POSTCONVICTION REVIEW OF JURY DISCRIMINATION: MEASURING THE EFFECTS OF JUROR RACE ON JURY DECISIONS

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INTRODUCTION

In the spring of 1992, a state jury with no black members acquitted four white police officers charged with using excessive force to restrain black motorist Rodney King.[1] Many Americans who had watched the relentlessly televised videotape of the officers delivering sixty-one baton blows in eighty-one seconds found the acquittals incredible.[2] Some suggested that the defendants would have been convicted if blacks had been on the jury.[3] Others considered such assumptions racist; presuming that a verdict may depend on the race of the jurors, they countered, is impermissible.[4] Still others argued that no one can

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1. The jury found all four officers not guilty of assault charges, acquitted three of using excessive force, and deadlocked on the excessive force charge against the remaining officer. *See A Juror Describes the Ordeal of Deliberations*, N.Y. TIMES, May 6, 1992, at A23.

2. *See, e.g.*, Barry Scheck, *Following Orders*, NEW REPUBLIC, May 25, 1992, at 17.

3. *See, e.g.*, Frank Tuerkheimer, *The Rodney King Verdict: Why and Where to from Here?*, 1992 WIS. L. REV. 849, 850 ("[I]t is almost impossible to say that racism did not play a part in the *King* verdict."); George J. Church, *The Fire This Time*, TIME, May 11, 1992, at 18, 22 (poll conducted after the first verdict showed 92% of blacks, but only 62% of whites, "thought they would have voted to convict if they had been on the jury"); Richard Lacayo, *Anatomy of an Acquittal*, TIME, May 11, 1992, at 30 (outcome decided when trial moved to overwhelmingly white community); Timothy P. O'Neill, *Wrong Place, Wrong Jury*, N.Y. TIMES, May 9, 1992, at A23 (acquittal due to judge's decision to move the trial from the City of Los Angeles to a locality with a smaller proportion of black citizens).

Almost a year later, a federal jury with two black members convicted two of the four officers of intentionally violating Rodney King's constitutional rights. *See Most Blacks Say Too Few Convicted in King Beating Case*, REUTERS, Apr. 19, 1993, *available in* LEXIS, Nexis Library, Reuters File (55% of blacks, but only 21% of whites, told pollsters that two guilty verdicts were not enough).

4. *See, e.g., Race Against Time*, NEW REPUBLIC, May 25, 1992, at 7, 8 ("[T]he answer to the problem of racism . . . is not to compound it with more racist assumptions.").

possibly know what role juror race plays in jury decisions.[5]

These disagreements about the effect of juror race on jury decisions are not confined to popular debate; they plague courts that review claims of jury discrimination.[6] The controversies surrounding the King case are examples of the growing conflict in courts and legal literature over two questions, both fundamental to the choice and application of rules for allocating postconviction relief to defendants who allege that race discrimination shaped the composition of their juries. The first question is empirical: Does racial composition affect jury decisions and, if so, are judges able to measure that effect? The second is normative: Assuming judges are able to predict when changes in racial composition will influence jury decisions, should the law permit them to act upon those predictions?

The U.S. Supreme Court has not provided clear answers to either of these questions, despite more than a century of opinions condemning the systematic or intentional exclusion of blacks from juries. The Court's views on the empirical question are hopelessly inconsistent; its position on the normative question is unknown. For many decades, the Court has assumed that jury discrimination affects jury decisions, but in some of its most recent opinions it has abandoned this position.[7]

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5. Analysts have explained the inconsistency between the state and federal verdicts in the Rodney King cases by referring to differences in the strength of the government's evidence, as well as differences in jury composition. *See, e.g.*, Jerome H. Skolnick & James J. Fyfe, *A Case For Federal Prosecution*, L.A. TIMES, Apr. 19, 1993, at B7.

6. I use the term *jury discrimination* to refer generally to any governmental action affecting the racial composition of juries that the U.S. Supreme Court has found or will find to violate constitutional norms. I mean to include intentional and unintentional discriminatory practices that may deny defendants or jurors their rights under the Equal Protection Clause, the Due Process Clauses, or the Sixth Amendment.

