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RACIAL BIAS AND JUROR SELECTION IN DEATH PENALTY CASES

by

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B.A. University of Central Florida, 2020

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I. Abstract

Across the country, African American defendants are being discriminated against in the criminal courts and by juries, particularly in capital cases.¹ This assertion is supported by two lines of research. First, an analysis of Supreme Court decisions focusing on the racial impact on voir dire. Second, social-legal studies on juror decision making have demonstrated legal and socio-legal histories providing evidence that demonstrate there is a racial bias in our system. Based on these findings, this paper sets forth several legal and policy recommendations to improve the fair adjudication of African American defendants charged with capital crimes.

¹ Jack Glaser, Karin D. Martin, Kimberly B. Kahn, *Possibility of death sentence has divergent effect on verdicts for black and white defendants* 39 LAW & HUM. BEHAV. 539 (2015).

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II. Introduction

In the words of Clarence Darrow, a famous American trial attorney from the early 20th century, “almost every case has been won or lost when the jury is sworn.”² As such, exploring the biases of potential jurors is essential because juror bias, not evidence, may sway verdicts and result in injustice. This is especially important in capital punishment cases where the finality of death is imposed.

The Sixth and Fourteenth Amendments of the Constitution protect defendants’ rights, including the right to a fair and impartial jury.³ Specifically, the Sixth Amendment ensures that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”⁴ As courts review the constitutionality of topics such as the jury selection, they determine their interpretations within the context of the Sixth Amendment by determining whether an impartial jury was formed and through the Equal Protection Clause of the Fourteenth Amendment to ensure equal protection for any citizen, regardless of race.⁵ Lastly, the Eighth Amendment guarantees protection from cruel and unusual punishment and is the basis for the debate concerning whether or not the death penalty should be imposed.⁶

Throughout history, juries have been selected in order to create a fair and impartial jury. At common law, jurors were required to be impartial – individuals capable of being unaffected by external pressures and internal biases.⁷ In 1895, the Supreme Court defined the job of the jury

² Judge Robert M. Dow Jr., Eric Andrews, Laverne Morris, *Selecting a Jury can be Complicated During Divisive Political Times* 1 (June 2018).

³ U.S. Const. Amend. VI.

⁴ U.S. Const. Amend. VI.

⁵ U.S. Const. Amend. VI; *See also*, U. S. Const. amend. XIV.

⁶ U.S. Const. Amend. XIII.

⁷ Jeffrey Abramson, *We the Jury*, 100 (1994).

by holding that jurors must follow the court's instructions rather than taking both the facts of the case and the law into their own hands.⁸ Through the nineteenth and early twentieth centuries, all criminal trials required a jury that could not be waived for reasons relating to public policy; this changed in 1930 when the Court held that the right to a jury trial may be waived by a defendant.⁹ However, when a defendant elects to participate in a jury trial, the jury must be one that is fair to the defendant. The Supreme Court held in 1975 that the constitutional right to trial by jury "required that the jury pool be a mirror image or microcosm of the eligible community population."¹⁰ These together create a very specific idea of what a constitutional jury for any given trial should look like – reflective of whatever community the defendant is to be tried in. To contrast, another idea on constitutional jury composition creates a jury that attempts to encompass fairness – a democratic cross-sectional jury.¹¹ The goal of this kind of jury is to bring about diverse ideas and even biases to be used during deliberation.¹² Through this form of juries, one juror might bring a perspective that another would not otherwise be exposed to. This becomes very significant at trial because of the great impact of jury composition on the outcome of trial. The process of creating a diverse jury composition is accomplished through jury selection.

Judges and attorneys play a significant role in determining the composition of juries. Through voir dire, parties can eliminate prospective jurors who are unfit to serve as jurors, while also ensuring that the population of the jury is composed of jurors who are not biased against

⁸ *Sparf v. United States*, 156 U.S. 51 (1885).

⁹ *Patton v. United States*, 281 U.S. 308 (1930).

¹⁰ *Id.* at 100.

¹¹ *Id.* at 101.

¹² *Id.*

either side. The question to be answered upon review is whether jury selection based on race should be allowed in death penalty cases, where the punishment is so severe and so permanent that there is no room for error.

The implications of research on the implications of juror decision making on the outcome of trial go beyond that of our legal system and delve into the need for social reform with regards to African American defendants. Research into sociology and psychology with regard to these kinds of cases will force both our legal system and our country to acknowledge that African Americans have been and continue to be discriminated against throughout the history of the United States legal system. As more researchers begin to make inquiries and face these issues head on, the closer our legal system will be to reforming those issues.

This thesis will examine constitutional decisions on racial discrimination, the impact of race on capital punishment decision making and come to conclusions about the corrective measures that should be implemented to reduce bias. Part III reviews the history of Supreme Court rulings on the death penalty through examining the history of the death penalty, landmark cases on the death penalty, and contemporary issues with the death penalty. Part IV analyzes the process of decision making by identifying three concepts that tend to affect the outcome of a capital trial for African American defendants: the race of the defendant, the race of the victim, and the quantity of evidence offered at trial. Part V discusses research that may lead to reforming jury selection in capital cases. Part VI comes to conclusions about racial biases and jury selection.

This thesis concludes that first the Supreme Court must allow voir dire based on racial biases. Second, this thesis concludes that the jury for African American defendants must be racially diverse jury composition in order for the defendant to receive a fair and just trial.

III. Review of Supreme Court Rulings on the Death Penalty

History of the Death Penalty

The legal controversy surrounding the death penalty is rooted in the Eighth Amendment protection from cruel and unusual punishment.¹³ The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” By reviewing cases on the death penalty, the Supreme Court states its interpretation of the Eighth Amendment in its holdings.

There are two schools of thought when it comes to the interpretation of the Constitution: originalism and a living constitution. Under the idea of a living constitution, the Eighth Amendment is vague for the very purpose of it being altered and changed along with the culture of our country and what is deemed to be “cruel and unusual.” As the ideas of morality and normality change throughout time, as does the applicability of this amendment to crime and punishment in our country. It is then up to the courts to decide how to apply the Eighth Amendment to these principles. According to originalist ideas, however, the words of the forefathers and what they intended at that time in history is how the Constitution should be interpreted today. Under this idea, the Eighth Amendment must be construed according to what the intent of the forefathers was in creating this amendment.

