 1630-1725*, 43 AM. J. LEGAL HIST. 280, 280–305 (1999).

<sup>56</sup> LÓPEZ, *supra* note 5, at 81–86; Mumford, *supra* note 55, at 295.

<sup>57</sup> STEIKER & STEIKER, *supra* note 6, at 20–21.

<sup>58</sup> *Id.* at 17–19, 25.

<sup>59</sup> *Id.*; ROBERT M. BOHM, *DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 189 (5th ed. 2017).

<sup>60</sup> *See generally* Mumford, *supra* note 55, at 280–305.

<sup>61</sup> *See generally* Esteban J. Parra et al., *Estimating African American Admixture Proportions by Use of Population-Specific Alleles*, 63 AM. J. HUM. GENETICS 1839, 1839–51 (1998); Sarah A. Tishkoff et al., *The Genetic Structure and History of Africans and African Americans*, 324 SCIENCE 1035, 1035–44 (2009).

<sup>62</sup> LÓPEZ, *supra* note 5, at 82–83.

<sup>63</sup> *Id.* at 83 (describing how these “boundaries of Black identity” differed from state to state, i.e. Alabama and Arkansas using the “one-drop” rule compared

Frustrated by the lack of any scientifically meaningful and consistent method of classifying racial groups, lawmakers and jurists struggled to establish legal rules to define Whiteness.<sup>64</sup> For example, from 1790 to 1952, naturalization was restricted to “free white persons,” which forced courts to define who qualified as White.<sup>65</sup> In *United States v. Bhagat Singh Thind*, the Supreme Court rejected “scientific” racial classification methods and opted for a common-sense approach holding that “the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man . . . .”<sup>66</sup> The *Thind* Court emphasized that “[i]t does not seem necessary to pursue the matter of scientific classification further” and limited Whiteness to those of European descent, as the Court believed the drafters of the naturalization law had envisioned.<sup>67</sup> Discriminatory laws,<sup>68</sup> one-drop rules,<sup>69</sup> and racist judicial decisions<sup>70</sup> provide a lens into a society struggling to maintain a pseudoscientific racial hierarchy—a racial hierarchy that carried very real consequences.

### C. *Mob Violence and Racial Injustice in the Jim Crow South*

Following the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments between 1865 and 1870, subjugation through slavery ended, and *de jure* “Jim Crow” segregation began.<sup>71</sup> Jim Crow laws codified *de facto* racial segregation into law beginning in the 1880s and 1890s and gained approval from the Supreme Court in *Plessy v. Ferguson* with the “separate but equal doctrine” in 1896.<sup>72</sup> Widespread racial violence against African Americans was

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to Tennessee actually defining “Blacks” as ‘mulattoes, mestizos, and their descendants . . . .’”).

<sup>64</sup> *Id.* at 92, 103.

<sup>65</sup> *See id.* at 1, 88; *see* *U.S. v. Bhagat Singh Thind*, 261 U.S. 204, 214 (1923).

<sup>66</sup> *Bhagat Singh Thind*, 261 U.S. at 214.

<sup>67</sup> *Id.* at 204, 207 (“Section 2619, Revised Statutes . . . provides that the provisions of the Naturalization Act shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent.”) (citations omitted).

<sup>68</sup> *See* Mumford, *supra* note 55, at 295.

<sup>69</sup> *See* LÓPEZ, *supra* note 5, at 82-83.

<sup>70</sup> *See Bhagat Singh Thind*, 261 U.S. at 213.

<sup>71</sup> LESLIE VINCENT TISCHAUSER, *JIM CROW LAWS* 1–16 (2012).

<sup>72</sup> *Id.* at 1–32.

commonplace in the Jim Crow South.<sup>73</sup> Whites feared property crimes, violence, and “sexual aggression” from newly freed slave populations.<sup>74</sup> At least 4,425 lynchings were documented between 1877 and 1950, which often involved burning, mutilation, and dismemberment.<sup>75</sup>

Widespread mob violence in the South led many to question whether southern states could maintain the supremacy of legal authority.<sup>76</sup> White mobs terrorized Black communities in dozens of cities in the early twentieth century culminating in the Red Summer of 1919.<sup>77</sup> Many of these violent outbursts of racial hatred, which are often omitted from history books, followed a similar pattern: a White mob would form, demand to lynch a Black man accused of an interracial crime, and then riot—indiscriminately killing African Americans and burning Black homes and businesses with few, if any, repercussions.<sup>78</sup> In the first half of the twentieth century, the threat of racial violence overshadowed numerous trials in the South and deprived many African American defendants of basic due process.<sup>79</sup> *Moore v. Dempsey*, *Powell v. Alabama*, and *Brown v. Mississippi* show the close nexus between state sanctioned capital punishment and lynching.<sup>80</sup>

The events that led to *Moore* began in 1919 when a number of White farmers and law enforcement officers purportedly shot into a union meeting of Black sharecroppers in Phillips County, Arkansas, before the sharecroppers returned fire, killing a White man.<sup>81</sup> Days

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<sup>73</sup> NGOZI NDULUE, *ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY* 5–10 (Robert Dunham ed., 2020).

<sup>74</sup> STEIKER & STEIKER, *supra* note 6, at 22.

<sup>75</sup> *Id.* at 25; NDULUE, *supra* note 73, at 6.

<sup>76</sup> See generally Elwood M. Beck et al., *Contested Terrain: The State Versus Threatened Lynch Mob Violence*, 121 AM. J. SOCIO. 1856, 1856–1884 (2016).

<sup>77</sup> See generally JAN VOOGD, *RACE RIOTS & RESISTANCE: THE RED SUMMER OF 1919* ix–118 (2008).

<sup>78</sup> *Id.* at 18; LES PAYNE & TAMARA PAYNE, *THE DEAD ARE ARISING: THE LIFE OF MALCOLM X* 13–23 (2020).

<sup>79</sup> See NDULUE, *supra* note 73, at 5–8.

<sup>80</sup> See *Moore v. Dempsey*, 261 U.S. 86, 91 (1923); *Powell v. Alabama*, 287 U.S. 45, 47–48 (1932); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936); see generally STEWART EMORY TOLNAY & ELWOOD M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930* 1–16 (1995) (discussing the legacy of racial violence in the South).

<sup>81</sup> *Moore*, 261 U.S. at 87.



of mob violence followed, and scores of African Americans were killed.<sup>82</sup> In the mayhem, a second White man was allegedly shot and killed, and numerous African Americans were arrested, including the five petitioners in *Moore*.<sup>83</sup> After the arrests, a mob marched on the jail, and demanded to lynch the defendants before it was disbursed by law enforcement with assurances that “the law” would be carried out, presumably meaning the defendants would be executed.<sup>84</sup>

As the sharecroppers’ trial neared, witnesses were beaten until they gave evidence, and a mob surrounded the courthouse threatening anyone “interfering with the desired result.”<sup>85</sup> The defendants were convicted after an abbreviated trial of less than an hour.<sup>86</sup> Defense counsel did not consult with their clients, make any legal challenges, or call any witnesses, and after deliberating for less than five minutes, an all-white jury returned guilty verdicts.<sup>87</sup> Following a *habeas corpus* petition, the Supreme Court held that the petitioners’ rights to due process had been violated, opining that “[a] trial for murder in a state court in which the accused are hurried to conviction under mob domination without regard for their rights, is without due process of law and absolutely void.”<sup>88</sup>

The petitioners in *Powell* were Black teenagers accused of raping two White women on a freight train in northern Alabama in 1931.<sup>89</sup> The young men, who became known as the Scottsboro Boys, were held under close military guard through every stage of their detainment and trials, owing to a tense atmosphere of mob hostility.<sup>90</sup> The defendants were not given time to secure counsel and were not provided with counsel until the day of trial, when they were represented by a lawyer who admitted the defendants “would be better off if he should step entirely out of the case” and a second equally

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<sup>82</sup> Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50–51 (2000).

<sup>83</sup> See *id.* at 51; *Moore*, 261 U.S. at 87–88.

<sup>84</sup> *Moore*, 261 U.S. at 88–89.

<sup>85</sup> *Id.* at 89.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 86.

<sup>89</sup> Klarman, *supra* note 82, at 51.

<sup>90</sup> *Id.*; *Powell v. Alabama*, 287 U.S. 45, 51 (1932).

ill-equipped member of the bar.<sup>91</sup> The defendants, who were rushed to trial, received nothing more than a “*pro forma*” defense, and were sentenced to death in a series of trials that were completed in a day.<sup>92</sup> When the defendants’ appeals reached the Supreme Court, the *Powell* Court held that the teenagers’ rights under the Due Process Clause of the Fourteenth Amendment had been violated, noting:

a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.<sup>93</sup>

A few years later in 1934, the events unfolded that would lead to the *Brown* decision.<sup>94</sup> Three African American men were accused of murdering a White farmer in Kemper County, Mississippi.<sup>95</sup> The men were intimidated, beaten, and tortured by a mob, including law enforcement officers, until they confessed to stories dictated to them.<sup>96</sup> After an abrupt trial, the men were convicted and sentenced to death based on the coerced confessions alone.<sup>97</sup> A *habeas corpus* petition made its way to the Supreme Court, and the *Brown* Court held that confessions extracted through the use of force violated the Due Process Clause of the Fourteenth Amendment, emphasizing that “[t]he rack and torture chamber may not be substituted for the witness stand.”<sup>98</sup> Together *Moore*, *Powell*, and *Brown* provide a glimpse of grave injustices, an ominous shadow of mob violence, and a flagrant disregard for the constitutional rights of African Americans in the Jim Crow South.

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<sup>91</sup> Klarman, *supra* note 82, at 55; *Powell*, 287 U.S. at 51–58.

<sup>92</sup> *Powell*, 287 U.S. at 58 (emphasis added).

<sup>93</sup> *Id.* at 59.

<sup>94</sup> *Brown v. Mississippi*, 297 U.S. 278, 281 (1936).

<sup>95</sup> *Id.* at 279.

<sup>96</sup> *Id.* at 281–283.

<sup>97</sup> *Id.* at 284.

<sup>98</sup> *Id.* 285–286.

D. *Reforming the Death Penalty During the Civil Rights Era*

The Civil Rights Movement was instrumental in reforming the death penalty due in large part to the steadfast work of the National Association for the Advancement of Colored People (“NAACP”) and the Legal Defense Fund (“LDF”).<sup>99</sup> Until the 1970s, juries had standardless discretion to impose the death penalty, and when they did, racial discrepancies in sentencing rates were extremely conspicuous.<sup>100</sup> For example, between 1930 and 1967, 455 inmates were executed for rape, and 405, or 89%, were Black.<sup>101</sup> The LDF relied on empirical evidence to support several death penalty appeals.<sup>102</sup> To show statewide discrimination in Arkansas in *Maxwell v. Bishop*, LDF attorneys introduced statistical evidence that Black defendants were significantly more likely to receive a death sentence when charged with raping a White woman than any other defendant-victim combination.<sup>103</sup> The Eight Circuit rejected this evidence concluding that it did not show discrimination in the case at hand.<sup>104</sup> In the years that followed the *Maxwell* decision, many courts have echoed this mantra to avoid addressing glaring social inequalities.<sup>105</sup>

After focusing primarily on capital cases involving Black defendants charged with nonhomicidal crimes, the LDF began representing every death row inmate it could, regardless of race, and brought as many procedural challenges possible in an attempt to impose a *de facto* moratorium on the death penalty.<sup>106</sup> The work of the LDF led to a slew of Supreme Court cases, and notably to *McGautha v. California*, where the Court held that unitary proceedings that

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<sup>99</sup> See generally, Eric L. Muller, *The Legal Defense Fund’s Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL’Y REV. 158, 158–187 (1985) (discussing the history of the LDF).

<sup>100</sup> STEIKER & STEIKER, *supra* note 6, at 43–44.

<sup>101</sup> *Id.* at 44.

<sup>102</sup> Muller, *supra* note 99, at 164–166.

<sup>103</sup> *Maxwell v. Bishop*, 398 F.2d 138, 143 (8th Cir 1968); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, U. CHI. L. REV. 243, 256 (2015).

<sup>104</sup> *Maxwell*, 398 F.2d at 147.

<sup>105</sup> Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 509–527 (1994).

<sup>106</sup> Muller, *supra* note 99, at 164–170 (“LDF attorneys sought postponements for all rape cases on appeal . . . us[ing] statistics to bolster their demands for outright abolition of the death penalty for rape . . .”).

assessed guilt and sentencing simultaneously, and the standardless discretion juries had to impose the death penalty, did not violate the Due Process Clause of the Fourteenth Amendment.<sup>107</sup> Although *McGautha* appeared to be the death knell of the moratorium movement, in 1972, the Supreme Court reversed course in *Furman v. Georgia*.<sup>108</sup>

In *Furman*, the Supreme Court issued a *per curiam* opinion followed by nine separate opinions, with the majority holding that the death penalty violated the Eighth and Fourteenth Amendments.<sup>109</sup> Although it is difficult to distill a 50,000 word opinion, and only Justices Marshall and Brennan believed the death penalty was *per se* unconstitutional, the five Justices in the majority were primarily concerned with arbitrary death sentencing patterns that appeared divorced from crime characteristics, the unfettered discretion of judges and juries to impose capital sentences, discrepancies in sentencing across racial and social groups, and the excessive and abhorrent nature of the punishment.<sup>110</sup> It followed from *Furman*, by implication, that all capital sentencing statutes nationwide were unconstitutional.<sup>111</sup>

In the wake of *Furman*, 558 death sentences were commuted to life in prison in jurisdictions across the country.<sup>112</sup> In the two years after the decision, over thirty states amended their death penalty statutes.<sup>113</sup> Many of these statutes narrowed the number of capital crimes, bifurcated the guilt and sentencing phases of trials, allowed

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<sup>107</sup> *McGautha v. California*, 402 U.S. 183, 221–222 (1971).

<sup>108</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

<sup>109</sup> *Id.*; Daniel D. Polsby, *The Death of Capital Punishment?* *Furman v. Georgia*, 1972 SUP. CT. REV. 1, 1 (1970).

<sup>110</sup> James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 5 (1989); Sherod Thaxton, *Un-Gregg-Ulated: Capital Charging and the Missing Mandate of Gregg v. Georgia*, 11 DUKE J. CONST. L. & PUB. POL'Y 145, 149–152 (2016); Polsby, *supra* note 109, at 11–15.

<sup>111</sup> Thaxton, *supra* note 110, at 149 (“According to the Court, *all* existing capital punishment statutes—both state and federal—were unconstitutional as applied . . . .”); Polsby, *supra* note 109, at 1 (“By implication, most or all extant statutes in American jurisdictions that prescribe the death penalty are unconstitutional.”).

<sup>112</sup> Thaxton, *supra* note 110, at 149; Marquart & Sorensen, *supra* note 110, at 7.

<sup>113</sup> Baldus et al., *supra* note 12, at 1649.

defendants to enter mitigating evidence in a pre-sentencing hearing, mandated jury instructions, implemented weighing procedures requiring capital juries to balance aggravating and mitigating factors, and provided for mandatory review of every death sentence by the jurisdiction's highest court.<sup>114</sup>

#### E. *The Modern Era of the Death Penalty*

In 1974, Leon Gregg received four death sentences under new Georgia statutes passed in the wake of *Furman*.<sup>115</sup> His appeals challenging the constitutionality of the death penalty in Georgia reached the Supreme Court in 1976 and were consolidated with similar appeals from four other states.<sup>116</sup> In *Gregg v. Georgia*, the Court concluded that the new death penalty statutes in Georgia, North Carolina, and Texas were constitutional, and “[t]he new procedures on their face satisf[ied] the concerns of *Furman*.”<sup>117</sup> Although the *Gregg* Court concluded that post-*Furman* reforms were adequate, empirical research in the years that followed provides evidence that the death penalty continued to be imposed disproportionately to punish African Americans, particularly African Americans accused of killing White victims.<sup>118</sup>

In 1987, in *McCleskey v. Kemp*, the Supreme Court directly addressed the question of whether statistical evidence showing that a Black defendant was more likely to receive a death sentence if he killed a White victim violated the Eighth and Fourteenth Amendments.<sup>119</sup> The statistical studies at the heart of *McCleskey*, which were conducted by Baldus and colleagues and funded by the LDF, analyzed 2,484 homicide cases in Georgia between 1973 and 1978, controlling for numerous covariates.<sup>120</sup> The Baldus study found that

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<sup>114</sup> Thaxton, *supra* note 110, at 153.

<sup>115</sup> *Id.* at 154.

<sup>116</sup> *Gregg v. Georgia*, 428 U.S. 153, 153 (1976).

<sup>117</sup> *Id.* at 155.

<sup>118</sup> Baldus et al., *supra* note 12, at 1731.

<sup>119</sup> *McCleskey v. Kemp*, 481 U.S. 279, 279 (1987).

<sup>120</sup> See David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 661–753 (1983); David C. Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375, 1375–1407 (1985); Samuel R. Gross, *David Baldus and the Legacy of McCleskey V. Kemp*, 97 IOWA L. REV. 1905, 1917 (2012).

21% of Black defendants and 8% of White defendants received a death sentence for killing a White victim.<sup>121</sup> In comparison, 1% of Black defendants and 3% of White defendants received a death sentence for killing a Black victim.<sup>122</sup> The authors calculated that the odds that a defendant would receive a death sentence were 4.3 times higher if the victim killed was White.<sup>123</sup>

The *McCleskey* Court dismissed the statistical findings of the Baldus study in similar fashion to the Eighth Circuit in *Maxwell*, opining “[t]he statistics do not *prove* that race enters into any capital sentencing decisions or that race was a factor in petitioner’s case.”<sup>124</sup> The *McCleskey* Court also noted that statistical evidence was better directed at legislatures and deemed that existing judicial safeguards were sufficient to protect against discrimination.<sup>125</sup> Although not reflected in the *McCleskey* Court’s decision, Baldus and colleagues questioned whether the fact that their statistical findings showed race-of-victim bias, a factor under a murderer’s control, rather than race-of-defendant bias, undermined *McCleskey*’s “moral” claim.<sup>126</sup> Regardless, the decisions in *Gregg* and *McCleskey* largely extinguished the hope generated by *Furman*.<sup>127</sup>

#### F. *A New Era of Segregation*

In addition to addressing social injustice in capital trials, the Civil Rights movement was hugely influential in addressing *de jure* racial segregation in American society.<sup>128</sup> By the latter half of the twentieth century, *de jure* segregation was on the decline, and a new era of *de facto* segregation of urban and suburban space took hold.<sup>129</sup> Over four million African Americans left the South between 1940 and 1970, and by 1980, 73% of metropolitan Blacks lived in inner cities compared to 33% of metropolitan Whites.<sup>130</sup> For every

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<sup>121</sup> Baldus et al., *supra* note 12, at 1731.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *McCleskey*, 481 U.S. at 282.

<sup>125</sup> *Id.* at 313, 319.

<sup>126</sup> Baldus et al., *supra* note 12, at 1733.

<sup>127</sup> See Gross, *supra* note 120, at 1921–22.

<sup>128</sup> Goldberg, *supra* note 7, at 16–17.

<sup>129</sup> Leah Platt Boustan, *Was Postwar Suburbanization “White Flight”?* *Evidence from the Black Migration*, 125 Q. J. ECON. 417, 418–419 (2010).

<sup>130</sup> *Id.* at 417–18.

African American that settled in a city, an estimated 2.7 Whites moved to the suburbs.<sup>131</sup> These demographic shifts coincided with industrial decline and concentrated African Americans in disadvantaged inner-city areas with high poverty, high unemployment, poor schools, poor social services, and little investment.<sup>132</sup> Many predominantly Black cities in the South faced similar issues.<sup>133</sup>

Empirical research shows that crime rates are typically higher in extremely disadvantaged neighborhoods, and local structural disadvantages account for White-Black differences in crime.<sup>134</sup> Higher rates of segregation in urban areas are associated with higher levels of violent crime, regardless of neighborhood racial composition.<sup>135</sup> Empirical evidence also shows higher rates of violence in places with fewer manufacturing jobs.<sup>136</sup> As manufacturing moved overseas, economic segregation intensified and led to higher rates of poverty in Black communities, a factor which typically leads to higher crime.<sup>137</sup> These problems were compounded by the War on Drugs, heavy-handed policing, and an emphasis on punitiveness across the political spectrum that led to mass incarceration, particularly of minorities.<sup>138</sup> More recent research shows that, although violence and property crime decreased from 2010 to 2013 in most areas, the decline was more modest in African American communities.<sup>139</sup> This research suggests that the Black-White crime gap is widening, and racially disproportionate trends in arrests and convictions are likely to continue.<sup>140</sup>

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<sup>131</sup> *Id.* at 419.

<sup>132</sup> Goldberg, *supra* note 7, at 18.

<sup>133</sup> *Id.* at 19.

<sup>134</sup> Krivo et al., *supra* note 19, at 352.

<sup>135</sup> Lauren J. Krivo et al., *Segregation, Racial Structure, and Neighborhood Violent Crime*, 114 AM. J. SOC. 1765, 1789 (2009).

<sup>136</sup> *Id.* at 1785, 1793.

<sup>137</sup> See Krivo et al., *supra* note 19, at 350–53; Krivo et al., *supra* note 135, at 1768–71; Goldberg, *supra* note 7, at 18–19.