Many government policies that manipulate racial composition have escaped constitutional condemnation. For instance, the Court has not decided if or how the Constitution limits venue transfers that alter the racial composition of jury pools. After the acquittal of the officers charged with beating Rodney King, legislators in at least two states proposed statutory limits on similar relocations. *See* Note, *Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King*, 106 HARV. L. REV. 705, 719-21 (1993). For an account of a particularly tortuous controversy over racial representation in alternative vicinages, see Larry Rohter, *Judge in Miami Shifts Trial of Officer in Blacks' Deaths*, N.Y. TIMES, May 7, 1992, at A23 [hereinafter Rohter, *Judge in Miami*]; Larry Rohter, *New Move Advised in Officer's Trial*, N.Y. TIMES, Aug. 18, 1992, at A15; *see also* State v. Gary, 609 So. 2d 1291 (Fla. 1992); State v. Lozano, 616 So. 2d 73 (Fla. Dist. Ct. App. 1993); *cf.* Charles Whitaker, *Is There a Conspiracy To Keep Blacks Off Juries?*, EBONY, Sept. 1992, at 56.

For discussions of other jury selection practices with disparate effects, see JON M. VAN DYKE, JURY SELECTION PROCEDURES 28-35 (1977); Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. BLACK STUD. 196 (1991); David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776 (1977); *Developments in the Law — Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1557-88 (1988) [hereinafter *Developments*]; Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590 (1990).

7. *Compare* Batson v. Kentucky, 476 U.S. 79, 86-87 (1986) *and* Taylor v. Louisiana, 419 U.S.

As recently as 1991, the Court justified its rule exempting properly raised claims of jury discrimination from harmless error review[8] by asserting that judges cannot possibly measure the effect of discrimination on verdicts.[9] During the same term, the Court demanded that judges perform that very task, expanding "cause and prejudice" and "actual innocence" review for untimely claims of all constitutional error, including jury discrimination.[10] The Court has yet to decide whether rules that link changes in racial composition to case outcome are unwise — because they lead inescapably to other rules mandating multiracial adjudication — or whether they are unconstitutional — because they rest on racial stereotypes about juror behavior.

Clear answers by the Court could determine whether properly raised claims of jury discrimination will remain exempt from harmless error review, whether relief for untimely claims of jury discrimination will continue to be conditioned upon a showing of "prejudice" or "actual innocence," and whether jury discrimination will remain a cognizable basis for habeas corpus relief.[11] Even if the present remedial

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522, 532 n.12 (1975) *with* Powers v. Ohio, 111 S. Ct. 1364, 1371 (1991). *See infra* notes 15-19 and accompanying text.

8. For most properly raised constitutional errors, relief is unavailable if the error was harmless and had no effect on conviction or sentence. Sullivan v. Louisiana, 113 S. Ct. 2078, 2081 (1993); Rose v. Clark, 478 U.S. 570, 578 (1986). The test for harmlessness in collateral proceedings is now less rigorous than the test for harmlessness on direct review. Brecht v. Abrahamson, 113 S. Ct. 1710, 1719-22 (1993).

9. *See* Arizona v. Fulminante, 111 S. Ct. 1246, 1264-65 (1991); *infra* notes 20-23 and accompanying text.

10. *See* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1719 (1992); Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991); McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991); *infra* note 27 and accompanying text; *see also infra* note 230 and accompanying text (explaining the Court's rule that postconviction relief for defaulted claims requires a showing of "actual innocence" if a defendant cannot show "cause and prejudice").

An abbreviated summary of the present rules for postconviction review of constitutional error, and jury discrimination in particular, may be helpful here. Judges reviewing most claims of constitutional error in postconviction proceedings must consider the effect of the error on case outcome regardless of when the defendant first challenged the error — a defendant who challenged the error promptly is not entitled to postconviction relief if the error was harmless, *see supra* note 8, and a defendant who failed to raise the error on time can obtain relief only if he can show "cause and prejudice," or, absent that, "actual innocence." *See infra* notes 24-27, 230 and accompanying text.

Because the Court has exempted jury discrimination from harmless error review, *see supra* note 9, judges reviewing timely raised claims of jury discrimination presently do not need to evaluate the effect of discrimination on case outcome. Judges must, however, examine the link between jury discrimination and case outcome if the defendant failed to object to the discrimination at trial.

11. Already, at least one state supreme court has been influenced by constitutional concerns to abandon the well-established rule requiring an inquiry into the effect of jury discrimination when a defendant claims his counsel's failure to challenge selection procedures amounted to ineffective assistance. *See Ex parte* Yelder, 575 So. 2d 137 (Ala.), *cert. denied,* 112 S. Ct. 273 (1991). For a full discussion of *Yelder,* see *infra* notes 171-73 and accompanying text.