The death penalty has been part of American culture for centuries, dating back to the 1700s.¹⁴ Influenced by early political policy and strong Christian ideals, the Framers of the Constitution considered the ramifications of the death penalty, advocating for its use in only the

¹³ U.S. Const. Amend. XIII.

¹⁴ Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797 (2012).

most serious of cases.¹⁵ This ideal was put into practice around the nineteenth and twentieth centuries, when the court system began to reject the British practices of mandatory death penalty.¹⁶ Since then, the death penalty has been used in only the most serious of cases with very careful discretion used to put someone to death for his or her crimes.¹⁷ Some states, such as Rhode Island, Wisconsin, Iowa and Maine, abolished the death penalty entirely.¹⁸ During the earliest part of the twentieth century, many states abolished the death penalty; however, this progressive movement did not last long.¹⁹ Within the next decade, half of those reinstated the death penalty, turning back the clock on capital punishment reform.²⁰ Even after narrowing the use of the death penalty, the practice has only evolved and brought about controversy that is still heavily debated.

In 1972, the Supreme Court reviewed the death penalty for three cases within the context of the Eighth Amendment in *Furman v. Georgia*.²¹ In this case, three men were sentenced to death for murder in Georgia, rape in Georgia, and rape in Texas, respectively.²² Each case was a trial by jury.²³ The Court held that because the death penalty was applied arbitrarily or in a discriminatory way, “the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eight and Fourteenth Amendments.”²⁴ The Court reasoned that in many cases, the death penalty is applied to people in

¹⁵ *Id.* at 797.

¹⁶ *Id.* at 802.

¹⁷ *Id.* at 803.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

²² *Id.* at 240.

²³ *Id.*

²⁴ *Id.* at 242.

poverty and African American defendants.²⁵ This is evident in cases with co-defendants in Texas, the state where one petitioner was sentenced to death.²⁶ In 16% of Texas cases with co-defendants, the defendants received separate trials, allowing for different sentencing.²⁷ In many cases, white co-defendants would receive life imprisonment while their black counterpart would receive the death penalty.²⁸ By holding that the death penalty could not be applied arbitrarily or in a manner that is discriminatory, the court took the first step to addressing the arbitrariness that leads to the incarceration of men and women on death row, including thousands of African American men.

Landmark Cases on Jury Selection and Race

Over the course of time, the Supreme Court has grappled with the appropriate procedural safeguards surrounding voir dire, especially concerning racial biases. An early case that focused on racial prejudice in jury selection was *Rosales-Lopez v. United States* (1981).²⁹ In this case, the Court held that racial prejudice (here involving a Mexican defendant) may be explored in voir dire if two prongs are satisfied: 1) the crime is one of violence, and 2) the defendant and victim are members of different racial or ethnic groups.³⁰ In the *Rosales-Lopez* case, Humberto Rosales-Lopez participated in a plan, along with a white female, to illegally bring three Mexican aliens over the border.³¹ Before trial, Rosales-Lopez's attorney requested voir dire concerning

²⁵ *Id.* at 249-250.

²⁶ *Id.* at 251.

²⁷ *Id.* at 251.

²⁸ *Id.*

²⁹ *Rosales-Lopez v. United States*, 451 U.S. 182 (1981).

³⁰ *Id.* at 192.

³¹ *Id.* at 184.

prejudice towards Mexicans.³² This request was denied.³³ Instead, the trial judge questioned potential jurors about their feelings and prejudices towards immigration and aliens.³⁴ With regard to its holding, the Court reasoned that the process of voir dire must be left to the discretion of the trial judge. The only time that a trial judge must question prospective jurors is in cases where issues of race and prejudice are so readily apparent throughout the course of the case that there is a substantial likelihood of racial prejudice infiltrating the minds and passions of the jury.³⁵ It is important to note that this likelihood is not a small likelihood or a mere possibility; the courts found it necessary for questioning if and only if there is a heavily weighing possibility of prejudice. This created a very narrow set of circumstances that allowed for questioning based on the racial biases of prospective jurors. The *Rosalez-Lopez* case was not a capital case, but still set forth the precedent for deciding how jury selection may be conducted.

The Supreme Court awarded more latitude during voir dire for African American defendants in 1986 when deciding the landmark case of *Turner v. Murray*.³⁶ This case held that voir dire that questioned the racial prejudices of prospective jurors may be allowed in capital punishment cases.³⁷ In this case, a black man was indicted for shooting and killing a white man in the course of a robbery in Virginia.³⁸ The question on appeal was whether the court erred in allowing for voir dire based on racial prejudice.³⁹ The Court concluded that “a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the victim’s race and

³² *Id.* at 185.

³³ *Id.* at 186-187.

³⁴ *Id.* at 186.

³⁵ *Id.* at 182.

³⁶ *Turner v. Murray*, 476 U.S. 28 (1986).

³⁷ *Id.* at 28.

³⁸ *Id.*

³⁹ *Id.* at 29.

questioned on the issue of racial bias.”⁴⁰ The Supreme Court reasoned that because the crime was interracial and sought to impose the death penalty, voir dire based on racial prejudice should be allowed, and the court did not err in doing so.⁴¹

When deciding *Turner v. Murray*, the Supreme Court looked back at prior rulings including *Ristaino v. Ross*, decided in 1976. In the *Ristaino* case, the Court held essentially the opposite of *Turner v. Murray*; the court held that jury selection that involves questioning on racial prejudice would not be allowed.⁴² Although the *Turner* majority considered the *Ristaino* holding, the Court did not overturn *Ristaino*. *Ristaino* and *Turner* both involved a violent crime involving a defendant and victim of different races, but the Court declined to use this as the reasoning for its holding in *Turner v. Murray*. Instead, the Court noted that the difference between *Ristaino v. Ross* and *Turner v. Murray* is the sentence of death.⁴³ *Ristaino* may still be applicable to other cases in holding that voir dire of prospective jurors based on race is unnecessary, but the Court held it is not applicable where a defendant faces the imposition of death, like in *Turner v. Murray*.⁴⁴ Because the sentence of death is so severe and permanent, *Turner v. Murray* held that voir dire based on race would be allowed at that level of punishment.⁴⁵ This case, decided in 1986, was yet another step towards eliminating the discrimination faced by African American defendants who risk the penalty of death at sentencing.