<sup>138</sup> *Id.* at 351–53, 365; Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 8–18 (2011).

<sup>139</sup> Krivo et al., *supra* note 19, at 359–64.

<sup>140</sup> *Id.* at 364–65.

## II. EMPIRICAL RESEARCH ON JUROR DECISION-MAKING

Meta-analyses of empirical studies of juror decision-making provide strong evidence of race-of-victim bias but only modest evidence of race-of-defendant bias with high between-study heterogeneity, indicating that race-of-defendant bias is likely moderated by other variables.<sup>141</sup> Although early mock juror research suggests that race-of-defendant guilt and sentencing bias is moderated by explicit racial bias,<sup>142</sup> few researchers have reexamined these relationships.<sup>143</sup>

### A. *Studies of Race-of-Victim Bias*

In 1990, given concerns over racial disparities in death-sentencing patterns in the wake of *Furman*, the United States General Accounting Office (“GAO”) conducted a review of capital charging, sentencing, and conviction rates.<sup>144</sup> The GAO considered 28 post-*Furman* studies of 23 datasets, 82% of the studies reported that a victim’s race influenced the likelihood that a defendant would be capitally charged or receive a death sentence—defendants accused of murdering Whites were more likely to receive a death sentence than those accused of killing Blacks.<sup>145</sup> However, the impact of a defendant’s race on sentencing outcomes, irrespective of a victim’s race, was less clear and varied across studies.<sup>146</sup> In 1998, Baldus and George Woodworth expanded the GOA report and found evidence of race-of-victim disparities favoring White victims in twenty-five of thirty jurisdictions, and evidence of race-of-defendant disparities favoring White defendants in thirty jurisdictions.<sup>147</sup>

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<sup>141</sup> See *infra* Sections II.A–B.

<sup>142</sup> See John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCH. 510, 524 (1997) [hereinafter *Nature of Prejudice*].

<sup>143</sup> See *infra* note 155 and accompanying text.

<sup>144</sup> U.S. GEN. ACCT. OFF., GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 1–5 (1990).

<sup>145</sup> *Id.* at 3–5.

<sup>146</sup> *Id.* at 6.

<sup>147</sup> David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 501, 519 (James R. Acker et al. eds., 2d ed. 2003).



In 2006, Jennifer Eberhardt and colleagues added an important dimension to death penalty research on race-of-victim bias.<sup>148</sup> The authors analyzed forty-four capital trials from Philadelphia between 1977 and 1999 with Black defendants and White victims.<sup>149</sup> The authors had undergraduate students rate images of the defendants based on how stereotypically Black they looked.<sup>150</sup> The results showed that 24.4% of the defendants who were considered less stereotypically Black received a death sentence, compared to 57.5% of defendants who were deemed more stereotypically Black.<sup>151</sup> The authors also evaluated a subset of 118 trials where both the defendant and victim were Black.<sup>152</sup> The death sentencing rate was 46.6% for defendants considered less stereotypically Black and 45% for defendants considered more stereotypically Black, a difference that was not statistically significant.<sup>153</sup> These results supported the authors' conclusion that jurors were more biased against defendants who looked more stereotypically Black, but only if the victim was White.<sup>154</sup>

More recently, in 2015, Frank R. Baumgartner and colleagues evaluated thirty capital-prosecution studies from 1976 to 2007 and found that, in every study, killers of Whites were more likely than killers of Blacks to be capitally prosecuted.<sup>155</sup> The authors also found that of the seventy-eight post-*Furman* capital-sentencing studies they considered, sixty-nine studies reported evidence of race-of-victim bias.<sup>156</sup> The average bias ratio was 2.85 in prosecution studies and 6.93 in sentencing studies.<sup>157</sup> Ratios of 1.00 would indicate that defendants were equally likely to be capitally prosecuted and sentenced, respectively, regardless of whether the victim was White or Black.<sup>158</sup> The fact that both ratios were higher than

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<sup>148</sup> Eberhardt et al., *supra* note 34, at 383.

<sup>149</sup> *Id.* at 383–84.

<sup>150</sup> *Id.* at 384.

<sup>151</sup> *Id.* (reporting a statistically significant *F*-statistic ( $F = 4.11, p < 0.05$ )).

<sup>152</sup> *Id.* at 384–85.

<sup>153</sup> *Id.* at 385 (reporting an *F*-statistic of  $F < 1$ ).

<sup>154</sup> *See id.*

<sup>155</sup> Baumgartner et al., *supra* note 24, at 211–12, 219 n.6.

<sup>156</sup> *Id.* at 212.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 211–212.

1.00 indicates that killers of Whites were more likely to be capitally prosecuted and sentenced than killers of Blacks.<sup>159</sup>

Baumgartner and colleagues also studied all the executions reported in the United States between 1977 and 2013 and collected information on the associated victims.<sup>160</sup> The results showed that the ratio of executions relative to homicides by race of offender and victim was 3.83 for the Black defendant/White victim group, 1.02 for the White Defendant/White victim group, 0.46 for Black defendant/Black victim group, and 0.34 for the White defendant/Black victim group.<sup>161</sup> These results indicate that Black defendants were over eleven times more likely to be executed for killing a White victim than a Black victim.

### B. *Studies of Race-of-Defendant Bias*

In 1992, Craig Haney and Laura T. Sweeney conducted a meta-analysis of fourteen experimental studies that included nineteen statistical tests of race-of-defendant sentencing bias.<sup>162</sup> One of the studies examined capital sentencing, while the other thirteen considered non-capital cases.<sup>163</sup> The results indicated that mock jurors were significantly more punitive towards Black defendants than White defendants, but the effect size was small.<sup>164</sup> The authors also examined potential sources of between-study heterogeneity.<sup>165</sup> The results indicated that studies that included more methodological rigor, illustrated the defendant pictorially, and considered the race of mock jurors, the defendant, and the victim uncovered race-of-defendant bias more consistently.<sup>166</sup>

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<sup>159</sup> *See id.*

<sup>160</sup> *Id.* at 215–216.

<sup>161</sup> *Id.* at 216–17.

<sup>162</sup> Sweeney & Haney, *supra* note 27, at 183–85.

<sup>163</sup> *Id.* at 184.

<sup>164</sup> *Id.* at 189, 190 (reporting a significant  $p$ -value ( $p < 0.001$ ) and noting that “[t]he estimated average effect size (Cohen’s  $d$ ) across the 19 samples was 0.173, which could be characterized as a rather small effect”). For reference, a Cohen’s  $d$  of 0.2 is considered small, 0.5 is considered medium, and 0.8 is considered large.

<sup>165</sup> *See id.* at 186–88.

<sup>166</sup> *Id.* at 186–88, 190, 191 (reporting a larger, but still modest, Cohen’s  $d$  ( $d = 0.263$ ,  $k = 7$ ,  $n = 1,865$ ) for a sub-sample of studies where the subjects’ race and victims’ race were specified).

Two years later, Ronald Mazzella and Alan Feingold conducted a meta-analysis of research on mock juror decision-making, which included an examination of twenty-nine studies that considered both defendant and victim race.<sup>167</sup> The authors found no evidence of race-of-defendant bias in either the full sample of studies that evaluated verdicts or the studies that independently considered murder, assault, rape, and negligent homicide.<sup>168</sup> The authors also did not find evidence of race-of-defendant bias in sentencing in the full sample or when studies of theft, assault, and rape were considered independently.<sup>169</sup> However, there was evidence that mock jurors were more punitive in sentencing towards Black defendants in negligent homicide studies and towards White defendants in studies of fraud.<sup>170</sup> The authors concluded that high levels of heterogeneity between studies suggested that differences in methodological approaches, statistical measures, and a complex interaction of variables impacted the results.<sup>171</sup>

After more than a decade of additional research, a consensus still had not emerged regarding race-of-defendant bias.<sup>172</sup> In 2005, Tara L. Mitchell and colleagues hypothesized that mock jurors would show more race-of-defendant out-group bias against defendants of a different race.<sup>173</sup> The authors found a statistically significant but small effect size, indicating very slight race-of-defendant out-group bias in mock juror verdicts.<sup>174</sup> Similarly to previous meta-analyses,

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<sup>167</sup> Mazzella & Feingold, *supra* note 27, at 1319, 1325, 1330, 1332–34.

<sup>168</sup> *Id.* at 1325, 1330, 1333 (reporting a Cohen's *d* very close to zero for the full sample of studies ( $d = 0.01$ ,  $k = 21$ ,  $n = 3486$ )).

<sup>169</sup> *Id.* (reporting a small Cohen's *d* of for the full sample ( $d = 0.06$ ,  $k = 27$ ,  $N = 4045$ )).

<sup>170</sup> *Id.* at 1332–33 (reporting a modest Cohen's *d* for non-negligent homicide ( $d = 0.22$ ,  $k = 5$ ,  $n = 506$ ) and for fraud ( $d = -0.37$ ,  $k = 4$ ,  $n = 231$ ), and concluding “there was consistent evidence of heterogeneity of race effects on guilt attributions”).

<sup>171</sup> *Id.* at 1325, 1330, 1333–35 (reporting chi-square tests of homogeneity of effect sizes with *p*-values of  $p < 0.001$  for studies of race-of-victim and race-of-defendant bias in guilt and sentencing decisions).

<sup>172</sup> See Mitchell et al., *supra* note 27, at 621–24 (reviewing the literature on racial bias and jury decision-making and noting inconsistencies among the then-current state of the field).

<sup>173</sup> *Id.* at 627.

<sup>174</sup> *Id.* (reporting a statistically significant Z-statistic ( $Z = 3.93$ ,  $p < 0.001$ ) and a modest Cohen's *d* ( $d = 0.09$ ,  $k = 46$ ,  $n = 7,397$ )).

the authors noted high between-study heterogeneity.<sup>175</sup> When the authors considered punitiveness in sentencing, they found a slightly larger, but still small, effect reflective of slight race-of-defendant out-group sentencing bias.<sup>176</sup> Once again, there was large between-study heterogeneity.<sup>177</sup>

More recently, in 2014, Devine and Caughlin meta-analyzed the effects of mock juror attributes on guilt judgments.<sup>178</sup> The greatest effects, albeit still modest, were associated with authoritarianism and trust in the legal system.<sup>179</sup> The authors found limited evidence that Black jurors showed stronger out-group bias than White jurors.<sup>180</sup> Given high levels of heterogeneity, Devine and Caughlin conducted moderator analyses.<sup>181</sup> Effect sizes were once again small, but the authors found that mock jurors with higher authoritarianism scores were significantly more likely to convict in homicide cases and in capital trials than mock jurors with lower authoritarianism scores, and men were more likely to convict or recommend death in capital trials than women.<sup>182</sup>

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<sup>175</sup> *Id.* (reporting a significant Cochran's  $Q$  ( $Q = 279.28, p < 0.001$ )).

<sup>176</sup> *Id.* at 628 (reporting a significant  $Z$ -statistic ( $Z = 5.10, p < 0.001$ ) and a small Cohen's  $d$  ( $d = 0.19, k = 20, N = 3,141$ )).

<sup>177</sup> *Id.* at 627-629.

<sup>178</sup> Devine & Caughlin, *supra* note 27, at 109-10 (discussing authoritarianism and trust in the legal system).

<sup>179</sup> *Id.* at 115 (reporting statistically significant but small mean-weighted Pearson's correlation coefficients for juror authoritarianism ( $\bar{r} = 0.17, k = 11, N = 2,938, p < 0.01$ ) and for trust in the legal system ( $\bar{r} = 0.22, k = 17, N = 2,763, p < 0.01$ )). For reference, sample mean-weighted Pearson correlations ( $\bar{r}$ ) of 0.00 to 0.30 are generally considered small. See also *SPSS TUTORIALS: PEARSON CORRELATION*, KENT ST. UNIV. LIBR., <https://libguides.library.kent.edu/SPSS/PearsonCorr> (last visited Nov. 3, 2021).

<sup>180</sup> *Id.* (reporting a non-significant mean-weighted Pearson's correlation coefficient ( $\bar{r} = 0.13, k = 10, N = 1,029, p > 0.05$ ) for White mock jurors and a significant mean-weighted Pearson's correlation coefficient ( $\bar{r} = -0.02, k = 32, N = 4,476, p < 0.05$ ) for Black mock jurors).

<sup>181</sup> *Id.* at 118.

<sup>182</sup> *Id.* at 119 (reporting statistically significant ( $p < 0.01$ ) mean-weighted Pearson's correlation coefficient for juror authoritarianism in homicide cases ( $\bar{r} = 0.20, k = 13, N = 2,528, p < 0.01$ ), capital trials ( $\bar{r} = 0.21, k = 8, N = 1,930, p < 0.01$ ), and for men in capital trials ( $\bar{r} = -0.07, k = 9, N = 3,621, p < 0.05$ )).

### C. *Studies of Explicit and Implicit Bias*

Many people who hold explicitly racist views are aware that racial stereotypes affect their decision-making and act in unabashedly racist and intentionally discriminatory ways.<sup>183</sup> This first form of overt bias is known as explicit bias.<sup>184</sup> Many other people claim, and even believe, that they hold egalitarian views and are unaware that racial stereotypes subtly affect their thoughts and actions.<sup>185</sup> This second form of bias is known as implicit bias.<sup>186</sup> Explicit bias is typically studied by social scientists using survey methods, while implicit bias is typically studied with implicit association tests (“IATs”).<sup>187</sup> Although racism operates on multiple levels of consciousness in complex ways, many scholars prefer to temporarily dichotomize racism as explicit and old-fashioned or implicit and modern.<sup>188</sup> This dichotomization has led many scholars to dismiss explicit racism as a relic of the past and focus their attention primarily, if not exclusively, on implicit bias.<sup>189</sup> As a result, studies of implicit bias have proliferated, yielding important insights and

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<sup>183</sup> John F. Dovidio et al., *Reducing Contemporary Prejudice: Combating Explicit and Implicit Bias at the Individual and Intergroup Level*, in REDUCING PREJUDICE AND DISCRIMINATION 137, 137 (Stuart Oskamp ed., 2000) [hereinafter *Reducing Contemporary Prejudice*].

<sup>184</sup> Selmi, *supra* note 37, at 198.

<sup>185</sup> *Reducing Contemporary Prejudice*, *supra* note 183, at 137–38.

<sup>186</sup> Selmi, *supra* note 37, at 194.

<sup>187</sup> *Id.* at 198–99. IATs measure the differential association of concepts. For example, study participants may be asked to press a key on a computer keyboard when they see a word or concept in one of two categories. When the concepts mapped onto the same key are associated, responses are typically faster. If study participants are asked to press one button when they see a female face or name and a second button when they see a male face or name, they are likely to respond faster than if they were asked to press one button when they see a female face and a male name and a second button when they see a male face and a female name. See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464–80 (1998). Researchers have adapted this methodology to study unconscious racial bias in a variety of ways. See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 876–93 (2004) (showing that White study participants subliminally primed with an image of an African American face recognized images of weapons more quickly than participants subliminally primed with a White face).

<sup>188</sup> Selmi, *supra* note 37, at 198.

<sup>189</sup> See *id.* at 198–99.

inspiring numerous acolytes, but often at the expense of a more holistic approach.<sup>190</sup>

While dozens of researchers have studied race-of-victim and race-of-defendant bias over the past few decades, surprisingly few have considered the effects of implicit bias on juror decision-making—fewer still have examined the effects of explicit bias.<sup>191</sup> Two seminal studies led by John F. Dovidio provide insight into the impact of implicit and explicit bias on mock juror decision-making.<sup>192</sup> The first of these studies examined the behavior of 104 undergraduate mock jurors.<sup>193</sup> The authors hypothesized that mock jurors who self-reported high levels of explicit racial bias would show strong race-of-defendant bias, and those with low self-reported scores would show a more nuanced pattern.<sup>194</sup> Mock jurors participating in the study read a summary of a death penalty trial and were told they would participate in the sentencing phase of the trial.<sup>195</sup> They were then shown a video of five other student jurors who advocated for the death sentence.<sup>196</sup> Mock jurors were randomly assigned to treatment groups where the race of the defendant was varied between White and Black and the race of one of the five jurors was varied between White and Black—the remaining jurors were White.<sup>197</sup>

Mock jurors were asked how likely they were to recommend the death penalty on a seven-point scale, with higher scores indicating they were more likely to recommend a death sentence.<sup>198</sup> Statistical tests revealed that high-prejudice mock jurors were more punitive towards the Black defendant than the White defendant regardless of

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<sup>190</sup> See, e.g., *id.* at 195 n.5.

<sup>191</sup> My goal is to remind scholars of the importance of explicit bias rather than criticize individual researchers, so I have omitted citations. See generally 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, 311 (2010) (reviewing studies of implicit bias).

<sup>192</sup> John F. Dovidio et al., *Racial Attitudes and the Death Penalty*, 27 J. APPLIED SOC. PSYCH. 1468, 1480 (1997) [hereinafter *Racial Attitudes*]; *Nature of Prejudice*, *supra* note 142, at 530–35.

<sup>193</sup> *Racial Attitudes*, *supra* note 192, at 1472–73.

<sup>194</sup> *Id.* at 1472.

<sup>195</sup> *Id.* at 1473.

<sup>196</sup> *Id.* at 1473–74.

<sup>197</sup> *Id.* at 1473.

<sup>198</sup> *Id.* at 1474.

the racial composition of the mock jury.<sup>199</sup> Low-prejudice mock jurors reported the lowest mean sentencing scores when the jury was all White and the defendant was Black.<sup>200</sup> However, when a Black juror advocated for the death penalty, low-prejudice mock jurors were significantly more likely to recommend death for the Black defendant.<sup>201</sup> These results support the authors' hypothesis that explicit racism affects decision-making in more direct ways, and implicit biases operate in more subtle, indirect ways.<sup>202</sup>

The second seminal study by Dovidio and colleagues, which included thirty-three undergraduate mock jurors, also examined the effects of implicit and explicit bias on determinations of guilt.<sup>203</sup> After completing IATs and explicit bias diagnostics, mock jurors were told they would be participating in an unrelated study and were asked to assess the guilt of a Black defendant accused of an interracial, double-murder before assessing the guilt of a Black defendant accused of assaulting a White man.<sup>204</sup> Statistical tests showed that measures of explicit racial bias were highly correlated with ratings of guilt.<sup>205</sup> In contrast, there was no evidence that measures of implicit bias were associated with ratings of guilt.<sup>206</sup> Based on these results, the authors concluded implicit bias is most relevant to spontaneous race-related decisions, while explicit bias is more relevant to deliberative race-related decisions like assessing guilt.<sup>207</sup>

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<sup>199</sup> *Id.* at 1478 (reporting the results of an ANCOVA showing that high-prejudiced mock jurors' adjusted mean sentencing scores were significantly higher ( $F = 4.37, p < 0.04$ ) for the Black defendant treatment ( $M = 4.70$ ) than the White defendant treatment ( $M = 3.71$ )).

<sup>200</sup> *Id.* at 1477, 1480 (reporting higher adjusted mean sentencing scores for both men ( $M = 2.49$  versus  $M = 4.82$ ) and women ( $M = 2.18$  versus  $M = 4.18$ ) when the jury was all White and the defendant was Black).

<sup>201</sup> *Id.* at 1478, 1480 (reporting low-prejudiced mock jurors were more likely to sentence the Black defendant to death when a Black juror was present ( $t = 3.07, p < 0.01$ ) and more likely to sentence the Black defendant to death than a White defendant when a Black juror was present ( $t = 1.74, p < 0.04$ )).

<sup>202</sup> *Id.* at 1480.

<sup>203</sup> *Nature of Prejudice, supra* note 142, at 521–22.

<sup>204</sup> *Id.* at 521–22.

<sup>205</sup> *Id.* at 523–24 (reporting a statistically significant Pearson's correlation coefficients for scores on the Old-Fashioned Racism Scale ( $r = 0.51, p < 0.003$ ) and Modern Racism Scale ( $r = 0.48, p < 0.033$ ) but not a word-completion IAT ( $r = -0.15, p < 0.432$ )).

<sup>206</sup> *Id.* at 523.

<sup>207</sup> *See id.* at 524.

#### D. *Contradictory Studies and the Shift Towards Implicit Bias*

Despite the findings of Dovidio and colleagues, which provide evidence that race-of-defendant bias is moderated by explicit racial bias, research in the years that followed showed a methodological shift away from measures of explicit bias towards measures of implicit bias, which many view as the key to reconciling conflicting studies.<sup>208</sup> In recent years, numerous legal scholars have described racism as almost entirely implicit in nature and have dismissed explicit racism as a relic of the past, often not even mentioning it.<sup>209</sup> Additionally, the few recent studies that have considered the relationship between explicit bias and juror decision-making have yielded conflicting results.<sup>210</sup>

In contrast to the two studies led by Dovidio, a 2004 experimental study of mock juror decision-making published by Belle L. Bottoms and colleagues found no evidence that high-prejudiced mock jurors made more racially biased guilt judgments than low-prejudiced mock jurors in child sexual abuse cases.<sup>211</sup> However, it is important to note that the 228 university students included in the study were from a socioeconomically and racially diverse university, were told not to be swayed by prejudice, and likely had a strong motivation to give socially desirable answers.<sup>212</sup> Moreover, juror racial bias is likely moderated by case type, and guilt judgments in sexual abuse cases may not show the same patterns as guilt judgments in capital cases.<sup>213</sup>

In 2010, Levinson and Young examined the association between implicit and explicit bias and juror decision-making.<sup>214</sup> The authors

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<sup>208</sup> Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012).