Concerns about linking juror race to outcome appear to have persuaded other judges reviewing defaulted claims of jury discrimination to deny that juror race can influence verdicts. One

choices of the Court prove resilient, more information about the effects of juror race on verdicts could improve the application of current standards.[12]

This article examines these important questions.[13] In Part I, I review the empirical evidence concerning the effect of jury discrimination on jury decisions. Using the work of social and cognitive psychologists, I argue that the influence of jury discrimination on jury decisions is real and can be measured by judges in certain circumstances. The empirical studies suggest criteria that courts could use to identify the cases in which jury discrimination is most likely to affect the verdict. I also refute the argument that white judges can never predict the behavior of jurors of racial backgrounds different than their own and conclude that judicial estimates of the effects of jury discrimination on jury decisions are feasible.

I address in Part II pragmatic and constitutional objections to rules that require judges to measure the influence of jury discrimination on jury decisions. I argue that neither the specter of government-sponsored "jurymandering"[14] nor antidiscrimination principles limit

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federal district judge, in rejecting a petitioner's defaulted claim of jury discrimination, suggested that any assumption that black jurors would have voted differently than white jurors would be insulting to black jurors. Wilson v. Jones, 723 F. Supp. 629, 635 (N.D. Ala. 1989) (stating that the inference that a jury with more blacks would have acquitted the defendant "impugn[s] the integrity of every black juror who sits in judgment of a black defendant"), *vacated on other grounds*, 902 F.2d 923 (11th Cir. 1990); *see also* Batiste v. State, 834 S.W.2d 460, 466 (Tex. Ct. App. 1992) (stating that "appellant must prove that the black jurors struck, merely by virtue of their skin color, would have rendered a different verdict"), *writ granted* (Oct. 21, 1992).

12. *See infra* text accompanying notes 144-59.

13. Surprisingly little law review scholarship has been devoted to postconviction review of jury discrimination claims. Critics and supporters of the Court's ever-increasing reliance on outcome-dependent tests for postconviction relief have only tentatively examined the particular problems of applying such tests to jury discrimination. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 1170-72, 1200 (2d ed. 1992); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 715-19 (1990); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 253-67 (1988); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 99-101 (1988).

Those writing about jury discrimination have debated the merits of linking juror race with verdict outcomes generally, but they have not addressed the problems of conditioning postconviction remedies for discrimination upon some showing of prejudice or impaired accuracy. *See* 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, 163-211 (1989); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990); Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Toni M. Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501 (1986); William T. Pizzi, Batson v. Kentucky: *Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97; Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726-50 (1992).

14. I have borrowed this term from Jeff Rosen. *See* Jeff Rosen, *Jurymandering*, NEW REPUBLIC, Nov. 30, 1992, at 15.

the choice or application of review standards for jury discrimination. I conclude that the choice between outcome-dependent tests and outcome-independent tests should rest instead on a careful balancing of the costs of disturbing judgments in criminal cases against the costs of tolerating proven jury discrimination.

In Part III, I examine the difficulties of conditioning postconviction relief for jury discrimination upon a showing that the discrimination caused the conviction of an "actually innocent" person. Review standards that test for innocence or accuracy are intended to promote truthful judgments. When applied to jury discrimination, they require a judge to compare the factual accuracy of the decision reached by the illegally selected jury with the factual accuracy of the decision a legally chosen jury would probably make. I argue that this is a standardless task, one that courts should not be required to perform.

I. Empirical Claims About the Effects of Jury Discrimination

A. *The Court's Conflicting Positions*

The Supreme Court appears unable to decide whether jury discrimination affects jury decisions. Prior to 1991, the Court assumed that changes in a jury's racial composition could change that jury's decision. The Court reasoned that jury discrimination could violate the individual constitutional rights of criminal defendants because defendants who were sentenced, tried, or indicted by illegally selected juries faced a risk of an adverse outcome not faced by defendants judged by properly chosen juries. For example, in *Batson v. Kentucky,*[15] the Court concluded that the government's use of peremptory challenges to exclude blacks violated the black defendant's rights under the Equal Protection Clause. The Court assumed that the exclusion of black jurors affected black defendants differently than white defendants, heightening the risk of an adverse verdict.[16]

15. 476 U.S. 79 (1986).

16. The Court explained:

> 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 .... Purposeful racial discrimination in selection of the venire violates *a defendant's* right to equal protection because it denies *him* the protection that a trial by jury is intended to secure.