⁴⁰ *Id.* at 28.

⁴¹ *Id.* at 33-35.

⁴² *Ristaino v. Ross*, 424 U.S. 589 (1976).

⁴³ *Turner v. Murray*, 476 U.S. 28 (1986).

⁴⁴ 424 U.S. 589 (1976). *See also*, 476 U.S. 28 (1986).

⁴⁵ 476 U.S. 28 (1986).

Current Legal Issues with the Death Penalty

During voir dire, either party may challenge prospective jurors through one of two methods: peremptory challenge or challenge for cause. A challenge for cause is a challenge of a potential juror that has a bias against the defendant or other reason that they may not be impartial throughout the case.⁴⁶ Challenges for cause are unlimited throughout the process of voir dire because it is the defendant's right to a constitutional trial with a jury free of bias.⁴⁷ To contrast, peremptory challenges are challenges of a prospective juror that may be made without giving a reason.⁴⁸ In capital cases, both parties are permitted twenty peremptory challenges.⁴⁹ However, there are certain exclusions to the ability of a party to excuse a juror without reason including challenge based on race, gender, or membership in a distinctive group.⁵⁰

At the heart of issues with jury selection is the prosecutor.⁵¹ Prosecutorial misconduct is an area of law that is harder to reverse, especially when it comes to unconstitutional voir dire, due to the substantial errors involved.⁵² When considering other facets of law, there are easier solutions.⁵³ Evidence found on faulty grounds or a coerced confession can be thrown out with a motion to suppress. To contrast, when a prosecutor commits an unconstitutional use of peremptory challenges, the case ends in a reversal or a dismissal of charges.⁵⁴ Improper

⁴⁶ 47 AM. JUR. 2D *Challenges to Jurors for Cause, Generally* § 193 (2020).

⁴⁷ *Id.* § 193.

⁴⁸ 47 AM. JUR. 2D *Jury Number of Peremptory Challenges to Jurors* § 200.

⁴⁹ *Id.* § 200.

⁵⁰ 47 AM. JUR. 2D *JURY* § 206; *See also* 47 Am. Jur. 2d *Jury* § 207; *See also* 47 Am. Jur. 2d *Jury* § 208.

⁵¹ Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999).

⁵² *Id.* at 717-18.

⁵³ *Id.* at 715.

⁵⁴ *Id.* at 717-18.

peremptory challenges are one of the few areas of misconduct in which the court considers intent.⁵⁵

The concept of “unconstitutional jury selection” stems from the Equal Protection Clause of the Fourteenth Amendment applying due process to the states. The Equal Protection Clause provides that no State shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁵⁶ To make decisions about the constitutionality of challenges conducted during jury selection, the Court must look to the Equal Protection Clause and consider its interpretation of the law as it applies to cases before the Court.

Unconstitutional peremptory challenges had been brought up to the court on appeal multiple times by 1995. However, rather than limiting the prosecutor’s ability to exclude jurors in a way that was unconstitutional, the Court took a step backwards. The decision in *Purkett v. Elem* made it easier for prosecutors to arbitrarily exclude jurors. In the *Purkett* case, the prosecutor excluded a prospective juror based on the appearance of his hair and facial hair.⁵⁷ The Court held that the reasonableness of a race-neutral reason for excluding a prospective juror is not a factor that must be considered in determining whether the exclusion should be allowed.⁵⁸ For this reason, race-neutral explanations given by prosecutors do not need to be “persuasive, or even plausible.”⁵⁹

When the courts first began addressing the issue of unconstitutional jury selection, a defendant claiming his or her rights were violated through improper peremptory challenges

⁵⁵ *Id.* at 718.

⁵⁶ U.S. Const. Amend. XIV.

⁵⁷ *Purkett v. Elem*, 514 U.S. 765 (1995).

⁵⁸ *Id.* at 764-765.

⁵⁹ *Id.* at 768.

needed to prove a consistent pattern of racial discrimination by the prosecuting attorney.⁶⁰

Because of the absurdly high burden of proof, the Court reconsidered its holding by changing the test used to determine a violation of the defendant's rights through the jury selection process.

The Supreme Court decided *Batson v. Kentucky* in 1986, a landmark case aimed at remedying the problem of racial discrimination through jury selection.⁶¹ Although this case was not a capital case, it set forth a remedy for both capital cases and cases that do not involve the death penalty. In *Batson*, the prosecutor used four peremptory strikes to excuse all members of the jury who were black.⁶² The defendant was also black.⁶³ When deciding this case, the court looked back to its holding in *Swain v. Alabama*, determining that the holding in *Swain v. Alabama* was inconsistent with the Equal Protection Clause of the Constitution.⁶⁴ In altering the outcome of their previous case law, the court held a number of new requirements for both prosecutors and defendants when considering violations of the Equal Protection Clause in voir dire;

1. The Equal Protection clause protects a defendant from exclusion of the members of his own race from the jury, for reasons based solely on race.⁶⁵
2. Although prosecutors are entitled to peremptory challenges without cause, a defendant is entitled to jury selection that is not based on race.⁶⁶ No juror may be struck on the for the lone reason of that particular juror belonging to the same race as the defendant.⁶⁷

⁶⁰ *Swain v. Alabama*, 380 U.S. 202 (1965).

⁶¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁶² *Id.* at 79.

⁶³ *Id.*

⁶⁴ 380 U.S. at 202.

⁶⁵ 476 U.S. at 79.

⁶⁶ *Id.* at 79.