<sup>209</sup> See Selmi, *supra* note 37, at 195 n.5, 219–22 (discussing research on implicit bias and its pervasiveness).

<sup>210</sup> See Mitchell et al., *supra* note 27, at 621.

<sup>211</sup> Bette L. Bottoms et al., *Effects of Victim and Defendant Race on Jurors' Decisions in Child Sexual Abuse Cases*, 34 J. APPLIED SOC. PSYCHOL. 1, 16 (2004) (reporting non-significant logistic regression results ( $p > 0.05$ ) for juror prejudice level (Wald = 0.04,  $p = 0.84$ ), victim race (Wald = 1.80,  $p = 0.22$ ), defendant race (Wald = 0.27,  $p = 0.61$ ), and all interaction terms (all Wald's  $\leq .87$ , all  $p$ -values  $\geq 0.35$ )).

<sup>212</sup> *Id.* at 24–25.

<sup>213</sup> See generally Mazzella & Feingold, *supra* note 27, at 1315–38 (examining heterogeneity in juror decision-making by crime type).

<sup>214</sup> Levinson & Young, *supra* note 191, at 308, 339–40.



presented sixty-six jury-eligible university students with a description of a robbery and had them evaluate the strength of evidence, including a still image where the perpetrator's forearm was visible—his complexion was varied between light and dark depending on the treatment group.<sup>215</sup> Participants completed two measures of explicit bias, two IATs, rated how inculpatory each piece of evidence was, and rated the guilt of the defendant on a 100-point scale, with higher scores indicating higher confidence.<sup>216</sup>

Mock jurors in the treatment group that saw the image of the defendant with his complexion darkened perceived the evidence as more inculpatory and viewed the defendant as more guilty than those who saw the same man with a light complexion.<sup>217</sup> The authors found no evidence that explicit bias had an effect on guilt judgments.<sup>218</sup> The authors concluded that the race-of-defendant bias observed was implicit in nature because many mock jurors could not consistently remember the race of the defendant at the end of the study, and IAT scores were correlated with biased evidence judgments.<sup>219</sup> When interpreting these results, it is important to note that the study was conducted in Hawaii, which has a unique cultural history that is atypical for the United States, and only eighteen of the sixty-six participants were of European descent.<sup>220</sup>

More recently, in 2014, Levinson and colleagues conducted an experimental study of mock juror behavior that included 445 jury-eligible participants from Alabama, California, Florida, Oklahoma,

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<sup>215</sup> *Id.* at 331–34.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 337 (reporting MANCOVA results indicating that mock jurors viewed the evidence as significantly more inculpatory ( $F = 4.84$ ,  $p = 0.032$ ) when the defendant had a dark complexion ( $m = 86.23$ ) than when he had a light complexion ( $m = 80.49$ ) and considered the defendant with the dark complexion significantly ( $F = 4.40$ ,  $p = 0.034$ ) more guilty ( $m = 66.97$ ) than the defendant with the light complexion ( $m = 56.37$ )).

<sup>218</sup> *Id.* at 338 (reporting that all correlations and logistic regression coefficients had non-significant  $p$ -values ( $p > 0.5$ )).

<sup>219</sup> *Id.* For more information on the IAT study, which was published separately, see Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO STATE J. CRIM. L. 187, 206 (2010) (reporting regression results showing mock jurors with higher Black/Guilty ( $\beta = 0.25$ ,  $t = 2.23$ ,  $p < 0.05$ ) and Black/Unpleasantness ( $\beta = 0.34$ ,  $t = 3.04$ ,  $p < 0.05$ ) IAT scores were more likely to judge ambiguous evidence as indicative of guilt)).

<sup>220</sup> Levinson & Young, *supra* note 191, at 335–36.

and Texas.<sup>221</sup> Death-qualified mock jurors read a description of a shooting with the race of the defendant and race of the victim varied in a  $2 \times 2$  design, viewed an evidence slideshow, read victim impact testimony, and took two IATs and an explicit bias test.<sup>222</sup> The results showed no evidence of race-of-defendant or race-of-victim bias or a significant interaction between the treatments.<sup>223</sup> However, mock jurors who strongly associated White with worth, and Black with worthlessness, on a “value of life” IAT were significantly more likely to sentence the Black defendant to death than the White defendant.<sup>224</sup> Mock jurors with higher explicit bias scores were also significantly more likely to sentence a defendant accused of killing a White victim to death.<sup>225</sup>

In summary, although there is strong empirical evidence of race-of-victim bias, empirical evidence of race-of-defendant bias appears to show a more complex relationship moderated by other variables—with measures of authoritarianism, trust in the legal system, implicit racial bias, and explicit racial bias offering promising candidates.<sup>226</sup> Studies of national survey data add credence to this interpretation.<sup>227</sup> Support for the death penalty among White respondents has been consistently higher than among Black respondents.<sup>228</sup> Research also shows that an estimated one-third of this White-Black racial divide in support for the death penalty can be attributed to White racism, and rates of support for the death penalty are similar between non-racist Whites and African Americans.<sup>229</sup> Finally,

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<sup>221</sup> Levinson et al., *supra* note 26, at 553.

<sup>222</sup> *Id.* at 554–56.

<sup>223</sup> *Id.* at 561 (reporting non-significant logistic regression results for the race of defendant variable, the race of victim variable, and their interaction (all  $p$ -values  $> 0.5$ )).

<sup>224</sup> *Id.* at 562–63 (reporting statistically significant logistic regression results ( $\beta = -1.77$ ,  $p < 0.05$ )).

<sup>225</sup> *Id.* (reporting statistically significant logistic regression results ( $\beta = -1.77$ ,  $p < 0.05$ )).

<sup>226</sup> James D. Unnever & Francis T. Cullen, *The Racial Divide in Support for the Death Penalty: Does White Racism Matter?*, 85 SOC. FORCES 1281, 1281 (2007).

<sup>227</sup> Amy L. Anderson et al., *Age, Period, and Cohort Effects on Death Penalty Attitudes in the United States, 1974-2014*, 55 CRIMINOLOGY 833, 853–54 (2017).

<sup>228</sup> Unnever & Cullen, *supra* note 226, at 1281; Anderson et al., *supra* note 227, at 853–54 (2017).

<sup>229</sup> Unnever & Cullen, *supra* note 226, at 1281.

explicit measures of bias, authoritarianism, and trust in government also show a strong association with support for the death penalty in survey research.<sup>230</sup>

### III. EXPERIMENTAL DESIGN

The present article reports the results of one of the largest experimental studies of mock juror decision-making published to date. I surveyed 3,284 respondents using Amazon Mechanical Turk (“MTurk”).<sup>231</sup> Respondents were paid approximately \$1.50 to answer questions and make a sentencing decision in a mock capital trial with the race of the defendant and victim varied in a 3 × 3 experimental design. In the past, it was more difficult and expensive to recruit large samples of study participants, so many researchers relied on college students.<sup>232</sup> However, in recent years, widespread use of the Internet across demographic groups has drastically reduced the expense and increased the external validity of large-scale, online survey research.<sup>233</sup> Research shows that experimental studies conducted with MTurk generalize well to the results of studies conducted using nationally representative samples.<sup>234</sup>

Although both experimental and observational studies have yielded important results and offer insight into mock juror behavior,

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<sup>230</sup> Joe Soss et al., *Why Do White Americans Support the Death Penalty?*, 65 J. POLIT. 397, 397–421 (2003); Steven Stack, *Authoritarianism and Support for the Death Penalty: A Multivariate Analysis*, 36 SOC. FOCUS 333, 333 (2003).

<sup>231</sup> AMAZON MECHANICAL TURK, <https://www.mturk.com> (last visited May 10, 2021).

<sup>232</sup> Krista Casler et al., *Separate but Equal? A Comparison of Participants and Data Gathered Via Amazon’s Mturk, Social Media, and Face-to-Face Behavioral Testing*, 29 COMPUT. HUM. BEHAV. 2156, 2156 (2013).

<sup>233</sup> *Id.*

<sup>234</sup> Adam J. Berinsky et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com’s Mechanical Turk*, 20 POL. ANALYSIS 351, 351–66 (2012) (“the estimates of average treatment effects are similar in the MTurk and original samples”); Alexander Coppock, *Generalizing from Survey Experiments Conducted on Mechanical Turk: A Replication Approach*, 7 POL. SCI. RSCH. METHODS 613, 613–28 (2019) (finding the results did not differ much and were “relatively homogenous”); see also Scott Clifford et al., *Are Samples Drawn From Mechanical Turk Valid for Research on Political Ideology?*, 2 RSCH. & POLS. 1, 7–8 (2015).

experimental approaches provide several distinct advantages.<sup>235</sup> Observational studies require a researcher to control for numerous covariates, which adds a degree of subjectivity.<sup>236</sup> In contrast, random assignment to treatment and control groups in experimental studies reduces or eliminates problems with omitted variable bias.<sup>237</sup> While divorced from the setting of actual trials, in experimental studies, a researcher can manipulate variables like the race of the defendant and victim.<sup>238</sup> Finally, experimental designs allow researchers to generate data by recruiting participants, which allows statistical analysis of large samples that do not require the researcher to wait on the outcomes of actual trials.<sup>239</sup> On the contrary, observational studies often include data that is decades old to generate larger samples, which reduces their contemporary relevance.<sup>240</sup>

#### A. *Setting*

Every empirical study is a product of its time. I conducted this study during November 2020. A once-in-a-century global pandemic raged unabated; police killings of unarmed African Americans—including George Floyd, Breonna Taylor, Daniel Prude, Jonathan Price, and many others—sparked national outrage; the Black Lives Matter movement gained significant national attention; and racial justice protests spread throughout the country.<sup>241</sup> Joe Biden had

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<sup>235</sup> See Susan Athey & Guido W. Imbens, *The Econometrics of Randomized Experiments*, in 1 HANDBOOK OF ECONOMIC FIELD EXPERIMENTS 73, 78 (2017) (comparing experimental and observational studies).

<sup>236</sup> Kevin A. Clarke, *Return of the Phantom Menace: Omitted Variable Bias in Political Research*, 26 CONFLICT MGMT. & PEACE SCI. 46, 47 (2009).

<sup>237</sup> GUIDO W. IMBENS & DONALD B. RUBIN, CAUSAL INFERENCE OF STATISTICS, SOCIAL, AND BIOMEDICAL SCIENCES 31–32 (2015).

<sup>238</sup> Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars*, 80 TEMP. L. REV. 201, 211 (2007).

<sup>239</sup> See Bornstein et al., *infra* note 334, at 18.

<sup>240</sup> See, e.g., Baumgartner et al., *supra* note 24, at 211 (meta-analyzing data from 1972 to 2008); Eberhardt et al., *supra* note 34, at 384–85 (studying death penalty cases from 1979 to 1999).

<sup>241</sup> Susan Page & Veronica Bravo, *The Year That Was: A Global Pandemic, Racial Protests, a President-elect, Oh, and Impeachment.*, USA TODAY (Dec. 28, 2020, 10:10 AM), <https://www.usatoday.com/in-depth/news/politics/2020/12/28/2020-trump-biden-racial-justice-election-covid-rbg/3822810001>; Erika D. Smith, *2020 Was the Year America Embraced Black Lives Matter as a Movement, Not Just a Moment*, L.A. TIMES (Dec. 16, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-12-16/black-lives-matter-protests-george-floyd->

recently won a contentious presidential election, and his opponent, incumbent Donald Trump, disputed the election results as his presidency waned.<sup>242</sup> White nationalist and other extremist movements also gained momentum.<sup>243</sup> Many of these groups demonstrated against Black Lives Matter protests, COVID-19 restrictions, and perceived election fraud, often in combat regalia with automatic weapons.<sup>244</sup> The political polarization and racial issues characteristic of 2020 undoubtedly shaped public opinion on crime and punishment and will continue to do so in the future.<sup>245</sup>

### B. *Study Population*

The self-reported demographic characteristics of the mock jurors who participated in this study were similar to 2019 U.S. Census figures with some notable exceptions.<sup>246</sup> Black, Latino or Hispanic, and older mock jurors were underrepresented in this study relative to U.S. Census figures.<sup>247</sup> When evaluating these differences, it is important to acknowledge that screening procedures used in actual trials, and incorporated into this study, are likely to bias jury pools in similar directions relative to the U.S. population.

In contrast to the U.S. Census, I disqualified respondents who were felons and non-citizens and limited the study to English-speakers only following standard jury selection procedures.<sup>248</sup> Excluding felons from this study lowered the percentage of Black respondents from 10.1% to 9%. Citizenship and English language requirements also likely reduced the number of respondents who identified as

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coronavirus-covid-2020; Stephanie Zacharek, *2020 Tested Us Beyond Measure. Where Do We Go from Here?*, TIME (Dec. 14, 2020, 6:45 AM), <https://time.com/5917394/2020-in-review>.

<sup>242</sup> Hope Yen, Ali Swenson & Amanda Seitz, *AP FACT CHECK: Trump's claims of vote rigging are all wrong*, AP NEWS (Dec. 3, 2020), <https://apnews.com/article/election-2020-ap-fact-check-joe-biden-donald-trump-technology-49a24edd6d10888dbad61689c24b05a5>.

<sup>243</sup> Sarah Slobin & Sam Hart, *When the Right Wing Rallies*, REUTERS (Apr. 15, 2021), <https://graphics.reuters.com/USA-CAPITOL/SECURITY/xegpbxoadpq>.

<sup>244</sup> *Id.*

<sup>245</sup> *See* Smith, *supra* note 241.

<sup>246</sup> *See QuickFacts: United States*, *supra* note 21.

<sup>247</sup> *See id.*

<sup>248</sup> *Juror Qualifications*, U.S. COURTS, <https://www.uscourts.gov/services-forms/jury-service/juror-qualifications> (last visited Nov. 6, 2021).

Hispanic or Latino.<sup>249</sup> Moreover, I only allowed respondents to pick one racial group in contrast to the U.S. Census, which encourages respondents who identify as Hispanic or Latino to pick an additional racial group or multiple groups.<sup>250</sup> Finally, although older mock jurors were underrepresented in this study, there is evidence that jury selection methods result in a similar bias.<sup>251</sup> Jurors over sixty-five years old are often excused or exempted from jury duty, and studies suggest that voir dire processes discriminate against older Americans.<sup>252</sup> Race, sex, and age data are reported in Table 1. Complete demographic data is reported in Appendix A.

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<sup>249</sup> See Abby Budiman et al., *Facts on U.S. Immigrants, 2018*, PEW RESEARCH CENTER (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants/>.

<sup>250</sup> See *QuickFacts: United States*, *supra* note 21.

<sup>251</sup> See generally Max B. Rothman et al., *Jury Selection in Aging America: The New Discrimination?*, 2 MARQ. ELDER'S ADVISOR 69, 69–80 (2000) (discussing how exclusions, exemptions, and preemptive challenges impact age demographics of jury pools); Shamena Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001, 1001–30 (2014) (discussing how prosecutors and defense attorneys use peremptory challenges to alter the age composition of jury pools).

<sup>252</sup> Rothman et al., *supra* note 251, at 70.

TABLE 1  
 RACE, SEX, AND AGE STATISTICS FOR MOCK JURORS WHO  
 PARTICIPATED IN THIS STUDY VERSUS 2019 U.S. CENSUS  
 STATISTICS

|                    | 2019 Census | Mock Jurors |
|--------------------|-------------|-------------|
| <b>Race:</b>       |             |             |
| White              | 76.3%       | 76.0%       |
| Black              | 13.4%       | 9.0%        |
| Latino or Hispanic | 18.5%       | 7.5%        |
| Asian              | 5.9%        | 5.9%        |
| <b>Sex:</b>        |             |             |
| Male               | 49.2%       | 51.6%       |
| Female             | 50.8%       | 48.4%       |
| <b>Age:</b>        |             |             |
| 18-24              | 11.9%       | 9.6%        |
| 25-34              | 17.9%       | 35.8%       |
| 35-44              | 16.4%       | 26.3%       |
| 45-55              | 16.0%       | 15.0%       |
| 55+                | 37.8%       | 13.2%       |

### C. *Death Qualification*

Survey respondents were asked for informed consent before answering a death qualification question designed to meet the legal standard outlined in *Wainwright v. Witt*:

If you were selected to serve on a jury where the defendant faces the possibility of the death penalty, do you have such strong feelings about the death penalty that these sentiments would seriously affect you as a juror and prevent or substantially impair your performance in accordance with instructions from the court and your oath as juror?

Answer “No” if you would be able to objectively determine the defendant’s guilt or innocence and would be willing to consider both life in prison without

parole and the death penalty as possible sentences.  
Answer “Yes” if you would be unable to do so.<sup>253</sup>

#### D. *Treatment Groups*

Respondents who passed the death qualification by answering “No” were presented with a description of a robbery-turned-homicide. I used a 3 × 3 experimental design where the race of the defendant and the race of the victim presented to mock jurors were selected at random. As illustrated in Figure 1, the defendant was described as 1) “White” and depicted with a “police sketch” of a man with a light complexion and green eyes, 2) “Black” and depicted with an image of the same man with a darker complexion and brown eyes, or 3) “Black” and depicted with an image of the same man with his eye color and complexion darkened further. I either 1) left the victim’s race ambiguous, 2) described him as “White,” or 3) described him as “Black.” The number of respondents for each of the nine defendant-victim combinations are reported in Table 2.

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<sup>253</sup> *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (explaining the standard “for determining when a prospective juror may be excluded” because of his or her views on capital punishment is “whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath’”).



FIGURE 1  
 “POLICE SKETCHES” PRESENTED TO SURVEY RESPONDENTS IN THE  
 THREE DEFENDANT TREATMENT GROUPS



TABLE 2  
 MOCK JURORS RANDOMLY ASSIGNED TO EACH TREATMENT GROUP

| Treatment Group          | Ambiguous | White | Black | Total |
|--------------------------|-----------|-------|-------|-------|
| White                    | 269       | 264   | 264   | 797   |
| Black (Light Complexion) | 263       | 273   | 266   | 802   |
| Black (Dark Complexion)  | 263       | 268   | 266   | 797   |
| Total                    | 795       | 805   | 796   | 2,396 |

#### E. Study Design

I chose racially ambiguous first names and generic last names for the defendant and the victim and gave them realistic ages based on FBI statistics.<sup>254</sup> I described the murder as occurring during a robbery to add an aggravating factor and noted that the defendant had a difficult childhood and grew up in poverty to add mitigating factors. I made the prompt extremely general and loosely consistent with the facts that led to *Turner v. Murray*, where Turner appealed his conviction for shooting a store owner in front of an eyewitness.<sup>255</sup> I also informed mock jurors that the defendant had been convicted and included truncated sentencing instructions based on federal guidelines.<sup>256</sup> Finally, I asked mock jurors to determine sentencing.

<sup>254</sup> 2019 *Crime in the United States: Expanded Homicide Data Table 3—Murder Offenders by Age, Sex, Race, and Ethnicity, 2019*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-3.xls> (May 11, 2021); 2019 *Crime in the United States: Expanded Homicide Data Table 9—Murder Victims by Age by Weapon, 2019*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-9.xls> (May 11, 2021).

<sup>255</sup> See *Turner v. Murray*, 476 U.S. 28, 30 (1986).

<sup>256</sup> See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Zant v. Stephens*, 462 U.S. 862, 876–77 (1983); *Gregg v. Georgia*, 428 U.S. 153, 163–65 (1976).

Mock jurors randomly assigned to the Black defendant (light complexion) treatment and the Black victim treatment saw the following question:

Randy Jones, a twenty-nine year old Black man, was convicted of a brutal murder during a robbery.<sup>257</sup> He showed little remorse for shooting Shawn Davis, a twenty-seven year old Black man, in front of an eyewitness.<sup>258</sup> Evidence was introduced that Jones had a difficult childhood and grew up in poverty.

Police sketch of Jones<sup>259</sup>



You are on the jury and are asked to determine sentencing. The judge instructs you to weigh any aggravating and mitigating factors and to determine if any aggravating factors identified sufficiently outweigh any mitigating factors identified to justify a sentence of death.

What is the most appropriate sentence? Life in prison without parole or the death penalty?

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<sup>257</sup> The defendant was described as “White” or “Black” depending on the treatment group, and his complexion was varied.

<sup>258</sup> The victim’s race was omitted, or he was described as “Black” or “White” depending on the treatment group.

<sup>259</sup> If the defendant was described as “White” Figure 1.1., *supra*, was shown. If the defendant was described as “Black” Figure 1.2. or Figure 1.3., *supra*, was shown.