The Court added that "discriminatory selection procedures make 'juries ready weapons for officials to oppress *those accused individuals* who by chance are numbered among unpopular or inarticulate minorities.' " *Batson,* 476 U.S. at 86, 87 n.8 (emphasis added) (quoting Akins v. Texas, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting)). Jurors must be " 'indifferently chosen,' " *Batson,* 476 U.S. at 87 (quoting 4 William Blackstone, Commentaries on the Laws of England 350 (Cooley ed. 1899)), in order to "secure the *defendant's* right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.' " 476 U.S. at 87 (emphasis added) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1880)); *see*

In a trilogy of cases decided in 1991 and 1992, the Court shifted its approach. The Court focused on the harm to those excluded from jury service rather than on the risk that jury discrimination violates the individual rights of defendants by affecting case outcome,[17] distancing itself from its earlier position that juror race could affect jury decisions.[18] More pointed suggestions that jury selection has little, if any, impact on jury decisions appear in opinions in which the Court has refused to apply expanded definitions of jury discrimination

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also Castaneda v. Partida, 430 U.S. 482, 516 (1977) (Powell, J., dissenting) ("Were it not for the perceived likelihood that jurors will favor defendants of their own class, there would be no reason to suppose that a jury selection process that systematically excluded persons of a certain race would be the basis of any legitimate complaint by criminal defendants of that race.") Other examples of acknowledgment that juror race can affect jury decisions include Holland v. Illinois, 493 U.S. 474, 480 (1990) (cross-section requirement of the Sixth Amendment barring racial discrimination in the selection of the venire ensures an impartial jury and a fair outcome); Hobby v. United States, 468 U.S. 339, 346-49 (1984) (suggesting that, although the systematic exclusion of blacks and women from the position of grand jury foreperson failed to affect the fairness of the proceeding or create prejudice for the white defendant, other types of jury discrimination may have these effects); Taylor v. Louisiana, 419 U.S. 522, 532 n.12 (1975) (holding that systematic exclusion of women from venires violated the male defendant's rights under the Sixth Amendment in part because juror gender affects deliberations and results; citing social psychology studies); Brown v. Allen, 344 U.S. 443, 471 (1953) (jury discrimination denies to an accused "of the race against which such discrimination is directed" his rights to equal protection); *infra* notes 176-77 (discussing Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990)). *See also* Deirdre Golash, *Race, Fairness, and Jury Selection*, 10 BEHAV. SCI. & L. 155, 166 (1992) (discussing the Court's focus on the black defendant's rights to nondiscriminatory jury selection); Laurie Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081, 1101-02 (1987) (same).

17. *See* Georgia v. McCollum, 112 S. Ct. 2348 (1992) (holding that a venireperson's equal protection rights are violated when a criminal defendant exercises peremptory strikes on the basis of race, and recognizing a prosecutor's standing to raise those rights); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (holding that a civil litigant has standing to raise the rights of black venirepersons peremptorily struck by an opposing party); Powers v. Ohio, 111 S. Ct. 1364 (1991) (reversing the conviction of a white defendant due to the government's use of peremptory challenges to strike blacks from jury; holding that a white defendant has standing to raise the rights of excluded black venirepersons).

Previously, concern about the injury to those excluded by discriminatory practices had only been a supplementary factor in deciding whether to grant relief to criminal defendants. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 224 (1965); Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880); *see also* James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 287 (1988); Underwood, *supra* note 13, at 742-44.

18. The *McCollum* majority, for example, did not respond to the following observation by Justice O'Connor in her dissent:

> It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence. . . . [T]here is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury.

112 S. Ct. at 2364; *see also Powers*, 111 S. Ct. at 1371 (stating that "the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause"); Ramseur v. Beyer, 983 F.2d 1215, 1247 (3d Cir. 1992) (Cowen, J., dissenting) ("The Court did not outlaw race-based peremptory challenges because an excluded juror might have helped the defendant, but because they cast doubt on the integrity of the judicial process and the fairness of criminal proceedings.") (en banc), *cert. denied*, 113 S. Ct. 2433 (1993); Underwood, *supra* note 13, at 735, 744-45.

retroactively.[19]

Even when it assumes that juror discrimination affects jury decisions, the Court has expressed schizophrenic views about whether judges reviewing convictions are able to measure that effect. In 1991, the Court reiterated its long-standing policy of granting automatic relief for properly raised claims of jury discrimination, explaining in *Arizona v. Fulminante*[20] that even the impact of grand jury discrimination on a defendant's conviction is pervasive and unknowable.[21] The Court has been making this claim at least since 1986, when it asserted in *Vasquez v. Hillery*[22] that one reason for granting relief in every case of grand jury discrimination is the inability of courts to determine when the exclusion of blacks has shaped case outcome. The Court explained:

> [E]ven if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.
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> . . . .
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> . . . Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted.[23]

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19. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989).