⁶⁷ *Id.*

The court also altered the test for determining whether there was been a violation of the Equal Protections Clause.⁶⁸ To establish a prima facie case, a defendant must:

1. Show the defendant is part of a recognizable racial group and that the prosecutor has made an attempt to excuse prospective jurors of that racial group.⁶⁹
2. The facts and circumstances all point to the reasonable inference that the prosecutor has made an unethical attempt at excluding members of the jury based on their race in violation of the Equal Protection Clause.⁷⁰

Once this standard of a prima facie case has been met, the burden shifts to the prosecutor to identify a race-neutral reason for striking each prospective juror that was excused with a peremptory challenge.⁷¹ In the Court's opinion, the Court listed four main arguments that may not be used by a prosecutor to meet the burden of proof.

1. The defendant need not show a pattern or history of such conduct and may use the facts laid out by the prosecutor in that case alone.⁷²
2. The inference that a black juror may favor a black defendant is not sufficient reasoning for striking a black prospective juror.⁷³
3. Peremptory challenges with the sole basis of discrimination and eliminating members of a particular race will not be justified, even if they are equally applied to white jurors, black jurors, and any other race alike.⁷⁴

⁶⁸ *Id.* at 80.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 80.

⁷² *Id.* at 97.

⁷³ *Id.* at 80.

⁷⁴ *Id.* at 122.

4. The fact that both the state and defense may use racially discriminatory peremptory challenges is not a reason that a prosecutor may use to justify their use of discriminatory exclusion of prospective jurors.⁷⁵

The court, based on the prima facie case and the reasoning of the prosecutor, will then determine whether there is what is known now as a *Batson* violation.⁷⁶

The Court extended the holdings in *Batson* five years later in deciding *Powers v. Ohio*.⁷⁷ After *Batson*, parties primarily objected to excluding prospective jurors of the defendant's own race.⁷⁸ In *Powers v. Ohio*, the Court extended its ruling by holding that a *Batson* violation claim could be raised regardless of if the prospective jurors eliminated were of a dissimilar race to the defendant. The Court reasoned that "to bar a petitioner's claim because his race differs from that of the excluded jurors would "condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service."⁷⁹

The *Batson* test is still the test used when there is a claim that a defendant's Equal Protection rights have been violated throughout jury selection through discriminatory peremptory strikes. In June of 2019, the Supreme Court used the *Batson* test to decide *Flowers v. Mississippi*, one of the most recent cases regarding jury selection, racial discrimination and the death penalty.⁸⁰ The Supreme Court held that, in the sixth trial of defendant Curtis Flowers, the state prosecutor committed a *Batson* violation during pre-trial jury selection.⁸¹

⁷⁵ *Id.* at 125-26.

⁷⁶ *Id.* at 98.

⁷⁷ *Powers v. Ohio*, 499 U.S. 400 (1991).

⁷⁸ *Id.* at 405.

⁷⁹ *Id.* at 415.

⁸⁰ *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

⁸¹ *Id.* at 2235.

In 1996, Curtis Flowers killed four employees at the Tardy Furniture Store in Mississippi.⁸² Out of four victims, three victims were white. Flowers is a black defendant.⁸³ Since 1996, Curtis Flowers has been through a total of six trials, each involving prosecutorial misconduct, *Batson* violations, and mistrials.⁸⁴ The sixth trial came before the Supreme Court on appeal with the question: Were the State's reasons for peremptory challenge of five black jurors race-neutral? The Court was to determine whether the State committed yet another *Batson* violation in the prosecution of Curtis Flowers. The Court reversed the decision of the Mississippi Supreme Court and held that, yes, the state prosecutor did violate *Batson*.⁸⁵

The Supreme Court reached its ruling for four main reasons. First, the Supreme Court looked to the prosecutor's history of peremptory challenges in Flowers' case.⁸⁶ Of the 36 prospective jurors, the state attempted to strike every one of them throughout jury selection in the Flowers' first four trials.⁸⁷ Because of this, the state courts upheld a finding of a *Batson* violation on the part of the state twice.⁸⁸ Second, there was a clear pattern in the way the state conducted jury selection.⁸⁹ In both the first four trials and the sixth trial, the state attempted to rid the jury of black jurors and create a jury that was entirely white.⁹⁰ Third, the ratio of time spent on black versus white jurors was shockingly disproportionate; one hundred and forty-five questions were asked of the five black jurors while a mere twelve questions were asked to a total of eleven white

⁸² *Id.* at 2228.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 2235.

⁸⁶ *Id.* at 2228.

⁸⁷ *Id.* at 2236.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

jurors.⁹¹ Lastly, the state exercised peremptory challenges on black jurors with faulty, inaccurate reasoning. In some instances, the state claimed to strike black jurors for knowing defense witnesses and members of Flowers' family.⁹² This reasoning may sound justifiable standing alone; however, a number of white prospective jurors had relationships with both the defense witnesses and the defendant's family without being questioned on this matter, let alone stricken as jurors.⁹³

When using the *Batson* test, the court examined the totality of the circumstances to reach its holding with all of the relevant and necessary facts. Because of the clearly egregious pattern of the state's prosecutor, the Supreme Court upheld a *Batson* violation, and reversed and remanded the case.⁹⁴ Because *Flowers* was an indication to the Court that the *Batson* test was not working, it is both an example of the ever-present racial biases in the courtroom and the struggle of enforcing justice for African American defendants.

⁹¹ *Id.* at 2247.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 2244.

IV. Research on Juror Decision Making

Research in juror decision making has focused on a number of factors that make the penalties for African American defendants harsher than those imposed for the same crime by a white defendant.⁹⁵ Some of these include juror race, victim race and strength of evidence.⁹⁶ Research recorded by the Bureau of Justice Statistics showed that although the number of white men and black men on death row is fairly equal, the population of free black men compared to the population of black men on death row is severely disproportionate.⁹⁷ While African Americans account for forty-two percent of the men on death row, only thirteen percent of American citizens are black men.⁹⁸ Those percentages should be more similar, but they are not similar because of the implicit biases of jurors in trials across the country.⁹⁹

Defendant Race

Of the few studies that have focused on race and juror decision making, many rely on entirely white participants, which presents significant issues in generalizability of these findings.¹⁰⁰ By implementing an experimental design that includes only part of the jury pool, the outcomes of the studies were significantly shifted the because the studies give a limited and narrow perspective on juror decision making. Three studies, however, display the effects of this kind of study well: Sweeney and Haney in 1992, Mazzella and Feingold in 1994, and Bowers,

⁹⁵ David M. Flores, *Mechanisms of Moral Disengagement in Capital Juror Decision Making: An Empirical Examination*, 55 (May 2010).