### F. *Formulating Mock Juror Questions*

When formulating questions to screen for racial bias, I selected three subtle questions because I thought they would elicit more truthful answers than longer instruments, like the Old-Fashioned Racism Scale or the Modern Racism Scale, which ask questions that are obviously about race and often have clearly socially acceptable answers.<sup>260</sup> I also selected this approach because asking a few simple questions is more realistic to actual voir dire practices.<sup>261</sup> Based on research by Devine and Caughlin, I hypothesized that mock jurors who had a high degree of respect for state authority and believed the legal system was fair to African Americans, despite historical and contemporary evidence to the contrary, would be more racially biased.<sup>262</sup> I also hypothesized that respondents who were unempathetic to the fact that life circumstances are often the product of socio-historical forces would be more racially biased based on research by Lynch and Haney.<sup>263</sup> Finally, I chose a question that subtly inquired into racial attitudes by assessing respondents' fear of African Americans that I adapted from the 1990 General Social Survey.<sup>264</sup> In contrast to an actual trial, I asked my three voir dire questions *after* mock jurors made a sentencing decision to avoid alerting

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<sup>260</sup> See Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks-Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI-KENT L. REV. 1179, 1194–96 (2003) (discussing jurors' desire to avoid embarrassment and answer questions in socially desirable ways); see generally John B. McConahay et al., *Has Racism Declined in America? It Depends on Who Is Asking and What Is Asked*, 25 J. CONFLICT RESOLUT. 563, 563–79 (1981); John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale.*, in PREJUDICE, DISCRIMINATION, AND RACISM 91, 91–125 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (discussing modern racism).

<sup>261</sup> See Hans & Jehle, *supra* note 260, at 1194.

<sup>262</sup> Devine & Caughlin, *supra* note 27, at 122 (discussing trust in the legal system and authoritarianism).

<sup>263</sup> See Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 L. & SOC'Y. REV. 69, 75 (2011) (discussing why many White jurors fail to empathize with Black defendants).

<sup>264</sup> General Social Survey Data Explorer, NORC AT THE UNIV. OF CHI., <https://gssdataexplorer.norc.org/variables/1215/vshow> (last visited Oct. 27, 2021).

them that the study was about racial issues.<sup>265</sup> The three voir dire questions I asked were:

1. The criminal justice system is biased against Black people. True or False?
2. People who have faced difficult life circumstances are less responsible for their crimes. True or False?
3. Would you feel safe living in a neighborhood where half your neighbors were Black? Yes or No?

Because some studies show that survey respondents are more likely to answer in the affirmative, I required answers in the affirmative and negative.<sup>266</sup> I also randomly varied the question and response order. Mock jurors who answered “True” to question one, “False” to question two, and “Yes” to question three, failed the voir dire. Next, I asked disqualifying questions designed to eliminate felons, those facing felony charges, non-citizens, and minors from the sample of survey respondents.<sup>267</sup> Finally, I asked mock jurors nine demographic questions. Disqualifying questions and demographic questions are reported in Appendix B.

### G. *Statistical Approach*

After completing the survey, I defined the variables reported in Table 3 in order to estimate the causal effects of the treatments using

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<sup>265</sup> In an experimental setting, it is difficult to determine if asking questions about race in voir dire reminds jurors of their own biases and not to act on these biases, or if it simply encourages them to respond in ways they assume are desirable to the researcher. See generally Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY SOC. PSYCH. 597, 597–612 (2006) (discussing mock juror decision-making when racial issues were raised during voir dire in an experimental context).

<sup>266</sup> See Ozan Kuru & Josh Pasek, *Improving Social Media Measurement in Surveys: Avoiding Acquiescence Bias in Facebook Research*, 57 COMPUTS. HUM. BEHAV. 82, 82. (2016) (discussing acquiescence bias in online surveys).

<sup>267</sup> *Juror Qualifications*, *supra* note 248.

a potential outcomes framework.<sup>268</sup> Causal inference requires several assumptions.<sup>269</sup> Assignment must be individualistic, meaning a respondent's assignment to treatment did not depend on the values of covariates or potential outcomes of other respondents; probabilistic, meaning there is a non-zero probability that every respondent could have received any one of the treatments; and unconfounded, meaning the assignment mechanism did not depend on potential outcomes.<sup>270</sup> Random assignment to treatment groups largely addresses these problems.<sup>271</sup>

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<sup>268</sup> For a binary treatment  $w \in \{0,1\}$ , potential outcomes of treatment  $w$  for individual  $i$  can be defined as  $Y_i(1)$  and  $Y_i(0)$ . Although only  $Y_i(1)$  or  $Y_i(0)$  can be observed and  $\Delta_i = Y_i(1) - Y_i(0)$  cannot be directly observed, in a randomized experiment where  $Y_i = Y_i(W_i)$  and  $W_i \perp \{Y_i(1), Y_i(0)\}$ , the estimator of the ATE ( $\hat{\tau}$ ) is unbiased:

$$\mathbb{E}[\hat{\tau}] = \mathbb{E}[Y_i(1)] - \mathbb{E}[Y_i(0)] = \tau$$

Notably, for the purposes here it is possible to estimate the ATE ( $\hat{\tau}$ ) with ordinary least squares regression:

$$Y_i = \alpha + W_i \hat{\tau} + \varepsilon_i$$

This flexible model can accommodate additional treatment groups, covariates, and interaction terms. See Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies*, 66 J. EDUC. PSYCH. 688, 696–98 (1974) [hereinafter *Estimating Causal Effects*]; Donald B. Rubin, *Assignment to Treatment Group on the Basis of a Covariate*, 2 J. EDUC. STATS. 1, 1–26 (1977) [hereinafter *Assignment*]; Paul W. Holland, *Statistics and Causal Inference*, 81 J. AM. STAT. ASS'N 945, 945–60 (1986); JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION* 11–24 (2008).

<sup>269</sup> See IMBENS & RUBIN, *supra* note 237, at 31.

<sup>270</sup> See *id.*

<sup>271</sup> See *id.* at 40–41.

TABLE 3  
VARIABLE DEFINITIONS USED IN LINEAR PROBABILITY MODELS

| Variables           | Definitions  |
|---------------------|--|
| <b>Independent:</b> |  |
| Death Eligible      | Yes, No  |
| Death Sentence      | Yes, No  |
| <b>Treatment:</b>   |  |
| Victim              | None, White, Black   |
| Defendant           | White, Black (Light), Black (Dark)                                 |
| <b>Opinion:</b>     |  |
| Voir Dire           | Passed, Failed   |
| <b>Demographic:</b> |  |
| Age                 | 18–24, 25–34, 35–44, 45–55, > 55                                   |
| Death Penalty State | Yes, No  |
| Education           | High School or Less, Some College, College Degree, Graduate Degree |
| Politicals          | Liberal, Moderate, Conservative                                    |
| Income              | <\$25,000, \$25,000–\$49,999, \$50,000–\$74,999, > \$75,000        |
| Sex                 | Male, Female   |
| Race                | White, Black, Latino, Asian, Other                                 |
| Religious           | Yes, No  |

I estimated two multinomial logistic regressions to determine if there was evidence indicating that the random assignment of survey respondents to treatment groups was flawed. These regressions showed no evidence of significant imbalances between treatment groups and are reported in Appendix C. I also limited participation to respondents with unique U.S. IP addresses to strengthen the individualistic assignment assumption. After assessing the model assumptions, I analyzed the data by running four linear probability models, a form of ordinary least squares regression, which I selected instead of logistic regression for ease of interpretability.<sup>272</sup> Finally, I conducted *post-hoc* Monte Carlo simulations to contextualize the results.

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<sup>272</sup> See Robin Gomila, *Logistic or Linear? Estimating Causal Effects of Experimental Treatments on Binary Outcomes Using Regression Analysis*, 150 J. EXPERIMENTAL PSYCH.: GEN. 700, 700–709 (2021) (discussing why linear models are easier to interpret, unbiased, and safer for modelling the causal effects of treatments on binary outcomes).

## IV. RESULTS

A. *Linear Probability Model One*

The first linear probability model I ran regressed the Death Eligible variable on the Voir Dire and Demographic variables.<sup>273</sup> The regression results showed a significant collective effect ( $F(20, 3263) = 8.306$   $p < 0.001$ ) and are reported in Table 4.

TABLE 4  
RESULTS OF LINEAR PROBABILITY MODEL ONE

| Variable                    | Est.   | SE    | t-value | p-value         |
|-----------------------------|--------|-------|---------|-----------------|
| (Intercept)                 | 0.680  | 0.038 | 17.846  | $p < 0.001$ *** |
| <b>Voir Dire:</b>           |        |       |         |                 |
| Failed                      | 0.088  | 0.023 | 3.908   | $p < 0.001$ *** |
| <b>Age:</b>                 |        |       |         |                 |
| 25–34                       | -0.016 | 0.030 | -0.532  | 0.595           |
| 35–44                       | 0.019  | 0.031 | 0.622   | 0.534           |
| 45–55                       | 0.059  | 0.033 | 1.774   | 0.076           |
| >55                         | 0.032  | 0.034 | 0.943   | 0.346           |
| <b>Death Penalty State:</b> |        |       |         |                 |
| Yes                         | 0.021  | 0.016 | 1.368   | 0.171           |
| <b>Education:</b>           |        |       |         |                 |
| Some College                | 0.034  | 0.028 | 1.190   | 0.234           |
| College Degree              | -0.049 | 0.026 | -1.866  | 0.062           |
| Graduate Degree             | -0.060 | 0.032 | -1.854  | 0.064           |
| <b>Politics:</b>            |        |       |         |                 |
| Moderate                    | 0.109  | 0.019 | 5.864   | $p < 0.001$ *** |
| Conservative                | 0.137  | 0.021 | 6.554   | $p < 0.001$ *** |
| <b>Income:</b>              |        |       |         |                 |
| \$25,000 – \$49,999         | 0.051  | 0.022 | 2.280   | 0.023*          |
| \$50,000 – \$74,999         | 0.054  | 0.024 | 2.262   | 0.024*          |
| >\$75,000                   | 0.067  | 0.025 | 2.718   | 0.007**         |
| <b>Sex:</b>                 |        |       |         |                 |
| Male                        | -0.051 | 0.015 | -3.265  | 0.001**         |
| <b>Race:</b>                |        |       |         |                 |
| Black                       | -0.073 | 0.031 | -2.374  | 0.018           |
| Latino                      | -0.022 | 0.031 | -0.701  | 0.484           |
| Asian                       | 0.000  | 0.033 | 0.001   | 0.999           |
| Other                       | -0.001 | 0.061 | -0.016  | 0.987           |
| <b>Religious:</b>           |        |       |         |                 |
| Yes                         | -0.076 | 0.017 | -4.587  | $p < 0.001$ *** |

<sup>273</sup> Results were calculated with robust standard errors. Significance codes are reported as follows:  $p < 0.001$ \*\*\*,  $p < 0.01$ \*\* , and  $p < 0.05$ \*.

### B. *Linear Probability Model Two*

The second linear probability I ran regressed the Death Sentence variable on an interaction of the Defendant and Victim treatments, controlling for Voir Dire and the Demographic variables.<sup>274</sup> The regression results showed a collective significant effect ( $F(28, 2367) = 7.597$   $p < 0.001$ ) and are reported in Table 5.<sup>275</sup> Predicted probabilities and simple effects are reported in Appendix D.

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<sup>274</sup> Results were calculated with robust standard errors. Significance codes are reported as follows:  $p < 0.001^{***}$ ,  $p < 0.01^{**}$ , and  $p < 0.05^*$ .

<sup>275</sup> Results were calculated with robust standard errors and averaged over the levels of Age, Death Penalty State, Education, Sex, Politics, Income, Race, and Religion.



TABLE 5  
RESULTS FROM LINEAR PROBABILITY MODEL TWO

| Variable                         | Est.   | SE    | <i>t</i> -value | <i>p</i> -value    |
|----------------------------------|--------|-------|-----------------|--------------------|
| (Intercept)                      | 0.287  | 0.056 | 5.099           | <i>p</i> <0.001*** |
| Voir Dire:                       |        |       |                 |                    |
| Failed                           | 0.139  | 0.032 | 4.390           | <i>p</i> <0.001*** |
| Victim:                          |        |       |                 |                    |
| White                            | -0.027 | 0.043 | -0.618          | 0.537              |
| Black                            | -0.027 | 0.043 | -0.634          | 0.526              |
| Defendant:                       |        |       |                 |                    |
| Black (Light)                    | -0.051 | 0.042 | -1.219          | 0.223              |
| Black (Dark)                     | -0.024 | 0.042 | -0.572          | 0.568              |
| Defendant × Victim Interactions: |        |       |                 |                    |
| Black (Light) × White            | 0.057  | 0.060 | 0.951           | 0.342              |
| Black (Dark) × White             | 0.079  | 0.060 | 1.330           | 0.184              |
| Black (Light) × Black            | -0.001 | 0.059 | -0.019          | 0.985              |
| Black (Dark) × Black             | 0.034  | 0.060 | 0.560           | 0.576              |
| Age:                             |        |       |                 |                    |
| 25–34                            | 0.046  | 0.038 | 1.217           | 0.224              |
| 35–44                            | 0.108  | 0.040 | 2.722           | 0.007**            |
| 45–55                            | 0.114  | 0.043 | 2.653           | 0.008**            |
| >55                              | 0.121  | 0.044 | 2.761           | 0.006**            |
| Death Penalty State:             |        |       |                 |                    |
| Yes                              | 0.017  | 0.020 | 0.830           | 0.406              |
| Education:                       |        |       |                 |                    |
| Some college                     | -0.014 | 0.038 | -0.357          | 0.721              |
| College degree                   | -0.047 | 0.035 | -1.338          | 0.181              |
| Graduate degree                  | -0.073 | 0.042 | -1.737          | 0.083              |
| Income:                          |        |       |                 |                    |
| \$25,000 – \$49,999              | -0.009 | 0.029 | -0.313          | 0.755              |
| \$50,000 – \$74,999              | 0.026  | 0.031 | 0.838           | 0.402              |
| >\$75,000                        | 0.041  | 0.032 | 1.284           | 0.199              |
| Politics:                        |        |       |                 |                    |
| Moderate                         | 0.117  | 0.025 | 4.758           | <i>p</i> <0.001*** |
| Conservative                     | 0.256  | 0.028 | 9.220           | <i>p</i> <0.001*** |
| Sex:                             |        |       |                 |                    |
| Male                             | 0.054  | 0.020 | 2.648           | 0.008**            |
| Race:                            |        |       |                 |                    |
| Black                            | 0.029  | 0.038 | 0.757           | 0.449              |
| Latino                           | 0.041  | 0.041 | 1.020           | 0.308              |
| Asian                            | 0.063  | 0.044 | 1.424           | 0.155              |
| Other                            | -0.066 | 0.075 | -0.884          | 0.377              |
| Religious:                       |        |       |                 |                    |
| Yes                              | -0.041 | 0.021 | -1.915          | 0.056              |

Because I was interested in assessing whether mock jurors were more punitive against the Black defendant of dark complexion relative to the Black defendant of light complexion based on the race of

the victim, I calculated the additional interactions not captured by the regression reported in Table 5. The effect of darkening the defendant's complexion (Black (Dark)  $\times$  Black (Light)) on sentencing was not statistically significant for the Black versus Ambiguous ( $\beta = -0.046$ ,  $t = -0.776$ ,  $p = 0.438$ ), White versus Ambiguous ( $\beta = -0.058$ ,  $t = -0.996$ ,  $p = 0.319$ ), or Black versus White ( $\beta = -0.013$ ,  $t = -0.214$ ,  $p = 0.831$ ) victim treatments.

### C. *Linear Probability Model Three*

The third linear probability model I ran regressed the Death Sentence variable on an interaction of the Voir Dire variable and the Victim treatments, controlling for the Defendant treatments and Demographic variables. The regression results showed a collective significant effect ( $F(26, 2369) = 8.159$   $p < 0.001$ ) and are reported in Table 6.<sup>276</sup> Predicted probabilities and simple effects are reported in Appendix E. I was also interested in whether mock jurors who failed voir dire would be less punitive against a defendant convicted of killing a Black victim relative to a White victim, so I calculated an additional interaction. The interaction comparing the effect of failing voir dire (Failed – Passed) on sentencing for the Black versus White victim treatments was not statistically significant ( $\beta = -0.074$ ,  $t = 0.983$ ,  $p = 0.325$ ).

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<sup>276</sup> The interaction of the Black versus White victim treatment by voir dire status, which was omitted from the regression table, was not statistically significant ( $-0.074$ ,  $p = 0.325$ ). Results were calculated with robust standard errors and averaged over the levels of the Age, Death Penalty State, Education, Sex, Politics, Income, Race, and Religion variables. Significance codes are reported as follows:  $p < 0.001$  \*\*\*,  $p < 0.01$  \*\*, and  $p < 0.05$  \*.

TABLE 6  
RESULTS FROM LINEAR PROBABILITY MODEL THREE

| Variable                   | Est.   | SE    | t-value | p-value    |
|----------------------------|--------|-------|---------|------------|
| (Intercept)                | 0.267  | 0.053 | 5.067   | p<0.001*** |
| <b>Victim</b>              |        |       |         |            |
| White                      | -0.006 | 0.026 | -0.240  | 0.810      |
| Black                      | 0.021  | 0.026 | 0.804   | 0.421      |
| <b>Voir Dire</b>           |        |       |         |            |
| Failed                     | 0.172  | 0.049 | 3.494   | p<0.001*** |
| <b>Voir Dire × Victim:</b> |        |       |         |            |
| Failed × White             | -0.011 | 0.072 | -0.159  | 0.874      |
| Failed × Black             | -0.086 | 0.071 | -1.204  | 0.229      |
| <b>Defendant</b>           |        |       |         |            |
| Black (Light)              | -0.006 | 0.024 | -0.226  | 0.821      |
| Black (Dark)               | -0.013 | 0.024 | -0.530  | 0.596      |

#### D. *Linear Probability Model Four*

The fourth and final linear probability model regressed the Death Sentence variable on an interaction of the Voir Dire variable and Defendant treatments, controlling for the Victim treatments and the Demographic variables. The regression results reported in Table 7 showed a collective significant effect ( $F(26, 2369) = 8.432, p < 0.001$ ), and there were two significant interaction effects.<sup>277</sup> Predicted probabilities and simple effects are reported in Appendix F. Because I was interested in whether mock jurors who failed voir dire would be more punitive against the Black defendant of darker complexion relative to the defendant of lighter complexion, I calculated an additional interaction. The interaction comparing the effect of failing voir dire (Failed – Passed) on sentencing for the Black (Dark) versus Black (Light) defendant treatments was not statistically significant ( $\beta = -0.001, t = 0.013, p = 0.989$ ).

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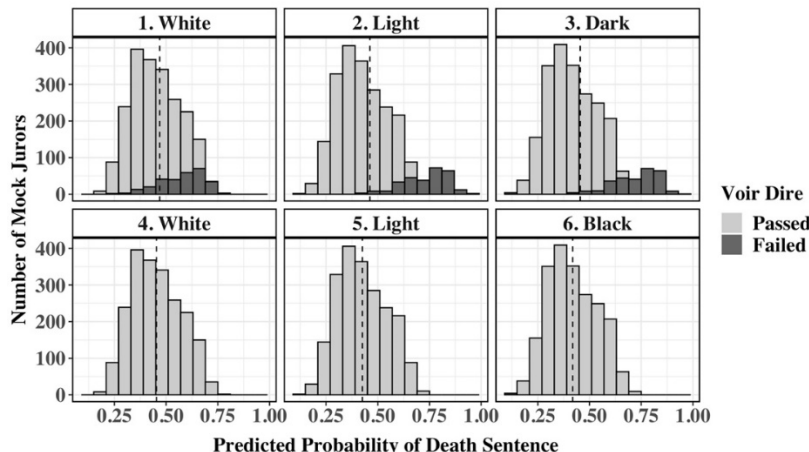
<sup>277</sup> Results were calculated with robust standard errors and averaged over the levels of Age, Death Penalty State, Education, Sex, Politics, Income, Race, and Religion. Significance codes are reported as follows:  $p < 0.001$ \*\*\*,  $p < 0.01$ \*\*, and  $p < 0.05$ \*.

TABLE 7  
RESULTS FROM LINEAR PROBABILITY MODEL FOUR

| Variable               | Est.   | SE    | t-value | p-value     |
|------------------------|--------|-------|---------|-------------|
| (Intercept)            | 0.290  | 0.053 | 5.444   | p<0.001 *** |
| Defendant:             |        |       |         |             |
| Black (Light)          | -0.028 | 0.026 | -1.076  | 0.282       |
| Black (Dark)           | -0.035 | 0.026 | -1.349  | 0.177       |
| Voir Dire:             |        |       |         |             |
| Failed                 | 0.019  | 0.054 | 0.359   | 0.719       |
| Voir Dire × Defendant: |        |       |         |             |
| Failed × Black (Light) | 0.183  | 0.073 | 2.519   | 0.012*      |
| Failed × Black (Dark)  | 0.184  | 0.073 | 2.515   | 0.012*      |
| Victim                 |        |       |         |             |
| White                  | -0.010 | 0.024 | -0.407  | 0.684       |
| Black                  | 0.009  | 0.024 | 0.382   | 0.702       |

The results of linear probability model four showed that mock jurors who failed voir dire were 18.3% to 18.4% more likely to sentence a Black defendant to death than a white defendant *ceteris paribus*. To illustrate how these mock jurors skewed the probability a Black defendant would receive a death sentence, I plotted the predicted probability that each death-eligible mock juror ( $n = 2,396$ ) would sentence the three defendants to death when the victim's race was ambiguous in Figure 2 (Frames 1–3). Next, I removed the jurors who failed voir dire ( $n = 285$ ) and plotted the predicted probabilities for the remaining jurors ( $n = 2,111$ ) in Figure 2 (Frames 4–6).