> [T]he fair cross section requirement "[does] not rest on the premise that every criminal trial, or any particular trial, [is] necessarily unfair because it [is] not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. . . . [T]he absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction . . . .

489 U.S. at 314-15 (quoting Daniel v. Louisiana, 420 U.S. 31, 32 (1975)); *see also infra* note 240 and accompanying text.

20. 111 S. Ct. 1246 (1991).

21. 111 S. Ct. at 1264-65. Explaining its decision to extend harmless error review to the admission of coerced confessions, the Court discussed harmless error review at length. It classified grand jury discrimination as a "structural" error that should escape harmless error review because it creates effects that "defy analysis by 'harmless-error' standards." 111 S. Ct. at 1265. A judge's ability to detect any given error's influence on outcome appeared to be the majority's exclusive criterion for exempting that error from harmless error review. *See* Charles J. Ogletree, Jr., Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions,* 105 HARV. L. REV. 152, 162 (1991). This past Term made it even clearer that measurability of effect is the favored method for determining which errors are subject to harmless error review. *See* Sullivan v. Louisiana, 113 S. Ct. 2078, 2082-83 (1993) ("structural error" exempt from harmless error review is that which is necessarily unquantifiable and indeterminate); Brecht v. Abrahamson, 113 S. Ct. 1710, 1717 (1993) (holding that a trial error, unlike a structural error, is amenable to harmless error analysis because it " 'may . . . be quantitatively assessed . . . to determine [the effect it had on the trial]' ") (quoting *Fulminante,* 111 S. Ct. at 1249).

22. 474 U.S. 254 (1986).

23. *Hillery,* 474 U.S. at 263-64; *see also* Bank of Nova Scotia v. United States, 487 U.S. 250, 257 (1988) (noting that the rule in *Hillery* was based in part on the presumption that a discriminatorily selected grand jury would treat defendants unfairly). Perhaps the most forceful and

At the same time that the Court breathed life into *Hillery*'s claim of judicial incapacity to gauge discrimination's influence, the Court continued to increase its demands that federal judges who review convictions measure the effect of all errors, including jury discrimination, on case outcome. For several years the Court has insisted that a federal judge may not reverse the conviction or sentence of a defendant who either relies on a "procedurally defaulted" claim of constitutional error[24] or argues that the failure of his counsel to raise a constitutional claim violated his right to effective assistance of counsel, unless that defendant first demonstrates "prejudice." The Court has defined prejudice to be a reasonable probability that, absent the error, a defendant's case would have turned out differently.[25] Consequently,

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detailed argument that the effects of jury discrimination are immeasurable was made 14 years before *Hillery* by Justice Marshall in his plurality opinion in Peters v. Kiff, 407 U.S. 493 (1972):

> If it were possible to say with confidence that the risk of bias resulting from the arbitrary action involved here is confined to cases involving Negro defendants, then perhaps the right to challenge the tribunal on that ground could be similarly confined. The case of the white defendant might then be thought to present a species of harmless error.
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> But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. First, if we assume that the exclusion of Negroes affects the fairness of the jury only with respect to issues presenting a clear opportunity for the operation of race prejudice, that assumption does not provide a workable guide for decision in particular cases. For the opportunity to appeal to race prejudice is latent in a vast range of issues, cutting across the entire fabric of our society.
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> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

407 U.S. at 503-04.

24. "Procedural default" describes the failure to comply with rules requiring claims to be raised within a specified time or in a certain manner. Most jurisdictions require defendants to raise claims of jury discrimination before the jury is sworn. *See, e.g.*, UTAH CODE ANN. § 78-46-16(1) (1992); McGruder v. State, 560 So. 2d 1137, 1141-43 (Ala. Crim. App. 1989); People v. Myers, 729 P.2d 698, 704-05 (Cal. 1987) (en banc). *But see* State v. Burch, 830 P.2d 357, 363-64 (Wash. Ct. App. 1992) (*Batson* claim raised first on appeal not untimely). State and federal defendants may attempt to raise defaulted claims on appeal or in collateral proceedings. *See, e.g.*, Amadeo v. Zant, 486 U.S. 214 (1988) (state defendant sought collateral relief in habeas corpus proceedings for defaulted claim of jury discrimination); Davis v. United States, 411 U.S. 233 (1973) (federal defendant sought collateral relief for defaulted claim of grand jury discrimination).