⁹⁶ *Id.* at 55.

⁹⁷ Tracy L. Snell, *Bureau of Justice Statistics, Capital Punishment, 2017: Selected Findings* 1 (2019).

⁹⁸ *U.S. Census Bureau QuickFacts: United States* 1 (2018); *See also NAACP Death Penalty Fact Sheet* (2017).

⁹⁹ Jack Glaser, Karin D. Martin, Kimberly B. Kahn, *supra*, note 1 at 539.

¹⁰⁰ Samuel R. Sommers, Race and the Decision Making of Juries, 12 *LEGAL CRIM. PSYCHOL.* 171 (2007).

Sandys, and Brewer in 2004. Sweeney and Haney studied exclusively white participants.¹⁰¹ Two years later, Mazzella and Feingold conducted a study that included white and black participants; however, participants were divided into two test groups based on their race.¹⁰² Lastly, Bowers, Sandys, and Brewer conducted a study in 2004 that involved both black and white participants who previously served together on real trials rather than mock trials.¹⁰³

Sweeney and Haney conducted fourteen studies involving almost three thousand participants to investigate the effect of juror race on sentencing.¹⁰⁴ Their study was a meta-analytic review of experimental studies.¹⁰⁵ As for methodology, the study was limited to only white participants.¹⁰⁶ The variable that changed was defendant race: trial transcripts indicated either a white defendant or a black defendant.¹⁰⁷ To complete this study, mock jurors were provided with trial transcripts.¹⁰⁸ Participants were instructed to make decisions about guilt and make sentencing recommendations.¹⁰⁹ The study altered the defendant's race and altered whether the case was interracial in a small amount of cases.¹¹⁰ All fourteen studies taken into consideration for Sweeney and Haney's meta-analysis were conducted within the United States. At the conclusion of reviewing the fourteen studies, there was a significant finding that showed

¹⁰¹ *Id.* at 173.

¹⁰² *Id.*

¹⁰³ William J. Bowers, Marla Sandys, Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DePaul L. Rev. 1499 (2004).

¹⁰⁴ Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL CRIMINOL PSYCHOL 173 (2007).

¹⁰⁵ Laura T. Sweeney, Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytical Review of Experimental Studies*, 10 BEHAV. SCI. & THE L. 173 (1992).

¹⁰⁶ *Id.* at 183.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 184.

an anti-black tendency in white mock jurors.¹¹¹ These jurors tended to recommend a longer and harsher sentence to African American defendants than to the white defendants used in the study.¹¹² However, the authors noted that although this is true, the racial discrimination is not solely against black defendants; the unrealistic standard of culpability is often attributed to the members of any dissimilar race, not just African American defendants.¹¹³ Overall, the results of the study confirmed the hypothesis that white mock jurors tend to hand out harsher sentencing penalties to African American defendants.¹¹⁴

The study conducted by Mazzella & Feingold was quite similar with one significant difference: the studies included participants of all races.¹¹⁵ Included in that study were around 6,700 people.¹¹⁶ In this study, to contrast from Sweeney and Haney, racial bias was not significant, masked in part by the guilt factor of a racially diverse study group.¹¹⁷ Effect size shows the statistical significance between two factors for testing. In these studies, the effect size was a mere .06, showing that racial bias was highly insignificant and showed little effect on decision making.¹¹⁸ The Mazzella and Feingold study is a prime example of the positive effects of a diverse jury composition when compared to the study completed by Sweeney and Haney.

Lastly, the study completed by Bowers, Sandys and Brewer shifted the perspective from sentencing decisions to juror making decisions. This is the most recent study of the three

¹¹¹ *Id.* at 190.

¹¹² *Id.*

¹¹³ *Id.* at 192.

¹¹⁴ *Id.*

¹¹⁵ Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL CRIM. PSYCHOL. 173 (2007).

¹¹⁶ *Id.* at 173.

¹¹⁷ *Id.*

¹¹⁸ Tara L. Mitchell, Ryann M. Haw, Jeffrey E. Pfeifer, Christian A. Meissner, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. AND HUM. BEHAV. 623 (2005).

discussed. The data for this study was received from the Capital Jury Project.¹¹⁹ This project interviewed jury members who served on capital trials across the country.¹²⁰ Fourteen states were included: Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.¹²¹ This study set itself apart from others when it utilized raw data from jurors that served on real trials rather than mock jurors, significantly increasing its credibility and applicability. A little over one thousand participants' information was used in this study from a total of three hundred and fifty-three trials.¹²² As part of the interviews, jurors were asked about their descriptions of the defendant, feelings about the defendant's family, how the defendant regarded his family, their consideration of mitigating circumstances, and their responses to levels of aggravation.¹²³ The study concluded that white jurors were more likely to view African American defendants as dangerous and unlikely to feel guilty for their actions.¹²⁴ This was specifically true for white male jurors, 63.3% of whom viewed black defendants as more dangerous.¹²⁵ White jurors were also less likely to consider mitigating circumstances in coming to their conclusions throughout trial by a forty-point difference between white jurors and black jurors.¹²⁶ This finding is statistically significant by a p value of .054.¹²⁷ Black male jurors, on the other hand, were more likely to feel empathy

¹¹⁹ William J. Bowers, Marla Sandys, Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1499 (2004).

¹²⁰ *Id.* at 1499.

¹²¹ *Id.*

¹²² *Id.* at 1500.

¹²³ *Id.*

¹²⁴ *Id.* at 1508.

¹²⁵ *Id.* at 1509.

¹²⁶ Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL CRIM. PSYCHOL. 178 (2007).