FIGURE 2  
PREDICTED PROBABILITY OF A DEATH SENTENCE FOR EACH  
DEFENDANT TREATMENT



E. Monte Carlo Analysis

After analyzing the results of the linear probability models, I conducted a Monte Carlo simulation to contextualize the effects of the death qualification. I randomly selected twelve mock jurors with replacement 1,000,000 times from the full venire and then from the death-qualified venire. Next, I calculated the probability of empan-eling mock jurors who failed the voir dire questions and made racially biased sentencing decisions from both groups. The probability of empan-eling racially biased mock jurors from the full venire, the probability of empan-eling racially biased mock jurors from the death-qualified venire, and the associated absolute risk increase (“ARI”) and relative risk increase (“RRI”) caused by the death qualification are reported in Table 8.

TABLE 8  
PROBABILITY OF EMPANELING ONE OR MORE BIASED JURORS FROM  
THE FULL VENIRE VERSUS THE DEATH QUALIFIED VENIRE

| Biased Jurors | Full Venire | Death-Qualified | ARI   | 95% CI       | RRI     | 95% CI           |
|---------------|-------------|-----------------|-------|--------------|---------|------------------|
| 1+            | 0.7207      | 0.7813          | 6.06% | 5.94%, 6.18% | 8.41%   | 8.29%, 8.54%     |
| 2+            | 0.3454      | 0.4263          | 8.09% | 7.96%, 8.23% | 23.44%  | 23.13%, 23.75%   |
| 3+            | 0.1128      | 0.1631          | 5.03% | 4.94%, 5.13% | 44.60%  | 43.88%, 45.33%   |
| 4+            | 0.0263      | 0.0447          | 1.85% | 1.80%, 1.90% | 70.32%  | 68.52%, 72.13%   |
| 5+            | 0.0045      | 0.0092          | 0.47% | 0.45%, 0.49% | 104.57% | 99.48%, 109.78%  |
| 6+            | 0.0006      | 0.0014          | 0.08% | 0.07%, 0.09% | 131.26% | 116.06%, 147.53% |

## V. DISCUSSION

The results of this study add to a growing body of research showing that the death qualification process underrepresents African Americans and overrepresents more punitive jurors in death-qualified venires.<sup>278</sup> Although it is somewhat surprising that I found no evidence of race-of-victim or race-of-defendant bias for the full death-qualified venire, and no evidence that darkening the complexion and eye color of the Black defendant increased the probability that the defendant would receive a death sentence, it is clear that these results mask a strong undercurrent of racism among a subgroup of respondents.<sup>279</sup> Respondents who failed the voir dire questions screening for racial bias were 18.3% to 18.4% more likely to sentence a Black defendant to death than a White defendant *ceteris paribus*.<sup>280</sup> What is even more troubling is the death qualification increased the likelihood of empaneling one or more of these racially biased mock jurors from 72.1% to 78.1%, raising the relative risk of empaneling a partial juror by 8.4%.<sup>281</sup>

In *Lockhart v. McCree*, the Supreme Court held that the death qualification does not violate the fair-cross section or impartiality requirements of the Sixth Amendment even if it underrepresents demographic groups (e.g., African Americans) based on their views about the death penalty and produces more conviction-prone juries.<sup>282</sup> However, the Supreme Court has never addressed evidence that the death qualification overrepresents racially biased jurors

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<sup>278</sup> See, e.g., Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 L. & POL'Y 148, 157–65 (2018); Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. UNIV. L. REV. 299, 335–36 (2017); Levinson et al., *supra* note 26, at 557–60; Alicia Summers et al., *Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics*, 40 J. APPLIED SOC. PSYCH. 3218, 3227–28 (2010); Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 25 BEHAV. SCI. & L. 57, 64–65 (2007).

<sup>279</sup> See *supra* Sections IV.B–D.

<sup>280</sup> See *supra* Table 7. Both p-values were statistically significant (Black (Light): 18.3%,  $p = 0.012$ ; Black (Dark): 18.4%,  $p = 0.012$ ).

<sup>281</sup> See *supra* Table 8. The 95% confidence interval for this estimate was 8.29% to 8.54%.

<sup>282</sup> *Lockhart v. McCree*, 476 U.S. 162, 162 (1986).

who, unlike conviction-prone jurors, are clearly partial. Accepting the results of this study as true and generalizable to actual trials, *arguendo*, the death qualification appears to violate an African American capital defendant's Sixth Amendment right to an impartial jury by increasing the likelihood of empaneling jurors who make racially biased sentencing decisions.<sup>283</sup>

There is an inherent contradiction in championing the jury as the consciousness of the community yet removing prospective jurors who embrace a widely held, socially acceptable viewpoint like opposition to the death penalty. There is no reason why the judiciary should allow the state to remove nullifiers, a privilege that arises in the context of a capital trial but not in a non-capital trial, based on a charging decision under the state's control. Allowing the state to remove nullifiers is particularly egregious when the same process overrepresents racist jurors and underrepresents African American jurors. It is not surprising that African Americans oppose the death penalty at much higher rates and are less likely to pass the death qualification than White Americans given that the death penalty has been used, and continues to be used, primarily to punish Black defendants.<sup>284</sup> Removing jurors because of viewpoints that are reflective of their racial identity is synonymous with removing them because of their racial identity. The result is unacceptable discrimination.

Voir dire is ill-suited to remedying the underrepresentation of African Americans caused by the death qualification,<sup>285</sup> and although it may safeguard against empaneling racially biased jurors, it is not a panacea. Accepting the premise that the death qualification overrepresents jurors who make racially biased sentencing decisions as true, it follows that the probability of empaneling one of these partial jurors will be higher after the death qualification unless voir dire is highly effective.<sup>286</sup> Although the fact that 10.1% of mock jurors in this study admitted to racial biases suggests that it is possible

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<sup>283</sup> See *supra* Sections IV.B–D; see *supra* Table 7.

<sup>284</sup> See *supra* Part I.

<sup>285</sup> See ERIC DAVIS, RACE AND VOIR DIRE (2019), <https://www.nacdl.org/getattachment/cd19fea6-e507-483a-9248-3913fcf75e9f/race-and-voir-dire.pdf>.

<sup>286</sup> See *supra* Sections IV.B–D; see *supra* Table 4. Mock jurors who failed voir dire were significantly more likely to pass the death qualification than those who passed voir dire (8.8%,  $p < 0.001$ ).

to screen for racial bias, voir dire has significant shortcomings.<sup>287</sup> Research shows that voir dire practices not only encourage dishonesty, but are also idiosyncratic across jurisdictions and highly dependent on the skills of the parties involved.<sup>288</sup> Moreover, even after admitting to bias, jurors are often still empaneled if they agree to be impartial.<sup>289</sup> As a result, voir dire is unlikely to countervail the threat the death qualification poses to an African American capital defendant's Sixth Amendment rights.

Voir dire inquiry into racial bias should be an absolute right in capital trials. The mock jurors who failed voir dire questions in this study made racially biased sentencing decisions against the Black defendants regardless of the race of the victim, which suggests that voir dire inquiry into racial biases should not be limited to interracial crimes.<sup>290</sup> It is also important to emphasize that I asked the voir dire questions in this study in a semi-anonymous survey, which likely increased mock juror candor. Courts should consider expanding the use of questionnaires in voir dire to encourage such honesty. Giving jury instructions on implicit and explicit bias and ending the practice of rehabilitating jurors who admit to biases are equally important steps. However, if the judiciary is serious about mitigating racism in capital trials, courts must be more willing to accept that statistical evidence of patterns of bias often imply that there is an unacceptably high likelihood of individualized bias in a specific trial. After

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<sup>287</sup> See *infra* Appendix A.

<sup>288</sup> See Lynch & Haney, *supra* note 278, at 148–49; Brian L. Cutler et al., *Jury Selection in Major Controlled Substance Trials: The Need for Extended Voir Dire*, FORENSIC REP. 331, 331–48 (1990); Michael T. Nietzel et al., *Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 BEHAV. SCI. & L. 467, 467–77 (1987); Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 L. & HUM. BEHAV. 1, 1–13 (1982); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 245–71 (1980).

<sup>289</sup> See Christopher A. Cospers, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1476–77 (2002).

<sup>290</sup> See *supra* Section IV.D; *Ristaino v. Ross*, 424 U.S. 589, 597–98 (1976) (finding the “mere fact” that the victim was a white man and the defendants were Black would not distort the trial and did not suggest a likelihood of racial prejudice); *Rosales-Lopez v. United States*, 451 U.S. 182, 193–94 (1981) (finding no racial antagonism would have affected the jury by introducing testimony about the petitioner and her daughter’s relationship, meaning the judge did not have to inquire further than he did); *Turner v. Murray*, 476 U.S. 28, 33–38 (1986) (discussing the heightened rule for interracial crimes).



identifying vectors of racial bias, courts must be more willing to use the full gamut of judicial tools to combat it.

A. *The Death Qualification, Race-of-Victim Bias, and Race-of-Defendant Bias in Context*

The results of linear probability model one indicated that several demographic groups were overrepresented in the death-qualified venire as a direct result of the death qualification.<sup>291</sup> These groups included jurors who failed voir dire, political moderates and conservatives, and wealthier respondents.<sup>292</sup> Demographic groups that were underrepresented in the death qualified venire included Black, religious, and male mock jurors.<sup>293</sup> Although individuals sentenced to death are disproportionately poor, male, and Black, the death qualification process selected for a more racially biased, more politically conservative, wealthier, more female, and Whiter venire.<sup>294</sup>

Linear probability model two revealed that respondents who failed the voir dire questions or identified as politically moderate or conservative were not only overrepresented in the death-qualified venire, they were also significantly more punitive.<sup>295</sup> Mock jurors in the thirty-five to forty-four, forty-five to fifty-four, and over fifty-five age groups were also significantly more likely to sentence a defendant to death than those in the eighteen to twenty-four age

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<sup>291</sup> See *supra* Table 4.

<sup>292</sup> See *supra* Table 4. Mock jurors who were more likely to pass the death qualification included those who failed voir dire (8.8%,  $p < 0.001$ ) relative to those who passed; moderates (10.9%,  $p < 0.001$ ) and conservatives (13.7%,  $p < 0.001$ ) relative to liberals; and respondent with income from \$25,000–49,999 (5.1%,  $p = 0.023$ ), \$50,000–74,999 (5.4%,  $p = 0.024$ ) or more than \$75,000 (6.7%  $p = 0.007$ ) relative to those reporting less than \$25,000.

<sup>293</sup> See *supra* Table 4. Black respondents were less likely to pass the death qualification than Whites (-7.3%,  $p = 0.018$ ), as were religious respondents relative to non-religious respondents (-7.6%,  $p < 0.001$ ), and males relative to females (-5.1%,  $p = 0.001$ ).

<sup>294</sup> See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1839, 1857 (1994); Jeffery L. Johnson & Colleen F. Johnson, *Poverty and the Death Penalty*, 35 J. ECON. ISSUES 517, 521 (2001); *QuickFacts: United States*, *supra* note 21.

<sup>295</sup> See *supra* Table 4. Death qualified mock jurors who failed voir dire were (13.9%,  $p < 0.001$ ) more punitive than those who passed as were death-qualified moderates (11.7%,  $p < 0.001$ ) and conservatives (25.6%,  $p < 0.001$ ) relative to liberals.

group.<sup>296</sup> Finally, although male respondents were less likely to pass the death qualification than females, death-qualified males were significantly more likely to sentence a defendant to death than death-qualified females.<sup>297</sup>

Between 1972 and 2018, over 60,000 Americans were asked if they “favor or oppose the death penalty for [persons convicted of] murder” as part of the General Social Survey (“GSS”).<sup>298</sup> Although this question is broader than the death qualification in this study, the two questions are similar and, not surprisingly, show similar trends.<sup>299</sup> GSS data indicates that, on average, respondents who identified as Republican or Independent have had more favorable views of the death penalty than Democrats, as have wealthier relative to poorer, older relative to younger, male relative to female, religious relative to non-religious, and White relative to Black respondents.<sup>300</sup>

In a sophisticated statistical analysis of GSS data, Amy L. Anderson and colleagues found evidence that death penalty support was lowest among the youngest and oldest respondents relative to middle-aged adults.<sup>301</sup> In this study, older mock jurors were underrepresented in the sample of respondents. Additionally, I grouped respondents over fifty-years-old into a single age group, which may have obfuscated a reduction in death penalty support among older Americans. However, my results may be more realistic to the context of an actual trial because there is evidence that older jurors are underrepresented in jury pools and discriminated against in *voir dire*, further reducing their representation.<sup>302</sup> Anderson and

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<sup>296</sup> See *supra* Table 4. Death qualified respondents in the 35–44 group (10.8%,  $p = 0.007$ ), the 45–54 group were (11.4%,  $p = 0.008$ ), and the over 55 group (12.1%,  $p = 0.006$ ) were more punitive than those in the 18–24 group.

<sup>297</sup> See *supra* Table 4. Death-qualified males were more punitive than females (5.4%,  $p = 0.008$ ).

<sup>298</sup> See *Trends: Favor or Oppose Death Penalty for Murder*, GSS DATA EXPLORER, NORC AT THE UNIV. OF CHI., <https://gssdataexplorer.norc.org/trends/Civil%20Liberties?measure=cappun> (last visited May 21, 2021). I calculated average support for capital punishment (“cappun”) between 1974 and 1978 for demographic groups using the “polviews,” “age,” “sex,” “race,” “degree,” “realinc,” “relig” GSS variables.

<sup>299</sup> See *id.*

<sup>300</sup> See *id.*

<sup>301</sup> Anderson et al., *supra* note 227, at 841–42.

<sup>302</sup> See *supra* Part III.B.

colleagues also reported a complex relationship between religious ideology and support for the death penalty, noting lower levels of support for all religious groups relative to evangelical Protestants.<sup>303</sup> The authors concluded that as the United States is becoming less Protestant, less White, and less Republican, these groups are becoming increasingly supportive of the death penalty.<sup>304</sup> My finding that mock jurors who reported they were religious were less likely to pass the death qualification may be attributable to shifting demographic and religious trends. It is equally important to acknowledge that I did not consider inter-denominational variability, which may have helped elucidate more nuanced trends.

When Anderson and colleagues considered race and gender, they found persistently lower levels of death penalty support among Black respondents relative to White respondents and among female respondents relative to male respondents.<sup>305</sup> While my results show that Black respondents were less likely to pass the death qualification than White respondents, which corresponds with GSS trends, in contrast, respondents identifying as female were more likely to pass the death qualification than males in this study.<sup>306</sup> Although this discrepancy may relate to methodological differences between the GSS survey and this study, past empirical research on mock juror behavior is consistent with the GSS data.<sup>307</sup> In general, experimental research shows that death-qualified jurors are more likely to be male, White, biased against out-groups, conviction prone, and death prone than jury pools in general.<sup>308</sup> It is important to note, however, that

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<sup>303</sup> Anderson et al., *supra* note 227, at 856–57.

<sup>304</sup> *Id.* at 859.

<sup>305</sup> *Id.* at 847, 853.

<sup>306</sup> See *supra* notes 26–27 and accompanying text.

<sup>307</sup> See Lynch & Haney, *supra* note 278, at 157.

<sup>308</sup> See *id.* at 157–59; Eisenberg, *supra* note 278, at 304–05, 336; Levinson et al., *supra* note 26, at 558–59; Summers et al., *supra* note 278, at 3227–28; Butler & Moran, *supra* note 278, at 65; Joseph W. Filkins et al., *An Evaluation of the Biasing Effects of Death Qualification*, in *THEORY AND RSCH. ON SMALL GRPS.* 153, 161, 163–65, 168–70 (R. Scott Tindale et al. eds., 2002); Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation.*, 8 *LAW & HUM. BEHAV.* 53, 67–69, 73–75 (1984); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 *LAW & HUM. BEHAV.* 121, 126–28 (1984); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translocation of Attitudes into Verdicts*, 8 *LAW & HUM. BEHAV.* 95, 109–11 (1984).

although males were less likely to pass the death qualification than females in this study, death-qualified males were significantly more likely than death-qualified females to recommend a death sentence.<sup>309</sup> This complexity suggests that males have more polarized views of the death penalty with larger proportions strongly opposed or strongly in favor of it.

After examining demographic trends, I assessed race-of-victim bias. I found no statistically significant evidence of race-of-victim bias for the full death-qualified venire and no statistically significant evidence that mock jurors who failed voir dire were more likely to sentence a defendant to death based on the race of the victim alone.<sup>310</sup> These results were surprising given the robust statistical evidence of race-of-victim bias across geographic, temporal, and methodological contexts.<sup>311</sup> However, it is important to consider that many observational studies that have reported evidence of race-of-victim bias relied on trial data that was decades old at the time of publication.<sup>312</sup> While it is possible that race-of-victim bias may have been more pronounced in the past, I think it is more likely that these discrepancies relate to methodological differences between studies. In actual trials, which observational studies rely on, jurors are often shown pictures of the victim or can determine the victim's race from testimony, the race of the victim's family, or other factors.<sup>313</sup> Research also shows that experimental studies that include more realistic prompts, like images of the defendant and victim, more consistently uncover evidence of bias.<sup>314</sup> In this study, I either omitted the

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<sup>309</sup> *Supra* note 27 and accompanying text.

<sup>310</sup> *See supra* Section IV.C–D.

<sup>311</sup> *See, e.g.,* Baumgartner et al., *supra* note 24, at 214–19 (discussing research on race-of-victim bias and reporting new empirical findings).

<sup>312</sup> *See generally id.* at 210 (reporting the results of a study analyzing data from 1976–2013); Eberhardt et al., *supra* note 34, at 383–84 (analyzing data from 1979 to 1999); Jeffery T. Ulmer et al., *The Race of Defendants and Victims in Pennsylvania Death Penalty Decisions: 2000–2010*, 37 JUST. Q. 955, 956 (2020) (analyzing data from 2000 to 2010).

<sup>313</sup> *See, e.g.,* Turner v. Murray, 476 U.S. 28, 36 (1986) (analyzing the constitutional right to voir dire inquiry into racial basis where the jury was aware of the victim's race).

<sup>314</sup> *See* Sweeney & Haney, *supra* note 27, at 190. *But see* Levinson et al., *supra* note 26, at 557–61 (finding that race-of-victim or race-of-defendant bias were moderated by measures of implicit and explicit bias in a recent experimental study that omitted images of the defendant and victim).

victim's race or described his race in words only. In contrast, I described the defendant's race in words and depicted him with an image. As a result, the victim racial cues were likely weaker than the defendant racial cues, and my models may have underestimated race-of-victim bias.

When I considered race-of-defendant bias in linear probability model two, it was less surprising that I failed to uncover statistically significant evidence of bias in the full death-qualified venire.<sup>315</sup> Meta-analyses of race-of-defendant bias have yielded mixed results; effect sizes have been small and between-study heterogeneity has been high, suggesting race-of-defendant bias is moderated by several variables.<sup>316</sup> After reviewing the literature, I hypothesized that race-of-defendant bias was likely moderated by authoritarianism, trust in the legal system, empathy, and explicit racial bias,<sup>317</sup> and I formulated my voir dire questions accordingly. Linear probability model four confirmed this hypothesis. The statistical results showed that mock jurors who failed the voir dire questions were 18.3% to 18.4% more likely to sentence a Black defendant to death than a White defendant *ceteris paribus*.<sup>318</sup>

Finally, I hypothesized, based on an observational study published by Eberhardt and colleagues, that darkening the Black defendant's eye color and complexion in one of the defendant treatments in this study would increase the likelihood that mock jurors would sentence the defendant to death, particularly when the victim was White.<sup>319</sup> I found no evidence to support this hypothesis.<sup>320</sup> When interpreting these results, it is important to note that Eberhardt

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<sup>315</sup> See *supra* Section IV.C.

<sup>316</sup> See generally Devine & Caughlin, *supra* note 27, at 115–20 (reviewing literature on race-of-defendant bias and reporting small effect sizes and high between-study heterogeneity).

<sup>317</sup> See generally *id.* at 115 (reporting meta-analysis results of studies that measured jury authoritarianism); Haney, *supra* note 16, at 1582–88 (discussing the “empathic divide”); *Racial Attitudes*, *supra* note 192, at 1475–79 (discussing the link between mock juror prejudice and punitiveness in the context of a capital trial); *Nature of Prejudice*, *supra* note 142, at 524–25 (discussing the relationship between measures of explicit juror prejudice and punitiveness in the context of a non-capital trial).

<sup>318</sup> See *supra* Section IV.E.

<sup>319</sup> See Eberhardt et al., *supra* note 34, at 383.

<sup>320</sup> See Section IV.C–E.

and colleagues' data was from the 1970s, 1980s, and 1990s.<sup>321</sup> While it is certainly possible that social norms have changed since then, I think it is more probable that racial stereotyping is moderated by a larger number of traits than complexion and eye color alone.

### B. *The Death Qualification in Legal Context*

The Supreme Court has addressed constitutional issues related to the death qualification process several times.<sup>322</sup> In 1968, in *Witherspoon v. Illinois*, the Court held that “a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”<sup>323</sup> The Court emphasized that “[c]ull[ed] of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.”<sup>324</sup> In 1975, in a second line of decisions related to juror selection, beginning with *Taylor v. Louisiana*, the Supreme Court recognized that the Sixth Amendment guaranteed the right to a jury drawn from a fair cross-section of the community and established a *prima facie* fair cross-section test four years later in *Duren v. Missouri*.<sup>325</sup>

Many jurists interpreted *Witherspoon* to mean that jurors could only be removed for cause if they made it unmistakably clear that their views about the death penalty would prevent them from rendering an impartial verdict or cause them to automatically vote against the death penalty.<sup>326</sup> In 1985, the Supreme Court addressed this issue in *Wainwright v. Witt*, holding that a juror can be excused for cause if his views about the death penalty “‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,’” adding that the standard does

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<sup>321</sup> Eberhardt et al., *supra* note 34, at 384.