¹²⁷ William J. Bowers, Marla Sandys, Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1516 (2004).

for the defendant and the defendant's family by a thirty-point difference between black male jurors and every other subject category.¹²⁸ The study overall had more realistic and accurate responses than any other study as they included participants who sat on a legitimate trial, rather than listening or reading a mock trial.

While some studies yield statistically insignificant results, others find a strong probability of white juror bias when it comes to decision making. However, the majority of studies agree that juror race has some effect on juror decision making, almost always a negative one for African American defendants. The effects of jury composition have yet to be studied extensively and would tend to replicate the study conducted by Bowers, Sandys and Brewer as they are one of the few studies on juror decision making to take into consideration data from both black and white participants. An even smaller amount of data has been collected on jurors of races that are not black or white, such as Latinos or Asian-Americans. This research should be conducted in the future to expand the true impact of a defendant's race on juror decision making.

Victim Race

Another factor that researchers have focused on to assess juror decision making is the race of the victim. Based on research conducted by the Death Penalty Information Center, there have been two hundred and ninety-one executions where the defendant was black, and the victim was white since 1976.¹²⁹ When those are reversed, the statistics are shockingly low in comparison. Of all of the cases where there have been white defendants perpetrating a black victim, there have

¹²⁸ *Id.* at 1513.

¹²⁹ *Executions by Race and Race of Victim*, DEATH PENALTY INFORMATION CENTER 1 (2019).

been only twenty-one executions – a statistic that is one hundred and thirty-nine percent lower than the rate at which juries execute black defendants convicted of killing white victims.¹³⁰

In 2004, Holcomb, Williams and Demuth conducted a study to investigate the effects of a victim's race on death penalty sentencing.¹³¹ The result of the study showed that white female victims were disproportionately represented in cases where defendants were given the death penalty when compared to their actual number of homicides.¹³²

The focus of the Holcomb, Williams and Demuth study was narrow, including only homicides in Ohio. The data was gathered from the Federal Bureau of Investigation's Supplemental Homicide Reports from 1981-1997.¹³³ After analyzing the sentences and demographics for each case, they found disparity in how defendants of any race who kill white victims and black victims were punished. Defendants who were prosecuted for killing white victims were 1.766 times more likely to receive the death penalty than non-white victims.¹³⁴ This finding was statistically significant ($p < .01$).¹³⁵ A defendant who kills a black male victim has only a twenty-two percent chance of receiving the death penalty, which is seventy-eight percent less than a white female victim.¹³⁶ To contrast, black victims are less likely to receive the justice than white victims receive through sentencing.¹³⁷

¹³⁰ *Id.*

¹³¹ Jefferson E. Holcomb, Marian R. Williams, Stephen Demuth, *White Female Victims and Death Penalty Disparity Research*, 21 JUST. Q. 876 (2004).

¹³² *Id.* at 891.

¹³³ *Id.* at 887.

¹³⁴ *Id.* at 892.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

Strength of Evidence

The final factor most often studied by sociologists involves the quantity of evidence admitted at trial. This factor is a control factor, and it is presumed that in cases where evidence is the strongest, jurors can confidently rely on the information in front of them.¹³⁸ In cases where convincing evidence is lacking, jurors may resort to other factors to render their decisions.¹³⁹ Regardless of how much trial is offered by the prosecution and defense at trial, the basis of every trial is evidence. The evidence of a trial will make or break a case. The strength of evidence is important to jurors and tends to effect whether the defendant's race will become an extralegal factor.¹⁴⁰

In 1979, Ugwuegbu completed a study showing the impact of strength of evidence on juror decision making.¹⁴¹ Until Ugwuegbu's study, strength of evidence was not a control factor studied extensively.¹⁴² Studies have been completed in civil cases or in general criminal cases, but not with regards to the effects of strength of evidence on racial biases in juror decision making.¹⁴³ Both black mock jurors and white mock jurors participated in this study; however, the two test groups remained separate.¹⁴⁴ The variables included the defendant's race, the victim's race and the strength of evidence.¹⁴⁵ Ugwuegbu studied whether the lack of culpable evidence would result in mock jurors relying on race in determining outcomes.¹⁴⁶ Ugwuegbu conducted a

¹³⁸ Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. OF EXPERIMENTAL SOC. PSYCHOL. 133 (1979).

¹³⁹ *Id.* at 135.

¹⁴⁰ *Id.* at 139.

¹⁴¹ *Id.* at 133.

¹⁴² *Id.* at 135.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 133.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 135.

controlled experiment with two different study groups.¹⁴⁷ Group one involved two hundred forty-four white undergraduate students while group two involved one hundred eighty-six black undergraduate students.¹⁴⁸ By creating these subject groups, interracial juror decision making was not studied.¹⁴⁹

The first experiment involved only white undergraduate students.¹⁵⁰ The control group was given a scenario involving race-neutral case briefs and asked to analyze the culpability of the defendant.¹⁵¹ The results showed only one significant effect that skewed the results: sex of the participant.¹⁵² Males tended to need more evidence to come to conclusions about culpability in the control group.¹⁵³ In experimental portion of the study, the mock jurors read different case briefs with different variables throughout the groups.¹⁵⁴ The crime used throughout the study was aggravated and forcible rape of a girl, with the race of the defendant and victim shifting throughout the different study groups.¹⁵⁵ One of the variables included strength of evidence.¹⁵⁶ Strength of evidence was evaluated by creating three categories: near-zero, marginal, and strong.¹⁵⁷ Near zero was defined as a trial with minimal evidence that the defendant in fact committed the crime that he was being charged with.¹⁵⁸ Questions were raised as to whether the defendant was guilty through a prosecution witness stating that the defendant was not the person

¹⁴⁷ *Id.* at 136.

¹⁴⁸ *Id.* at 136, 141.