<sup>322</sup> See, e.g., *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Witherspoon v. Illinois*, 391 U.S. 510, 522–23 (1968).

<sup>323</sup> *Witherspoon*, 391 U.S. at 522.

<sup>324</sup> *Id.* at 520.

<sup>325</sup> *Duren*, 439 U.S. at 364; *Taylor*, 419 U.S. at 530.

<sup>326</sup> *Wainwright v. Witt*, 469 U.S. 412, 418–19 (1985).

not require “unmistakable clarity.”<sup>327</sup> Shortly after the *Wainwright* decision, the Supreme Court addressed the issue of whether the death qualification violated the fair cross-section or the impartiality requirements of Sixth Amendment in *Lockhart v. McCree*.<sup>328</sup> Specifically, the *McCree* Court addressed the respondent’s claims that the death qualification violates the fair cross-section requirement by removing *Witherspoon*-excludables and violates the impartiality requirement because it “tips the scales” towards death by over-representing conviction-prone jurors.<sup>329</sup>

In addressing the fair cross-section claim, the *McCree* Court distinguished between removing jurors based on “shared attitudes that render members of the group unable to serve as jurors,” which is constitutionally permissible, versus removing jurors because they are members of a “distinctive group,” which is constitutionally impermissible.<sup>330</sup> After finding that the death qualification does not violate the fair cross-section requirement because *Witherspoon*-excludables do not constitute a “distinctive group,” the Court turned to *McCree*’s claim that the death qualification violated his Sixth Amendment right to an impartial jury.<sup>331</sup> The *McCree* Court considered fifteen empirical studies, six of which it deemed relevant, but only three of which it reviewed because the remaining three had been rejected as too “tentative and fragmentary” by the *Witherspoon* Court.<sup>332</sup> Assuming the empirical evidence established that death-qualified juries were more “conviction prone,” the *McCree* Court held that this did not imply partiality because a conviction-prone juror can still “conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.”<sup>333</sup>

Delivering the majority opinion, Chief Justice Rehnquist questioned the external validity and ecological validity of the empirical studies cited by the respondent and criticized them for failing to consistently consider the impact of jury deliberations and jury “nullifiers” (*i.e.*, jurors who would refuse to find a defendant guilty

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<sup>327</sup> *Id.* at 424 (citing *Adams v. Texas*, 448 U.S. 38, 45–46 (1980)).

<sup>328</sup> *Lockhart v. McCree*, 476 U.S. 162, 165 (1986).

<sup>329</sup> *See id.* at 167–84.

<sup>330</sup> *Id.* at 176–77.

<sup>331</sup> *Id.* at 174, 177.

<sup>332</sup> *Id.* at 168–73.

<sup>333</sup> *Id.* at 184.

regardless of the evidence if death is a possible sentence).<sup>334</sup> Empirical methods have improved since the *McCree* decision and many of the issues the Court noted can now be addressed methodologically.<sup>335</sup>

In the past, studies of mock jury behavior relied primarily on samples of college students.<sup>336</sup> Although many studies of college students are consistent with studies of nonstudents, samples drawn with internet-based survey tools, like the sample in this study, are more diverse, representative, and generalize closely to nationally representative studies, providing stronger support for their external validity.<sup>337</sup> A variety of research also suggests that hypothetical and

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<sup>334</sup> *Id.* at 168–73. External validity refers to the extent that a study is statistically generalizable to a larger population. Brian H. Bornstein et al., *Mock Juror Sampling Issues in Jury Simulation Research: A Meta-Analysis*, 41 L. & HUM. BEHAV. 13, 13 (2017). If survey participants are randomly drawn from a population (e.g., jury-eligible adults), their responses will mirror the views of that population more and more closely as the number of respondents surveyed increases because the randomization will tend to capture a representative sample. *See id.* at 13. However, if respondents are drawn from a subgroup of a population (e.g., college students), their responses may not generalize well to the population of interest (e.g., jury-eligible adults) because segments of the population of interest are absent (e.g., jury-eligible adults who are not college students). *See id.* at 14–15. Ecological validity refers to the extent that an experimental study provides a realistic representation of what is being studied. *See id.* at 14. For example, a mock trial may not adequately capture the realism of an actual trial, and the decisions made by mock jurors may not be comparable to jurors who are subjected to the atmosphere of a real trial and are aware their decisions have consequences. *See id.* As the *McCree* Court implied, omitting realistic elements of an actual trial-like jury deliberations or a death qualification that removes nullifiers may harm the ecological validity of mock juror research. *See Lockhart v. McCree*, 476 U.S. 162, 168–73 (1986).

<sup>335</sup> *See generally* Susan Athey & Guido W. Imbens, *The State of Applied Econometrics: Causality and Policy Evaluation*, 31 J. ECON. PERSPS. 3, 4 (2017) (discussing recent developments in econometrics).

<sup>336</sup> Bornstein et al., *supra* note 334, at 14.

<sup>337</sup> *See id.* at 25 (“[t]here were relatively few differences on the outcome measures when comparing community and college student samples”); Berinsky et al., *supra* note 234, at 352 (“demographic characteristics of domestic MTurk users are more representative and diverse than . . . student and convenience samples”); Coppock, *supra* note 234, at 614 (discussing “results from 15 replication studies, showing that in large part, original findings are replicated on both convenience and probability samples” like Amazon’s Mechanical Turk); Clifford et al., *supra* note 234, at 1 (“Overall, our results suggest that the same values and



consequential decision-making often result in similar outcomes and require similar thought processes, which supports the ecological validity of mock juror research.<sup>338</sup> It is equally important to emphasize, as Justice Marshall noted in his dissent in *McCree*, that it is hypocritical for courts to dismiss mock juror research as irrelevant to actual trials when the judiciary is the primary impediment preventing researchers from studying juror behavior during trials.<sup>339</sup> Given the judiciary's reticence to allow researchers to study actual trials and the obvious ethical issues with manipulating trial variables or seating multiple juries, mock jury research provides the best empirical data available on juror decision-making. With respect to Justice Rehnquist's emphasis on jury deliberations, research conducted in the wake of *McCree* shows that race-based punitive tendencies are amplified, not muted, by jury deliberations.<sup>340</sup> Finally, it is possible to differentiate between mock jurors who could fairly determine

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personality traits that motivate ideological differences in the mass public also divide liberals and conservatives on MTurk.”).

<sup>338</sup> See Min Jeong Kang et al., *Hypothetical and Real Choice Differentially Activate Common Valuation Areas*, 31 J. NEUROSCI. 461, 467 (2011) (discussing evidence that real and hypothetical decisions involve largely overlapping neural processes); Norbert L. Kerr et al., *Role Playing and the Study of Jury Behavior*, 7 SOCIO. METHODS & RSCH. 337, 350–51 (1979) (finding mock jurors who thought their decisions carried real consequences showed no differences in guilt and sentencing determinations, deliberation time, or applying a reasonable doubt criterion than those who did not); Anton Kühberger et al., *Framing Decisions: Hypothetical and Real*, 89 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1162, 1163, 1170 (2002) (noting that “real decision making consists of imagining and evaluating hypothetical options, and that this core process is the same for hypothetical decisions” and finding that “real and hypothetical decisions result in similar choices”). *But see* Martin F. Kaplan & Sharon Krupa, *Severe Penalties Under the Control of Others Can Reduce Guilt Verdicts*, 10 L. & PSYCH. REV. 1, 13 (1986) (reporting that mock jurors who thought their decisions carried real consequences were more likely to convict and more certain of the defendant's guilt than those who did not); David W. Wilson & Edward Donnerstein, *Guilty or Not Guilty? A Look at the “Simulated” Jury Paradigm*, 7 J. APPLIED SOC. PSYCH. 175, 177–81 (1977) (reporting mock jurors who were told a trial carried real consequences were more conviction prone than those who were not).

<sup>339</sup> *McCree*, 476 U.S. at 189 (Marshall, J., dissenting) (“[I]t is the courts who have often stood in the way of surveys involving real jurors and we should not now reject a study because of this deficiency.”).

<sup>340</sup> See, e.g., Lynch & Haney, *supra* note 263, at 92.

guilt but would not recommend a death sentence and jurors who would nullify a verdict, an issue that was central to *McCree*.<sup>341</sup>

Research conducted in the wake of *McCree*, including this study, shows strong empirical evidence that African Americans are disproportionately underrepresented in death-qualified venires and death-qualified jurors are more punitive in the guilt and sentencing phases of a trial.<sup>342</sup> This disparity is constitutionally permissible under *McCree* because African Americans are disproportionately underrepresented due to their “shared attitudes” about capital punishment, not because they are Black.<sup>343</sup> The *McCree* Court also made it clear that even if death-qualified jurors are more punitive in the guilt or sentencing phases of a capital trial, this does not necessarily imply they are biased.<sup>344</sup> However, in contrast to the empirical studies evaluated in *McCree*, the results presented here provide evidence that the death qualification increases the chances of empaneling jurors who are not only more punitive but make racially biased sentencing decisions.<sup>345</sup>

Although there is some ambiguity regarding whether the right to an impartial jury applies to the sentencing phase of a trial, the Supreme Court’s recent holdings make it clear that the Sixth Amendment requires a jury to establish aggravating factors beyond a reasonable doubt before a capital defendant can be sentenced to death, which implies the Sixth Amendment’s impartiality requirement follows into the sentencing phase of a trial.<sup>346</sup> Unlike jurors who are

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<sup>341</sup> See, e.g., Justin D. Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 877–79 (2019).

<sup>342</sup> See *infra* Appendix A. See generally, Lynch & Haney, *supra* note 278, at 148–49 (discussing research on the death qualification).

<sup>343</sup> See *McCree*, 476 U.S. at 176–77.

<sup>344</sup> See *id.* at 177–78.

<sup>345</sup> See *supra* Part V.

<sup>346</sup> See *Hurst v. Florida*, 577 U.S. 92, 94 (2016) (holding that a jury must make all of the factual findings supporting a sentence beyond a reasonable doubt); *McCree*, 476 U.S. at 196 (Marshall, J., dissenting) (“[E]ven where the role of the jury at the penalty stage of a capital trial is limited to what is essentially a fact-finding role, the right to an impartial jury established in *Witherspoon* bars the State from skewing the composition of its capital juries . . . .”); *Morgan v. Illinois*, 504 U.S. 719, 740 (1992) (Scalia, J., dissenting) (contrasting opinions that a jury trial is not required at sentencing with cases that imply the impartiality requirement applies to sentencing juries).

naturally more punitive, jurors whose sentencing decisions are heavily influenced by the defendant's race are not jurors who "conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case," even if they were selected from a fair cross-section of the community.<sup>347</sup>

A state process, like the death qualification, that underrepresents African Americans and overrepresents jurors who make racially biased sentencing decisions, merits renewed judicial scrutiny, especially in light of the Court's recent emphasis on eliminating racial bias from the criminal justice system.<sup>348</sup> Although a Fourteenth Amendment Equal Protection claim requires proof of discriminatory state intent or purpose, which courts are loath to recognize, Sixth Amendment challenges focus on outcomes, and state intent or purpose is irrelevant.<sup>349</sup> There is ample precedent that systematic exclusion of jurors does not require evidence of individualized prejudicial effects or a claimant's membership in an excluded group in order to shift the burden of justifying the relevant jury selection methods to the state.<sup>350</sup> The *Taylor* Court also made it clear that "[t]he right to a proper jury cannot be overcome on merely rational grounds."<sup>351</sup> To rebut a Sixth Amendment fair cross-section challenge, the state must show that the law in question "manifestly and primarily" advances a "significant state interest."<sup>352</sup>

The scope of the Sixth Amendment is broader than the fair cross-section requirement alone, as both the *Taylor* and *McCree* Courts emphasized.<sup>353</sup> If a court applies the Sixth Amendment principles

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<sup>347</sup> *McCree*, 476 U.S. at 184.

<sup>348</sup> See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 871 (2017) ("[B]latant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases . . .").

<sup>349</sup> See, e.g., McCleskey v. Kemp, 481 U.S. 279, 297–99 (1987) (discussing Fourteenth Amendment claims and the associated "discriminatory purpose" requirements). See generally Duren v. Missouri, 439 U.S. 357, 368 n.26 (discussing differences between Fourteenth Amendment equal protection and Sixth Amendment challenges).

<sup>350</sup> See *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975); *Peters v. Kiff*, 407 U.S. 493, 503 (1972); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 225 (1946).

<sup>351</sup> *Taylor*, 419 U.S. at 534.

<sup>352</sup> *Duren*, 439 U.S. at 367–68.

<sup>353</sup> *Taylor*, 419 U.S. at 530–31 ("Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . [T]he broad representative character of the jury should be maintained,

used to analyze statistical evidence supporting a fair-cross section claim in order to analyze statistical evidence that a state process violates the Sixth Amendment impartiality requirement, then the argument that the death qualification “manifestly and primarily” advances a legitimate state interest becomes more tenuous.<sup>354</sup> Although the purpose of the death qualification is to remove partial jurors, the results of this study and other research provide evidence that the death qualification fails to “manifestly and primarily” advance this goal because while it may reduce the representation of one class of purportedly partial jurors (*i.e.*, jurors who would refuse to sentence a defendant to death), it simultaneously increases the representation of another class of clearly partial jurors (*i.e.*, jurors who make racist sentencing decisions).<sup>355</sup>

There is also an inherent contradiction in championing the jury as a “guard against the exercise of arbitrary power” and as an interlocutor of “the commonsense judgment of the community,” while simultaneously claiming a significant state interest in removing any prospective juror who would dare exercise that “commonsense judgment” and nullify a verdict or refuse to recommend a death sentence for a widely held, socially acceptable reason.<sup>356</sup> There is simply no legitimate state interest in the wholesale exclusion of anyone who

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partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.” (citing *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting)); *Lockhart v. McCree*, 476 U.S. 162, 184 (1986) (“[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial . . . so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.” (emphasis added)).

<sup>354</sup> See *Duren*, 439 U.S. at 367–69.

<sup>355</sup> See generally Brooke Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants’ Right to Due Process*, 25 BEHAV. SCI. & L. 857, 864–65 (2007) (reporting empirical results showing death-qualified jurors had higher scores on a questionnaire assessing Modern Racism); Levinson et al., *supra* note 26, at 557–63 (reporting that death-qualified jurors had significantly higher scores on the Modern Racism Scale ( $p < 0.001$ )); Unnever & Cullen, *supra* note 226, at 1291 (“[T]he most robust predictor of the degree to which Americans support the death penalty is our measure of white racism.”); James D. Unnever et al., *Race, Racism, and Support for Capital Punishment*, 37 CRIME & JUST. 45, 50 (2008) (discussing the Black-White racial divide in support for the death penalty and the higher rates of support for the death penalty among racists in the U.S. and internationally).

<sup>356</sup> See *Taylor*, 419 U.S. at 530.

might conscientiously object to the death penalty if “the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a [body] truly representative of the community . . . .”<sup>357</sup> In the words of John Adams, “[i]t is not only [a juror’s] right but his Duty . . . to find the Verdict according to his best Understanding, Judgment and Conscience, tho [sic] in Direct opposition to the Direction of the Court.”<sup>358</sup>

Prior to the Civil War, conscientious objectors acquitted defendants who harbored runaway slaves.<sup>359</sup> More recently, civil rights advocates have encouraged jurors to nullify verdicts in the trials of nonviolent African American offenders as an act of civil disobedience against a system that views incarceration as the primary means of mitigating Black antisocial behavior.<sup>360</sup> Allowing the state to manipulate a jury pool to eliminate widespread, ethical viewpoints is antithetical to the basic principles of trial by jury.<sup>361</sup> Courts do not death-qualify juries in non-capital murder trials, drug-qualify juries in drug trials, or fraud-qualify juries in fraud trials. Why is the state given the unique privilege of mitigating nullification during jury selection in capital trials via the death qualification? The state decides whether to pursue capital murder charges and should bear the risk of nullification if the community objects.<sup>362</sup>

Regardless of the hypocrisy of advocating for commonsense judgment while simultaneously striking conscientious objectors, the arbitrary racial distinctions drawn in *McCree* deserve critical reevaluation. The *McCree* Court treated “distinctive groups” and “shared attitudes” as uncorrelated rather than highly interrelated concepts,

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<sup>357</sup> *Glasser v. United States*, 315 U.S. 60, 86 (1942).

<sup>358</sup> Note, *Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents*, 127 HARV. L. REV. 2092, 2095 (2014) (citing John Adams, Diary Notes, in LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

<sup>359</sup> *Id.* at 2096.

<sup>360</sup> See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

<sup>361</sup> See *Lockhart v. McCree*, 476 U.S. 162, 192–93 (1986) (Marshall, J., dissenting).

<sup>362</sup> See *Morgan v. Illinois*, 504 U.S. 719, 722 (1992); *McCleskey v. Kemp*, 481 U.S. 279, 350 n.3 (1987) (Blackmun, J., dissenting) (“The Court recognizes that the prosecutor determines whether a case even will proceed to the penalty phase. If the prosecutor does not pursue the death penalty, a mandatory sentence of life imprisonment is imposed.”).

using judicial code switching to create an illusory dichotomy based on culturally decontextualized racial classifications.<sup>363</sup> Race is not simply a phenotype.<sup>364</sup> Shared histories, cultures, ideologies, and attitudes define racial groups just as much, if not more than, phenotype.<sup>365</sup> The history of slavery, segregation, and racism are inextricably intertwined with Black identity in the United States.<sup>366</sup>

Given the long, racist history of capital punishment, it is not surprising that survey data shows that opposition to the death penalty has been consistently higher among African Americans than White Americans.<sup>367</sup> Although there are ideological variations within racial groups just as there are phenotypic variations, and a single trait is not diagnostic, courts should not be able to pick and choose the elements that define what it means to be Black in America to accommodate the state. Discrimination against a “distinctive group” based on “shared attitudes” that are culturally and historically linked to that group is synonymous with discrimination that targets members of a distinctive group because of their racial identity.<sup>368</sup> When race is viewed in cultural and historical context, rather than in a socio-cultural void, it becomes harder to deny that statistical evidence showing that the death qualification systematically excludes African Americans establishes a *prima facie* claim under *Duren*.<sup>369</sup>

### C. *Voir Dire* as a Safeguard Against Racial Bias

The Supreme Court has long acknowledged that “[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence”

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<sup>363</sup> *McCree*, 476 U.S. at 174–75.

<sup>364</sup> See Audrey Smedley, “Race” and the Construction of Human Identity, 100 AM. ANTHROPOLOGY 690, 699 (1998) (“The social categories of ‘race’ have always encompassed more than mere physical similarities and differences.”).

<sup>365</sup> See generally *id.* (discussing the interrelationship between race and identity).

<sup>366</sup> See *id.* at 695–96.

<sup>367</sup> See generally Michael Cholbi & Alex Madva, *Black Lives Matter and the Call for Death Penalty Abolition*, 128 ETHICS 517–18 (2018) (discussing the Black Lives Matter movements call for death penalty abolition and the widely held view that capital punishment is part of the “war against Black people”); Unnever et al., *supra* note 355, at 54–58 (discussing the Black-White racial divide in support for the death penalty).

<sup>368</sup> See *McCree*, 476 U.S. at 174.

<sup>369</sup> See *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

and that “there is . . . a unique opportunity for racial prejudice to operate but remain undetected” in capital trials.<sup>370</sup> Although racially motivated capital sentencing practices may not be as obvious in the capital trials of today as they were in *Moore v. Dempsey*, *Powell v. Alabama*, or *Brown v. Mississippi*, racism remains an insidious social force that continues to permeate the criminal justice system. Recently, in *Peña-Rodriguez v. Colorado*, the Supreme Court took the extraordinary step of piercing the no-impeachment rule, Federal Rule of Evidence 606(b), to allow courts to address the specter of juror racism *ex post*, holding that the Sixth Amendment right to an impartial trial necessitates this drastic remedy when “racial animus [is] a significant motivating factor in [a] juror’s vote to convict.”<sup>371</sup>

In his dissenting opinion in *Peña-Rodriguez*, Justice Alito underscored the importance of addressing racial prejudice, writing that “the Court is surely correct that even a tincture of racial bias can inflict great damage on [the justice] system, which is dependent on the public’s trust.”<sup>372</sup> Although the *Peña-Rodriguez* Court expanded *ex post* judicial remedies, the majority also highlighted the need to address racism *ex ante* with existing safeguards, including careful voir dire and instructions to jurors to review the evidence, deliberate together, and “reach a verdict in a fair and impartial way, free from bias of any kind.”<sup>373</sup> Although prophylactic measures like voir dire and jury instructions may help identify racially biased jurors, such measures are a safeguard, not a panacea, and voir dire inquiry into racial bias is not an absolute right.<sup>374</sup>

In 1931, in *Aldridge v. United States*, the Supreme Court recognized the right of an African American capital defendant accused of killing a White victim to question prospective jurors about racial bias in voir dire.<sup>375</sup> More recently, in 1973, the Supreme Court held in *Ham v. South Carolina* that denying a defendant, who was accused of drug possession and alleged his arrest was racially motivated, the right to question prospective jurors about racial bias in voir dire violated the Due Process Clause of the Fourteenth

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<sup>370</sup> *Turner v. Murray*, 476 U.S. 28, 35, 41 (1986) (citation omitted).