¹⁴⁹ *Id.* at 136.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 137.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

who committed the assault.¹⁵⁹ Marginal evidence was defined as doubtful evidence that was created by introducing a positive victim identification and testimony of the defendant's persistent denial of committing the crime.¹⁶⁰ Strong evidence was defined as a positive victim identification, police testimony of a confession, and the defendant testifying that the victim was "asking for it."¹⁶¹ The results showed that when evidence is at one extreme, either strong evidence or close to no evidence, the defendant's race played little to no role in determining culpability.¹⁶² However, the level of evidence that was marginal altered the way jurors perceived the defendant's culpability.¹⁶³ When there is some, but not enough evidence, black defendants become more likely to be found culpable than white defendants.¹⁶⁴ These results were found to be statistically significant ($p < .05$).¹⁶⁵ However, this experiment included only white participants.¹⁶⁶

The second experiment included only black undergraduate student participants.¹⁶⁷ Every other aspect of the experimental study was identical to the first experiment.¹⁶⁸ The results of the second experiment were not inconsistent with the results of the first experiment. When evidence was marginal, black mock jurors tend to find white defendants more culpable than black defendants.¹⁶⁹ However, there was one difference between the results of the white mock jurors and the black mock jurors. Black mock jurors, in addition to finding white defendants more

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 139.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 140.

¹⁶⁶ *Id.* at 136.

¹⁶⁷ *Id.* at 141.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 142.

culpable when there is marginal evidence, granted less harsh decisions of culpability, even when there was strong evidence against the black defendants.¹⁷⁰ This result was statistically significant ($p < .05$).¹⁷¹

Liberation Hypothesis

In 1966, researchers Kalven and Zeisel developed a theory aimed at explaining jury decisions that resulted in racial disparities: the liberation hypothesis.¹⁷² According to this hypothesis, when the evidence in a case is contradictory, confusing, or weak, jurors feel “liberated” to look to extra-legal factors to make their verdict and sentencing decisions.¹⁷³ The main extra-legal factors studied that tend to affect juror decisions were the race of the defendant, the race of the victim, and the severity of the case.¹⁷⁴

Twenty-two years after the liberation hypothesis was created, Barnett, a researcher set out to apply the liberation hypothesis to capital cases, developed a scale to quantify the seriousness of cases.¹⁷⁵ When ranking capital cases, Barnett categorized the variables into three groups: the level of certainty jurors have that the defendant is guilty, characteristics of the victim, and the severity or heinousness of the crime.¹⁷⁶ The results of Barnett’s study showed that in cases where jurors could be confident in their decisions, the effects of the white victim/ black defendant dyad

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Beth E. Bjerregaard, M. Dwayne Smith, John K. Cochran, and Sondra J. Fogel, *A Further Examination of the Liberation Hypothesis in Capital Murder Trials*, 63 CRIME AND DELINQUENCY 1018 (2017).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1019.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

were not significant.¹⁷⁷ To contrast, in cases where the evidence was contradictory or weak, racial disparities in sentencing became significant.¹⁷⁸ Barnett's study confirmed Kalven and Zeisel's liberation hypothesis by showing that when evidence was marginal, jurors looked to extralegal factors.¹⁷⁹

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1018.

V. Reforming Jury Selection in Capital Cases

As findings of racial biases continue to emerge in sociolegal research, it becomes jarringly apparent that a solution must be found to address these problems including the impacts of defendant race, victim race, and strength of evidence at trial. As recently as 2000, scholars have focused on reducing racial biases in jury selection.¹⁸⁰ A few solutions have emerged that may be quickly and effectively implemented in capital cases across the country: diverse jury composition and simplified jury instructions.¹⁸¹ Most importantly, an implicit bias test was created that can help protect African American defendants from juror biases that the average juror would not admit to willingly.

Diverse Jury Composition

One factor significantly alters the likelihood of an African American defendant being sent to death row – jury composition.¹⁸² The Supreme Court has noted this as an important factor for consideration when creating a fair trial when deciding *Batson v. Kentucky* in 1986.¹⁸³ As written by Justice Powell in the opinion for *Batson v. Kentucky*,

The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.¹⁸⁴

¹⁸⁰ William J. Bowers, Benjamin D. Steiner, Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 J. OF CONST. L. 174-274 (2001).

¹⁸¹ *Id.* at 174.

¹⁸² David M. Flores, *Mechanisms of Moral Disengagement in Capital Juror Decision Making: An Empirical Examination* 66 (May 2010).

¹⁸³ *Batson v. Kentucky*, 476 U.S. 80 (1986).

¹⁸⁴ *Id.* at 80.

In 2001, Bowers, Steiner and Sandys conducted a study on jury composition's effect on sentencing outcomes to confirm the data already presented on death sentence reform.¹⁸⁵ The study was based on the Capital Jury Project, which interviewed trials across the country, including 1,115 jurors from a total of fourteen states.¹⁸⁶ By using this data, the study was completed with a statistically significant population whose answers are highly credible as each participant was an jury member on a real trial rather than being a mock juror. The study pronounced two statistically significant patterns with regards to jury composition:

1. A jury composed of a white majority is associated with a higher likelihood of receiving a death penalty in black defendant/white victim cases.
2. A jury composed of at least one black juror tended to increase the likelihood of imposing a life sentence as opposed to a death sentence.¹⁸⁷

When it comes to jury composition, these are two main effects that greatly impact the outcome of a trial and sentencing are consistent from study to study.¹⁸⁸ These are known as the “white male dominance” and the “black male presence” effects.¹⁸⁹ When the number of white male jurors remains at four, the likelihood of a death sentence is fairly low – a twenty-three percent chance; however, when that number changes from four to five white male jurors, there is a forty-point increase, making it sixty-three percent likely that the defendant will be sentenced to death.¹⁹⁰ This is known as the white male dominance effect.¹⁹¹ The black male presence, on the

¹⁸⁵ Bowers, Steiner, Sandys, *supra*, note 180 at 174.

¹⁸⁶ *Id.* at 189.

¹⁸⁷ *Id.* at 189.

¹⁸⁸ Flores, *supra*, note 182 at 66.