<sup>371</sup> *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

<sup>372</sup> *Id.* at 875 (Alito, J., dissenting).

<sup>373</sup> *Id.* at 871 (majority opinion).

<sup>374</sup> See *Ristaino v. Ross*, 424 U.S. 589, 594 (1976).

<sup>375</sup> *Aldridge v. United States*, 283 U.S. 308, 314–15 (1931).

Amendment.<sup>376</sup> Because some courts interpreted *Ham* more broadly than others, the Supreme Court addressed the right to voir dire inquiry into racial bias again in 1976, in *Ristaino v. Ross*, and restricted the right to cases involving special circumstances.<sup>377</sup> In *Rosales-Lopez v. United States*, the Supreme Court defined these “special circumstances,” indicating that they were present for “violent criminal act[s] with a victim of a different racial or ethnic group” from that of the defendant or when “external circumstances . . . indicate a reasonable possibility that racial or ethnic prejudice [would] influence the jury’s evaluation of the evidence.”<sup>378</sup> Finally, in *Turner v. Murray*, the Court recognized an unacceptable risk of racial bias infecting sentencing decisions in capital trials, which the Court emphasized is especially serious given the broad discretion of juries to impose a death sentence and the grave consequences of improper sentencing.<sup>379</sup>

In this study, I described a generic robbery-turned-homicide and identified racist mock jurors using voir dire questions. The jurors who failed voir dire were 18.3% to 18.4% more likely to sentence a Black defendant to death controlling for the race of the victim.<sup>380</sup> These results support the conclusion that there is a “reasonable possibility” that the “special circumstances” outlined in *Rosales-Lopez*, and considered in the context of a capital trial in *Turner*, likely apply in every capital case involving an African American defendant, irrespective of the race of the victim.<sup>381</sup> “[A]n [o]unce of [p]revention is worth a [p]ound of [c]ure.”<sup>382</sup> Acknowledging that there is a “reasonable possibility” of bias infecting a capital trial and permitting voir dire inquiry into racial bias offers a minimally intrusive means of protecting a defendant’s constitutional rights.<sup>383</sup> This safeguard

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<sup>376</sup> *Ham v. South Carolina*, 409 U.S. 524, 527 (1973).

<sup>377</sup> *Ristaino*, 424 U.S. at 597.

<sup>378</sup> *Rosales-Lopez v. United States*, 451 U.S. 182, 192–93 (1981).

<sup>379</sup> *Turner v. Murray*, 476 U.S. 28, 35–36 (1986).

<sup>380</sup> See *supra* Table 7. Mock jurors who failed voir dire were significantly more likely to sentence both the Black defendant of lighter complexion (Black (Light): 18.3%,  $p = 0.012$ ) and darker complexion (Black (Dark): 18.4%,  $p = 0.012$ ) to death than the White defendant.

<sup>381</sup> See *Rosales-Lopez*, 451 U.S. at 192–94; *Turner*, 476 U.S. at 33.

<sup>382</sup> BENJAMIN FRANKLIN, ON PROTECTION OF TOWNS FROM FIRE (Feb. 4, 1735), reprinted in *THE PAPERS OF BENJAMIN FRANKLIN*, JANUARY 1, 1735, THROUGH DECEMBER 31, 1744, at 12–15 (Leonard W. Labree ed., 1961).

<sup>383</sup> See *Rosales-Lopez*, 461 U.S. at 192–94.



also has the potential to limit the need for the remedial measures authorized in *Peña-Rodriguez*.<sup>384</sup>

#### D. *The Dangers of Ignoring Explicit Racial Bias*

Explicit racial bias is a major social problem in contemporary America, not a relic of the past. In 2019, the FBI reported 7,314 hate crimes marking the highest level recorded since 2008.<sup>385</sup> These crimes involved planning, deliberation, and action.<sup>386</sup> They were not the result of unconscious stereotypes or implicit racial bias. The same year, 58% of Americans said, “race relations in the U.S. are bad,” 65% said “it has become more common for people to express racist or racially insensitive views since Trump was elected president,” 45% said expressing these views has become more acceptable, and 76% of African Americans reported they “have been treated unfairly because of their race or ethnicity at least from time to time.”<sup>387</sup>

The Anti-Defamation League has also reported an alarming increase in “the distribution of racist, antisemitic and anti-LGBTQ fliers, stickers, banners and posters” in recent years.<sup>388</sup> The Department of Homeland Security has identified White supremacists as the most pressing lethal threat among violent domestic extremists in the U.S.<sup>389</sup> The recent renaissance of White nationalism and right-wing extremism was perhaps punctuated most saliently by the storming of the U.S. Capitol and the parading of anti-Semitic and racist

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<sup>384</sup> See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

<sup>385</sup> FBI, UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2019, at 1 (2020), <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses.pdf>; *FBI Reports an Increase in Hate Crimes in 2019: Hate-Based Murders More than Doubled*, S. POVERTY L. CTR. (Nov. 16, 2020), <https://www.splcenter.org/news/2020/11/16/fbi-reports-increase-hate-crimes-2019-hate-based-murders-more-doubled>.

<sup>386</sup> See FBI, *supra* note 385, at 6.

<sup>387</sup> Juliana Menasce Horowitz et al., *Race in America 2019*, PEW RSCH. CTR. 4, 6, 13 (Apr. 9, 2019), <https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019>.

<sup>388</sup> *White Supremacist Propaganda Spikes in 2020*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/white-supremacist-propaganda-spikes-2020> (last visited Oct. 28, 2021).

<sup>389</sup> U.S. DEP’T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT OCTOBER 2020, at 17–18 (2020), [https://www.dhs.gov/sites/default/files/publications/2020\\_10\\_06\\_homeland-threat-assessment.pdf](https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf).

symbols, including the Confederate battle flag, through the halls of Congress on January 6, 2021.<sup>390</sup> Again, this was not the result of implicit racial bias. The Proud Boys, the Oath Keepers, the Three Percenters, and similar fringe groups openly embrace explicitly racist views.<sup>391</sup>

While it is the role of law enforcement to address extreme forms of racial prejudice, racism poses a broader threat to the rule of law. It is our role as academics, lawmakers, and jurists to recognize the dangers of racial bias, maintain public trust in the legal system, and prevent racism from undermining judicial processes. Working to mitigate racial bias in the criminal justice system is unquestionably important, but myopic focus on implicit bias, at the expense of explicit bias, is misguided. As Michael Selmi emphasized, “labeling nearly all contemporary discrimination as implicit and unconscious” absolves bad actors of responsibility and undermines remedial measures because unconscious thoughts and actions are not legally cognizable.<sup>392</sup> A linear march towards liberalism, inclusion, and understanding is not guaranteed. Explicit racial bias is intergenerationally obdurate—it festers and metastasizes when left unchecked and continues to pose a significant social problem.

#### E. *Reforming Voir Dire*

The Supreme Court has emphasized that screening for racial bias in voir dire is especially important in a capital trial given the “complete finality of [a] death sentence.”<sup>393</sup> However, many scholars question the basic viability of this safeguard, assuming few, if any, prospective jurors will answer questions about racial bias truthfully.<sup>394</sup> For example, in a 1986 article, Albert Alschuler responded to the *Turner* Court’s assertion that screening for racial bias in voir dire was “minimally intrusive” by arguing that it is also

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<sup>390</sup> *Identifying Far-Right Symbols Seen at the U.S. Capitol Riot*, WASH. POST (Jan. 15, 2021, 2:56 PM), <https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot/>.

<sup>391</sup> *See id.*

<sup>392</sup> Selmi, *supra* note 37, at 193.

<sup>393</sup> *Turner v. Murray*, 476 U.S. 28, 35 (1986).

<sup>394</sup> *See generally* Lee, *supra* note 37, at 846 (discussing view that jurors will not answer voir dire questions inquiring into racial bias truthfully).

“minimally useful” and describing the questioning that became the focus of *Turner* as “patronizing.”<sup>395</sup>

Due to concerns that racial animus could influence prospective jurors in *Turner*’s trial, his counsel requested the following voir dire question: “The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?”<sup>396</sup> As Alschuler emphasized, this question equated to asking, “[a]re you a bigot?”<sup>397</sup> Unfortunately, the trial judge’s approach was worse. He simply asked, “whether any person was aware of any reason why he could not render a fair and impartial verdict.”<sup>398</sup> Not surprisingly, all the venirepersons answered “No.”<sup>399</sup>

The fact that 10.1% of respondents in this study openly admitted to racial bias adds credence to the argument that it is possible to inquire into racial bias with a few carefully crafted voir dire questions.<sup>400</sup> However, this should be interpreted with caution. Assuming that all the mock jurors in this study answered the voir dire questions truthfully, which they likely did not, the results of this study suggest that even if voir dire was 80% successful at removing racially biased jurors, you would still expect to empanel a racially biased juror in 15.6% of capital trials.<sup>401</sup> Moreover, empirical evidence suggests that many prospective jurors are dishonest and the physical environment of the courtroom and voir dire questioning methods encourage this dishonesty.<sup>402</sup>

It is important to acknowledge that I conducted the mock voir dire in this study using a semi-anonymous survey. Confidential

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<sup>395</sup> Alschuler, *supra* note 37, at 160–61 (quoting *Turner*, 476 U.S. at 37).

<sup>396</sup> *Turner*, 476 U.S. at 30–31 (citing *Turner v. Commonwealth*, 273 S.E.2d 36, 42 n.8 (Va. 1980)).

<sup>397</sup> Alschuler, *supra* note 37, at 161.

<sup>398</sup> *Turner*, 476 U.S. at 31.

<sup>399</sup> *Id.*

<sup>400</sup> *See infra* Appendix A.

<sup>401</sup> *See id.*

<sup>402</sup> *See* Suggs & Sales, *supra* note 288, at 246–47; *see also* Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451, 452–453, 455–56 (1991) (discussing empirical literature on prospective juror dishonesty during voir dire and presenting a study of 190 jurors—25% of whom did not admit they had been a victim of a crime or had a family member who was a victim of a crime, and 30% of whom had not admitted they knew a law enforcement officer).

surveys, particularly computer-administered questionnaires, are more likely to elicit truthful responses than in-person questioning.<sup>403</sup> Research shows that respondents questioned in the presence of others often alter their answers to comply with social norms and avoid embarrassment.<sup>404</sup> Asking open-ended questions to an entire group in a highly formalized setting that do not require a response are unlikely to elicit one due to the psychological pressure of group conformity, especially when the questions are asked by an authority figure like a judge.<sup>405</sup> Questioning jurors individually in a group setting does not alleviate these problems.<sup>406</sup> In fact, psychologists often use this method of questioning to study social conformity.<sup>407</sup>

Many courts already use questionnaires in jury selection.<sup>408</sup> I have received them—most recently by email. The results of this study suggest that it would be wise to expand the use of questionnaires in voir dire. I recommend making voir dire questionnaires semi-anonymous by using a juror number rather than a name and focusing questions inquiring into bias against African American defendants on authoritarianism, trust in the legal system, empathy, and fear of racial integration. While I am confident that incorporating questionnaires into voir dire will improve juror candor and expanded use of jury instructions on implicit and explicit bias will help mitigate racism, using the full gamut of judicial tools to strike biased jurors is equally essential.

Problems with prospective juror dishonesty are compounded by the fact that prospective jurors are often still empaneled, even after admitting to biases.<sup>409</sup> This is almost certainly a mistake. As early

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<sup>403</sup> Hans & Jehle, *supra* note 260, at 1198–99; Roger Tourangeau & Ting Yan, *Sensitive Questions in Surveys*, 133 *PSYCHOL. BULL.* 859, 863 (2007); Timo Gnambs & Kai Kaspar, *Disclosure of Sensitive Behaviors Across Self-Administered Survey Modes: A Meta-Analysis*, 47 *BEHAV. RES. METHODS* 1237, 1238, 1252 (2015).

<sup>404</sup> Suggs & Sales, *supra* note 288 at 259–61; Hans & Jehle, *supra* note 260, at 1194–98.

<sup>405</sup> Suggs & Sales, *supra* note 288, at 258–61.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 260.

<sup>408</sup> See, e.g., *Jury Managers' Manual*, FLA. CTS., <https://www.flcourts.org/content/download/219266/file/manual.pdf> (last visited Nov. 16, 2021); *Juror Questionnaire for Criminal Cases*, CA. CTS., <https://www.courts.ca.gov/documents/jury002.pdf> (last visited Nov. 16, 2021).

<sup>409</sup> See Cosper, *supra* note 289, at 1471–77 (discussing juror rehabilitation).

as 1807, in *United States v. Burr*, the Court articulated the implied bias doctrine indicating that a juror “may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.”<sup>410</sup> In 1936, in *United States v. Wood*, the Court held that “[t]he [Sixth] Amendment prescribes no specific tests. The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.”<sup>411</sup> It follows that a “determination of implied bias . . . is not controlled by sincere and credible assurances by the juror that he can be fair.”<sup>412</sup>

Both the *Burr* and *Wood* Courts defined evidence of prejudice in notably probabilistic terms like *suspicion* or *presumption*.<sup>413</sup> Empirical evidence, including the results of this study, show that people with racially biased views are likely to make racially biased decisions based on those views.<sup>414</sup> As the NAACP and the Legal Defense and Education Fund noted in their *amicus* brief to the *Peña-Rodriguez* Court, there ““are some extreme situations that would justify a finding of implied bias.””<sup>415</sup> Removing partial jurors is “exactly the sort of ‘extreme’ situation” the doctrine was intended to address and would allow trial courts broader scope to address the issues that led to *Peña-Rodriguez* and to the extremely troubling facts of *Tharpe v. Ford*.<sup>416</sup> Although there are questions regarding

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<sup>410</sup> *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807).

<sup>411</sup> *United States v. Wood*, 299 U.S. 123, 133 (1936).

<sup>412</sup> *Brooks v. Dretke*, 418 F.3d 430, 434 (5th Cir. 2005).

<sup>413</sup> *Burr*, 25 F. Cas. at 50; *Wood*, 229 U.S. at 138.

<sup>414</sup> See generally *Racial Attitudes*, *supra* note 192 at 1480–84 (discussing results that show mock jurors with explicitly racist views were more punitive towards Black capital defendants); *Nature of Prejudice*, *supra* note 142, 524–25 (discussing results that show mock jurors with explicitly racist views were more punitive towards Black criminal defendants); Butler, *supra* note 355, at 859, 861, 865 (reporting empirical results showing death-qualified jurors had higher scores on a questionnaire assessing Modern Racism); Levinson et al., *supra* note 26, at 559, 564 (discussing results that show mock jurors with explicitly racist views were more punitive towards Black capital defendants when the victim is White).

<sup>415</sup> Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. at 19–20, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (citing Smith v. Phillips, 455 U.S. 209, 221–22 (1982) (O’Connor, J., concurring)).

<sup>416</sup> *Id.* at 20. See generally *Tharpe v. Ford*, 139 S. Ct. 911, 913 (2019) (statement of Justice Sotomayor respecting the denial of certiorari). Justice Sotomayor discussed the “truly striking evidence of juror bias” in the trial of Keith Leroy

whether the implied bias doctrine is clearly established law, numerous courts have relied on it in a variety of contexts.<sup>417</sup> In the words of Judge Price from the Texas Court of Criminal Appeals, “I am here to attest that the implied bias doctrine does exist. I know it does; I have seen it.”<sup>418</sup> Combating racism in the criminal justice system on a macro scale will require the judiciary to recognize that statistical evidence of generalized bias often indicates there is a high probability of individualized bias in a specific trial. The implied bias doctrine provides a powerful judicial tool and a viable way to incorporate statistical evidence into judicial decision-making. Perhaps it is time to dust it off.

### CONCLUSION

This article reports the results of one of the largest studies of mock juror capital sentencing decisions conducted to date and provides compelling evidence that racially biased jurors make racially biased sentencing decisions. After exploring the role that historical socio-legal forces played in defining race and shaping crime and punishment in the United States in Part I, I reviewed empirical literature on juror decision-making in Part II. As reported in Part III, I randomly assigned mock jurors to treatment groups with the race of the defendant and the race of victim varied in a 3 × 3 experimental design. I death qualified mock jurors, asked them to determine sentencing after reading a description of a robbery-turned-homicide, asked voir dire questions, and collected demographic information. I hypothesized that jurors who failed voir dire questions focused on authoritarianism, trust in the legal system, empathy, and explicit racial bias, would make racially biased sentencing decisions.

I estimated four linear probability models in Part IV and conducted *post-hoc* Monte Carlo simulations to contextualize the results. The statistical models did not show evidence of race-of-

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Tharpe, a man who was sentenced to death by at least one unabashedly racist juror who “wondered if black people even have souls.” *Id.* (citations omitted).

<sup>417</sup> See Petition for Writ of Certiorari at 10–12, *Uranga v. Davis*, No. 18-6899 (5th Cir. Nov. 20, 2018) (discussing Circuit Court split and various applications of the implied bias doctrine); *Uranga v. State*, 330 S.W.3d 301, 309 n.10 (Tex. Crim. App. 2010) (listing Circuit Courts that have “accepted the Sixth Amendment implied bias doctrine without qualification”).

<sup>418</sup> *Uranga*, 330 S.W.3d at 308 (Price, J., dissenting).

defendant or race-of-victim bias for the full death-qualified venire, and I found no evidence that darkening a Black defendant's complexion and eye color affected punitiveness in sentencing. However, mock jurors who failed the voir dire questions showed strong race-of-defendant sentencing bias. These mock jurors were 18.3% to 18.4% more likely to sentence an African American defendant to death than a White defendant based on his race alone. Monte Carlo simulations showed that the death qualification increased the probability of empaneling one or more of these racially biased mock jurors from 72.1% to 78.1%, raising the relative risk by 8.4%.

In Part V, I argue that the death qualification is unconstitutional. The results of this study provide evidence that the death qualification violates an African American defendant's Sixth Amendment right to an impartial jury by increasing the probability of empaneling jurors that make racially biased sentencing decisions. There is also no legitimate state interest in removing nullifiers from a jury pool who hold a widely embraced, ethical viewpoint like opposition to the death penalty.<sup>419</sup> Continuing to allow the state to death qualify juries is particularly troubling because in addition to overrepresenting racially biased jurors, the death qualification underrepresents African American jurors because they oppose the death penalty at much higher rates than White Americans.<sup>420</sup> Striking members of a racial group based on ideological beliefs linked to their racial identity is synonymous with striking them because of their racial identity and should be critically reevaluated in light of fair cross-section requirement of the Sixth Amendment. My empirical results also support the conclusion that the "special circumstances" that trigger the right to inquire into juror racial bias during voir dire, as defined in *Ristaino* and further articulated *Rosales-Lopez* and *Turner*, are likely present in all capital cases involving an African American defendant, regardless of the victim's race.

If the Supreme Court is committed to mitigating racism in capital trials on a broad scale, it should reassess the constitutionality of the death qualification. More broadly, the judiciary should increase the use of questionnaires in voir dire, provide jury instructions on explicit and implicit bias, closely scrutinize prospective jurors who self-report biases, end the practice of rehabilitating jurors who give

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<sup>419</sup> See *Lockhart v. McCree*, 476 U.S. 167, 172–73 (1986).

<sup>420</sup> See *Unnever & Cullen, supra* note 226, at 1281.

assurances they can be impartial after admitting to bias, and strike jurors when racial bias can reasonably be implied.



## APPENDIX A

TABLE A-1

| Variable                    | TOTAL        |               | INELIGIBLE |              | ELIGIBLE     |              |
|-----------------------------|--------------|---------------|------------|--------------|--------------|--------------|
|                             | n            | %             | n          | %            | n            | %            |
| <b>Voir Dire:</b>           |              |               |            |              |              |              |
| Passed                      | 2,953        | 89.9%         | 842        | 94.8%        | 2111         | 88.0%        |
| Failed                      | 331          | 10.1%         | 46         | 5.2%         | 285          | 11.9%        |
| <b>Age:</b>                 |              |               |            |              |              |              |
| 18–24                       | 315          | 9.6%          | 94         | 10.6%        | 221          | 9.2%         |
| 25–34                       | 1,177        | 35.8%         | 360        | 40.5%        | 817          | 34.1%        |
| 35–44                       | 864          | 26.3%         | 225        | 25.3%        | 639          | 26.6%        |
| 45–55                       | 493          | 15.0%         | 106        | 11.9%        | 387          | 16.1%        |
| >55                         | 435          | 13.2%         | 103        | 11.6%        | 332          | 13.8%        |
| <b>Death Penalty State:</b> |              |               |            |              |              |              |
| No                          | 1,597        | 48.6%         | 461        | 51.9%        | 1,136        | 47.4%        |
| Yes                         | 1,687        | 51.4%         | 427        | 48.1%        | 1,260        | 52.5%        |
| <b>Education:</b>           |              |               |            |              |              |              |
| High School or Less         | 318          | 9.7%          | 75         | 8.4%         | 243          | 10.1%        |
| Some College                | 651          | 19.8%         | 140        | 15.8%        | 511          | 21.3%        |
| College Degree              | 1,784        | 54.3%         | 518        | 58.3%        | 1,266        | 52.8%        |
| Graduate Degree             | 531          | 16.2%         | 155        | 17.5%        | 376          | 15.7%        |
| <b>Politics:</b>            |              |               |            |              |              |              |
| Liberal                     | 1,375        | 41.9%         | 473        | 53.3%        | 902          | 37.6%        |
| Moderate                    | 1,034        | 31.5%         | 242        | 27.3%        | 792          | 33.0%        |
| Conservative                | 875          | 26.6%         | 173        | 19.5%        | 702          | 29.3%        |
| <b>Income:</b>              |              |               |            |              |              |              |
| <\$25,000                   | 730          | 22.2%         | 221        | 24.9%        | 509          | 21.2%        |
| \$25,000 – \$49,999         | 964          | 29.4%         | 255        | 28.7%        | 709          | 29.6%        |
| \$50,000 – \$74,999         | 795          | 24.2%         | 215        | 24.2%        | 580          | 24.2%        |
| >\$75,000                   | 795          | 24.2%         | 197        | 22.2%        | 598          | 24.9%        |
| <b>Sex:</b>                 |              |               |            |              |              |              |
| Female                      | 1,693        | 51.6%         | 424        | 47.7%        | 1,269        | 52.9%        |
| Male                        | 1,591        | 48.4%         | 464        | 52.3%        | 1,127        | 47.0%        |
| <b>Race:</b>                |              |               |            |              |              |              |
| White                       | 2,495        | 76.0%         | 635        | 71.5%        | 1,860        | 77.5%        |
| Black                       | 297          | 9.0%          | 110        | 12.4%        | 187          | 7.8%         |
| Latino                      | 245          | 7.5%          | 75         | 8.4%         | 170          | 7.1%         |
| Asian                       | 193          | 5.9%          | 53         | 6.0%         | 140          | 5.8%         |
| Other                       | 54           | 1.6%          | 15         | 1.7%         | 39           | 1.6%         |
| <b>Religious:</b>           |              |               |            |              |              |              |
| No                          | 1,758        | 53.5%         | 449        | 50.6%        | 1,309        | 54.6%        |
| Yes                         | 1,526        | 46.5%         | 439        | 49.4%        | 1,087        | 45.3%        |
| <b>Total:</b>               | <b>3,284</b> | <b>100.0%</b> | <b>888</b> | <b>27.0%</b> | <b>2,396</b> | <b>73.0%</b> |

## APPENDIX B

I asked mock jurors the following disqualifying questions and removed mock jurors from the study who reported they had been convicted of a felony, were facing felony charges, were non-citizens, or were under 18:

1. Have you ever been convicted of a felony, or are you currently facing felony charges? Yes or No?
2. Are you a United States citizen? Yes or No?
3. How old are you?

After asking disqualifying questions, I asked mock jurors a series of demographic questions:

1. Which option best describes your political views? Conservative, Moderate, or Liberal?
2. What's your expected pre-tax income for 2020? Less than \$25,000, \$25,000-\$49,999, \$50,000-\$74,999, More than \$75,000?
3. Which option best describes your sex? Male or Female?
4. Are you religious? Yes or No?
5. What state are you from?
6. Which best describes your education? Less than High School, Some College, College Degree, Graduate Degree?
7. Which best describes you? Black, White, Hispanic or Latino, Asian, or Other?
8. What's 10+4? 14, 12, 5, 7?
9. Which option best describes your political views? Conservative, Moderate, or Liberal?

I randomized the question order (except for questions 1, 8, and 9), randomized the response order for nominal responses, included question 8 to eliminate survey respondents who were answering without reading the questions, and repeated question 1 as question 9 to eliminate anyone who did not answer consistently.

## APPENDIX C

I ran two multinomial logistic regressions to assess the effectiveness of the random assignment of study participants to the victim (Table C-1) and defendant treatment (Table C-2) groups. I found no evidence of significant imbalances (all  $p$ -values  $> 0.05$ ).

TABLE C-1  
MULTINOMIAL LOGISTIC REGRESSION REGRESSING VICTIM  
TREATMENTS ON DEFENDANT TREATMENTS AND DEMOGRAPHIC  
VARIABLES

| Variable                    | WHITE  |       |        |            | BLACK  |       |        |            |
|-----------------------------|--------|-------|--------|------------|--------|-------|--------|------------|
|                             | Est    | SE    | Wald   | $p$ -value | Est    | SE    | Wald   | $p$ -value |
| (Intercept)                 | 0.083  | 0.260 | 0.320  | 0.749      | -0.109 | 0.264 | -0.413 | 0.680      |
| <b>Defendant:</b>           |        |       |        |            |        |       |        |            |
| Black (Light)               | 0.057  | 0.123 | 0.462  | 0.644      | 0.038  | 0.123 | 0.306  | 0.760      |
| Black (Dark)                | 0.037  | 0.123 | 0.303  | 0.762      | 0.043  | 0.123 | 0.346  | 0.729      |
| <b>Age:</b>                 |        |       |        |            |        |       |        |            |
| 25–34                       | -0.121 | 0.189 | -0.642 | 0.521      | 0.082  | 0.197 | 0.418  | 0.676      |
| 35–44                       | -0.093 | 0.196 | -0.475 | 0.635      | 0.050  | 0.205 | 0.243  | 0.808      |
| 45–55                       | -0.175 | 0.213 | -0.820 | 0.412      | 0.003  | 0.221 | 0.015  | 0.988      |
| >55                         | -0.138 | 0.222 | -0.623 | 0.533      | 0.199  | 0.227 | 0.877  | 0.381      |
| <b>Death Penalty State:</b> |        |       |        |            |        |       |        |            |
| Yes                         | 0.051  | 0.103 | 0.496  | 0.620      | 0.046  | 0.103 | 0.443  | 0.658      |
| <b>Education:</b>           |        |       |        |            |        |       |        |            |
| Some college                | 0.102  | 0.194 | 0.523  | 0.601      | -0.205 | 0.194 | -1.061 | 0.289      |
| College degree              | 0.064  | 0.181 | 0.351  | 0.725      | -0.046 | 0.177 | -0.258 | 0.797      |
| Graduate degree             | 0.089  | 0.218 | 0.408  | 0.684      | 0.051  | 0.213 | 0.239  | 0.811      |
| <b>Income:</b>              |        |       |        |            |        |       |        |            |
| \$25,000 – \$49,999         | -0.198 | 0.145 | -1.367 | 0.172      | -0.090 | 0.147 | -0.612 | 0.541      |
| \$50,000 – \$74,999         | -0.104 | 0.157 | -0.661 | 0.509      | -0.023 | 0.159 | -0.148 | 0.882      |
| >\$75,000                   | -0.204 | 0.162 | -1.258 | 0.208      | -0.080 | 0.164 | -0.487 | 0.627      |
| <b>Politics:</b>            |        |       |        |            |        |       |        |            |
| Moderate                    | 0.098  | 0.122 | 0.803  | 0.422      | 0.155  | 0.122 | 1.271  | 0.204      |
| Conservative                | 0.168  | 0.135 | 1.248  | 0.212      | 0.142  | 0.135 | 1.052  | 0.293      |
| <b>Sex:</b>                 |        |       |        |            |        |       |        |            |
| Male                        | 0.010  | 0.102 | 0.098  | 0.922      | 0.111  | 0.102 | 1.084  | 0.279      |
| <b>Race:</b>                |        |       |        |            |        |       |        |            |
| Black                       | -0.088 | 0.193 | -0.458 | 0.647      | -0.067 | 0.193 | -0.347 | 0.729      |
| Latino                      | -0.162 | 0.195 | -0.832 | 0.405      | -0.296 | 0.202 | -1.463 | 0.144      |
| Asian                       | -0.195 | 0.224 | -0.871 | 0.384      | 0.115  | 0.213 | 0.542  | 0.588      |
| Other                       | 0.042  | 0.377 | 0.112  | 0.911      | -0.330 | 0.419 | -0.787 | 0.431      |
| <b>Religious:</b>           |        |       |        |            |        |       |        |            |
| Yes                         | -0.031 | 0.109 | -0.284 | 0.776      | -0.048 | 0.109 | -0.440 | 0.660      |

TABLE C-2  
 MULTINOMIAL LOGISTIC REGRESSION REGRESSING DEFENDANT  
 TREATMENTS ON VICTIM TREATMENTS AND DEMOGRAPHIC  
 VARIABLES.

| Variable             | BLACK (LIGHT) |       |        |         | BLACK (DARK) |       |        |         |
|----------------------|---------------|-------|--------|---------|--------------|-------|--------|---------|
|                      | Est           | SE    | Wald   | p-value | Est          | SE    | Wald   | p-value |
| (Intercept)          | 0.207         | 0.259 | 0.799  | 0.424   | 0.050        | 0.264 | 0.190  | 0.849   |
| Victim               |               |       |        |         |              |       |        |         |
| White                | 0.058         | 0.123 | 0.469  | 0.639   | 0.038        | 0.123 | 0.307  | 0.759   |
| Black                | 0.038         | 0.123 | 0.310  | 0.756   | 0.043        | 0.123 | 0.346  | 0.729   |
| Age:                 |               |       |        |         |              |       |        |         |
| 25-34                | -0.068        | 0.189 | -0.359 | 0.720   | 0.215        | 0.197 | 1.092  | 0.275   |
| 35-44                | -0.182        | 0.196 | -0.925 | 0.355   | 0.178        | 0.203 | 0.878  | 0.380   |
| 45-55                | -0.157        | 0.214 | -0.733 | 0.463   | 0.217        | 0.220 | 0.983  | 0.325   |
| >55                  | -0.125        | 0.220 | -0.569 | 0.570   | 0.255        | 0.226 | 1.128  | 0.259   |
| Death Penalty State: |               |       |        |         |              |       |        |         |
| Yes                  | 0.078         | 0.103 | 0.756  | 0.450   | -0.024       | 0.103 | -0.233 | 0.816   |
| Education:           |               |       |        |         |              |       |        |         |
| Some college         | -0.233        | 0.196 | -1.191 | 0.233   | -0.138       | 0.192 | -0.716 | 0.474   |
| College degree       | -0.008        | 0.180 | -0.046 | 0.963   | -0.061       | 0.178 | -0.344 | 0.731   |
| Graduate degree      | 0.123         | 0.215 | 0.571  | 0.568   | -0.139       | 0.218 | -0.641 | 0.522   |
| Income:              |               |       |        |         |              |       |        |         |
| \$25,000 - \$49,999  | -0.177        | 0.147 | -1.200 | 0.230   | 0.053        | 0.146 | 0.364  | 0.716   |
| \$50,000 - \$74,999  | -0.227        | 0.157 | -1.445 | 0.148   | -0.092       | 0.157 | -0.585 | 0.559   |
| >\$75,000            | 0.019         | 0.161 | 0.118  | 0.906   | -0.094       | 0.165 | -0.573 | 0.567   |
| Politics:            |               |       |        |         |              |       |        |         |
| Moderate             | -0.055        | 0.122 | -0.452 | 0.651   | -0.064       | 0.122 | -0.522 | 0.602   |
| Conservative         | -0.092        | 0.135 | -0.682 | 0.495   | -0.085       | 0.135 | -0.627 | 0.531   |
| Sex:                 |               |       |        |         |              |       |        |         |
| Male                 | 0.028         | 0.102 | 0.273  | 0.785   | -0.130       | 0.103 | -1.263 | 0.207   |
| Race:                |               |       |        |         |              |       |        |         |
| Black                | 0.204         | 0.192 | 1.063  | 0.288   | 0.050        | 0.199 | 0.250  | 0.803   |
| Latino               | 0.066         | 0.205 | 0.321  | 0.748   | 0.246        | 0.202 | 1.221  | 0.222   |
| Asian                | -0.262        | 0.218 | -1.202 | 0.229   | -0.139       | 0.213 | -0.654 | 0.513   |
| Other                | 0.641         | 0.443 | 1.446  | 0.148   | 0.701        | 0.438 | 1.602  | 0.109   |
| Religious:           |               |       |        |         |              |       |        |         |
| Yes                  | -0.006        | 0.109 | -0.054 | 0.957   | -0.132       | 0.109 | -1.209 | 0.227   |

## APPENDIX D

TABLE D-1

## LINEAR PROBABILITY MODEL TWO: PREDICTED PROBABILITIES

| Victim    | Defendant     | Est.  | SE    | Lower CL | Upper CL |
|-----------|---------------|-------|-------|----------|----------|
| Ambiguous | Black (Dark)  | 0.544 | 0.036 | 0.473    | 0.616    |
| Ambiguous | Black (Light) | 0.517 | 0.037 | 0.444    | 0.590    |
| Ambiguous | White         | 0.568 | 0.037 | 0.495    | 0.641    |
| White     | Black (Dark)  | 0.517 | 0.037 | 0.444    | 0.590    |
| White     | Black (Light) | 0.547 | 0.037 | 0.475    | 0.620    |
| White     | White         | 0.542 | 0.039 | 0.465    | 0.618    |
| Black     | Black (Dark)  | 0.551 | 0.038 | 0.476    | 0.625    |
| Black     | Black (Light) | 0.569 | 0.037 | 0.497    | 0.641    |
| Black     | White         | 0.541 | 0.039 | 0.465    | 0.617    |

FIGURE D-1

## LINEAR PROBABILITY MODEL TWO: PREDICTED PROBABILITIES

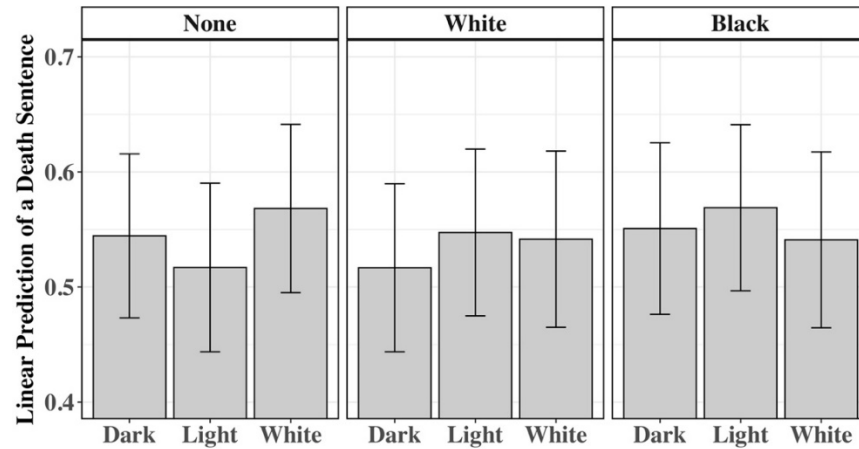


TABLE D-2

## LINEAR PROBABILITY MODEL TWO: SIMPLE EFFECTS

| Victim    | Defendant                    | Est.   | SE    | <i>t</i> -value | <i>p</i> -value |
|-----------|------------------------------|--------|-------|-----------------|-----------------|
| Ambiguous | Black (Dark) – Black (Light) | 0.027  | 0.041 | 0.668           | 0.504           |
| Ambiguous | Black (Dark) – White         | -0.024 | 0.042 | -0.572          | 0.568           |
| Ambiguous | Black (Light) – White        | -0.051 | 0.042 | -1.219          | 0.223           |
| White     | Black (Dark) – Black (Light) | -0.031 | 0.041 | -0.741          | 0.459           |
| White     | Black (Dark) – White         | -0.025 | 0.042 | -0.588          | 0.557           |
| White     | Black (Light) – White        | 0.006  | 0.043 | 0.136           | 0.892           |
| Black     | Black (Dark) – Black (Light) | -0.018 | 0.042 | -0.432          | 0.666           |
| Black     | Black (Dark) – White         | 0.010  | 0.043 | 0.227           | 0.820           |
| Black     | Black (Light) – White        | 0.028  | 0.042 | 0.663           | 0.508           |

## APPENDIX E

TABLE E-1

## LINEAR PROBABILITY MODEL THREE: PREDICTED PROBABILITIES

| Victim    | Voir Dire | Est.  | SE    | Lower CL | Upper CL |
|-----------|-----------|-------|-------|----------|----------|
| Ambiguous | Failed    | 0.643 | 0.050 | 0.546    | 0.740    |
| Ambiguous | Passed    | 0.471 | 0.027 | 0.419    | 0.523    |
| White     | Failed    | 0.626 | 0.055 | 0.517    | 0.734    |
| White     | Passed    | 0.465 | 0.027 | 0.412    | 0.517    |
| Black     | Failed    | 0.578 | 0.054 | 0.473    | 0.684    |
| Black     | Passed    | 0.492 | 0.027 | 0.439    | 0.545    |

FIGURE E-1

## LINEAR PROBABILITY MODEL THREE: PREDICTED PROBABILITIES

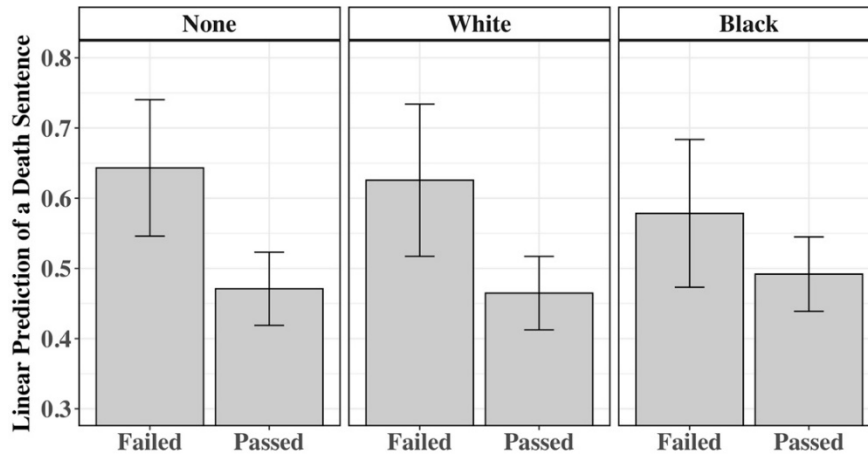


TABLE E-2

## LINEAR PROBABILITY MODEL THREE: SIMPLE EFFECTS

| Victim    | Voir Dire       | Est.  | SE    | t-value | p-value    |
|-----------|-----------------|-------|-------|---------|------------|
| Ambiguous | Failed – Passed | 0.172 | 0.049 | 3.494   | p<0.001*** |
| White     | Failed – Passed | 0.161 | 0.055 | 2.927   | 0.004**    |
| Black     | Failed – Passed | 0.087 | 0.054 | 1.616   | 0.106      |

## APPENDIX F

TABLE F-1

## LINEAR PROBABILITY MODEL FOUR: PREDICTED PROBABILITIES

| Defendant     | Voir Dire | Est.  | SE    | Lower CL | Upper CL |
|---------------|-----------|-------|-------|----------|----------|
| White         | Failed    | 0.515 | 0.055 | 0.408    | 0.622    |
| White         | Passed    | 0.496 | 0.027 | 0.442    | 0.549    |
| Black (Light) | Failed    | 0.670 | 0.050 | 0.571    | 0.769    |
| Black (Light) | Passed    | 0.467 | 0.027 | 0.415    | 0.520    |
| Black (Dark)  | Failed    | 0.664 | 0.052 | 0.562    | 0.765    |
| Black (Dark)  | Passed    | 0.460 | 0.027 | 0.408    | 0.513    |

FIGURE F-1

## LINEAR PROBABILITY MODEL FOUR: PREDICTED PROBABILITIES

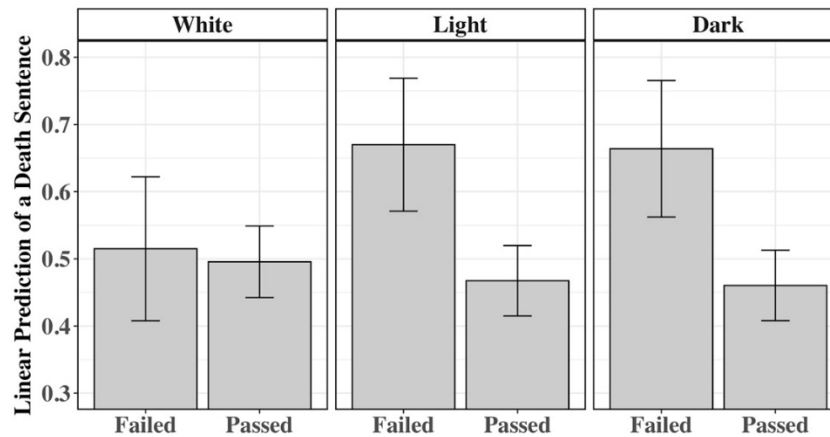


TABLE F-2

## LINEAR PROBABILITY MODEL FOUR: SIMPLE EFFECTS

| Defendant     | Voir Dire       | Est.  | SE    | t-value | p-value    |
|---------------|-----------------|-------|-------|---------|------------|
| White         | Failed – Passed | 0.019 | 0.054 | 0.359   | 0.719      |
| Black (Light) | Failed – Passed | 0.203 | 0.051 | 4.010   | p<0.001*** |
| Black (Dark)  | Failed – Passed | 0.203 | 0.052 | 3.940   | p<0.001*** |