¹⁸⁹ *Id.* at 66.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

other hand, has the opposite effect. Although not as significant of an increase as the white male dominance, the introduction of one black male juror increases the likelihood of a life sentence by thirty-four percent.¹⁹²

Simplified Jury Instructions

Multiple studies note a second factor as greatly impacting what leads jurors to disproportionately sentence African American defendants to the death penalty: incomprehensible jury instructions.¹⁹³ Although studied since the late seventies, there is still an overwhelming level of complexity to jury instructions that inhibits a jury's ability to accurately and effectively render verdicts in capital cases.¹⁹⁴ The study included one hundred and twenty participants, including fifty-eight white participants and sixty-two non-white participants.¹⁹⁵ All participants were jury eligible.¹⁹⁶ The researchers hypothesized that racial bias would be reduced against black defendants in participants who received simplified jury instructions.¹⁹⁷ Those who received a standard version of jury instructions would, in theory, be more likely to impose the death sentence.¹⁹⁸ The independent variables included in the study were defendant race and type of jury instruction, the standard instruction or the simplified instruction.¹⁹⁹

The results of the study confirmed the researchers' hypotheses: when jurors were given the standard jury instructions that were more complex and harder to understand, they were more

¹⁹² *Id.*

¹⁹³ Netta Shaked-Schroer, M.A., Mark Costanzo, Ph. D., Amy Marcus-Newhall, Ph.D., *Reducing Racial Bias in the Penalty Phase of Capital Trials*, 26 BEHAV. SCI. L., 603 (2008).

¹⁹⁴ *Id.* at 605-606. See also, Charrow, Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUMBIA L. REV. 1306-1374 (1979); Wiener, Pritchard, Weston, *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. OF APPLIED PSYCHOL. 455-467 (1995).

¹⁹⁵ See *id.* at 607.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

likely to impose the death penalty.²⁰⁰ Not only was it less likely that jurors imposed the death penalty with the simplified instructions, but the simplified instructions also reduced the racial disparity that occurs between white jurors and black jurors.²⁰¹ When the jurors used simplified instructions, the difference in sentencing patterns between white and non-white jurors disappeared almost entirely when deciding what sentence should be imposed for a black defendant.²⁰²

Implicit Bias Testing

While many studies on juror decision making focus on racial biases exhibited by jurors during voir dire, explicit bias is unlikely to be the sole cause of racial discrimination during capital trials.²⁰³ Instead, researchers now look to implicit bias for answers on why racial disparities occur throughout verdicts and sentencing.²⁰⁴ Implicit bias, as opposed to explicit bias, is an unconscious attitude towards a certain type of person based on assessment of a person's characteristics.²⁰⁵ These types of biases tend to stem from stereotypes and cognitive processes throughout one's life.²⁰⁶ Because these attitudes are unconscious, they pose a different type of danger to African American defendants; they are difficult to identify and eliminate through jury selection.

²⁰⁰ *Id.* at 609.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Kathryn Russell-Brown, *The Academic Swoon Over Implicit Racial Bias*, 15 DU BOIS R. 185 (2018).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 186.

²⁰⁶ *Id.*

In 1998, a group of scientists founded Project Implicit, a research organization aimed at studying implicit biases.²⁰⁷ Through their work, the Implicit Assessment Test (IAT) was created to identify participants' unconscious biases.²⁰⁸ While taking the test, participants categorize adjectives with either a good or bad connotation with concepts, race in this case.²⁰⁹ The test is meant to be taken as quickly as possible so that participants do not have time to think about what belongs there, which would instead indicate explicit bias.²¹⁰ Since the year 2000, courts have used the Implicit Assessment Test one hundred and twelve times in different parts of trial and sentencing.²¹¹

The research gained from those cases confirmed the researchers' hypothesis about racial implicit bias being alive and well in the criminal justice system.²¹² Mark Bennett, a U.S. District Court judge, is a prime example of the Court making attempts at eliminating implicit bias.²¹³ In 2010, Judge Bennett began using the Implicit Assessment Test with jurors by explaining the test and encouraging jurors to take the test and take the results into consideration throughout the course of trial.²¹⁴ Since he began this practice, Judge Bennett advocates for acknowledging and attempting to eliminate implicit bias through the Implicit Assessment Test.²¹⁵

²⁰⁷ About Us, PROJECT IMPLICIT (2011), <https://www.projectimplicit.net/about.html>.

²⁰⁸ Katheryn Russell-Brown, *The Academic Swoon Over Implicit Racial Bias*, 15 DU BOIS R. 186 (2018).

²⁰⁹ *Id.* at 187.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARVARD L. & POLICY R. 170 (2010).

VI. Conclusion

In 1972, the Court began to review the death penalty within the context of the Eighth Amendment for African American defendants. By holding in *Furman v. Georgia* that the death penalty could not be applied in a way that is not arbitrary or discriminatory, the Court showed that African Americans could not be treated differently throughout the process of the criminal legal system.²¹⁶ However, this decision was evidently not sufficient to curtail discrimination in jury selection.

The Court took the first step in reforming jury selections, in *Turner v. Murray*, by holding that jury selection that questioning of potential jurors on their racial biases may be permitted.²¹⁷ The Court decided this holding due to “the fact that the crime charged involved interracial violence...and the special seriousness of improper sentencing in a capital jury case.”²¹⁸

Justice for African American defendants occurs when jury composition reflects an actual jury of one’s peers – not a jury dominated by white men that is hand-picked by prosecutors. The key to reforming the criminal justice system for African Americans is allowing a jury composition that reflects not only the majority, but also the minorities of their community. To do this, the Supreme Court must allow voir dire based on racial prejudice and remand district level trials that exclude African American jurors. Furthermore, Court should impose a ban on juries that are composed of exclusively white jurors. Lastly, before the jury is sworn, judges should explain and administer the Implicit Administration Test to prospective jurors. In doing so, judges could minimize the influence of implicit bias within capital trials for African American defendants and

²¹⁶ *Furman v. Georgia*, 408 U.S. 242 (1972).

²¹⁷ *Turner v. Murray*, 476 U.S. 28 (1986).

²¹⁸ *Id.* at 29.

allow these defendants a fairer trial. When the courts mandate these solutions in capital trials, our legal system will be one step closer to ending the disproportionate discrimination against African American defendants.

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