25. *See* Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991). Habeas petitioners raising defaulted claims must demonstrate "cause" for the default and "prejudice" from the claimed error. Usually, a petitioner will attempt to show "cause" by arguing that his attorney's failure to challenge the error amounted to ineffective assistance of counsel. *See Coleman*, 111 S. Ct. at 2567; Murray v. Carrier, 477 U.S. 478, 488 (1986). In order for a defendant to prove that he was denied effective assistance of counsel, he must demonstrate that his counsel's representation was "unreasonable" and that "there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

If a defendant failed to raise his claim on time because its "factual or legal basis . . . was not

whenever a defendant raises either a defaulted claim of jury discrimination or an independent claim that his attorney's failure to challenge selection procedures amounted to ineffective assistance, in order to obtain relief he must demonstrate a reasonable probability that legal selection procedures would have changed both the racial composition of his jury and the outcome of his case.[26] Three recent Court decisions have extended the reach of prejudice tests, expanding the number of cases in which judges will have to measure the effects of all constitutional error, including jury discrimination.[27]

Curiously, the Court itself has attempted only once, more than fifteen years ago, to measure the effect of jury discrimination under these standards. In contrast to its claim in subsequent harmless error cases, the Court in *Davis v. United States*[28] had no difficulty finding that the grand jury discrimination proven in that case had no effect on the grand jury's decision to indict.[29] This striking conflict — together

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reasonably available" at the time it should have been raised, or because interference by governmental officials made compliance with procedural requirements "impracticable," he must still, in order to obtain relief, show that the error probably changed the outcome of his case. *Amadeo*, 486 U.S. at 222 (quoting *Murray*, 477 U.S. at 489-90); *see also* Reed v. Ross, 468 U.S. 1, 16 (1984).

State courts reviewing defaulted claims use similar standards. *See* Henry B. Robertson, *The Needle in the Haystack: Towards a New State Postconviction Remedy*, 41 DEPAUL L. REV. 333, 333 (1992); *see generally* Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 12 N.Y.U. REV. L. & SOC. CHANGE 359, 363-83 (1987-1988).

26. *See, e.g.*, Hollis v. Davis, 912 F.2d 1343, 1347-54 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 1478 (1992).

27. *See* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1719 (1992) (petitioner who failed to develop adequately the facts of his claim in state court only entitled to evidentiary hearing in federal court after showing prejudice); Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991) (showing of prejudice required when petitioner's attorney filed appeal three days late); McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991) (showing of prejudice required when petitioner "abuses the writ" by raising a claim in his habeas petition after failing to raise it in an earlier petition); *see also* Van Daalwyk v. United States, 792 F. Supp. 622 (E.D. Wis. 1992) (applying *McCleskey*'s cause and prejudice test to a defaulted *Batson* claim). *Compare* Blair v. Armontrout, 976 F.2d 1130, 1141-42 (8th Cir. 1992) (relying on *Keeney* to deny consideration of evidence not presented in state court proceedings), *cert. denied*, 113 S. Ct. 2357 (1993) *with* Watkins v. State, No. 90-989, 1992 Ala. Crim. App. LEXIS 1170, at *24 (Sept. 30, 1992) (court will presume prejudice when defendant shows that lower court would have granted motion to supplement record had counsel so moved) *and* People v. Andrews, 548 N.E.2d 1025 (Ill. 1989) (allowing defendant to supplement record of *Batson* error).

28. 411 U.S. 233 (1973).

29. The Court applied its prejudice test to defendant's claim of grand jury discrimination and upheld the trial court finding that the error had no effect on the outcome of the case. The trial court had reasoned, "[t]he same grand jury that indicted petitioner also indicted his two white accomplices. The case had no racial overtones. The government's case against petitioner was, although largely circumstantial, a strong one." *Davis*, 411 U.S. at 243-44.

In Francis v. Henderson, 425 U.S. 536 (1976), the Court again refused to grant relief, absent a showing of prejudice, to a black defendant who failed to raise his claim of grand jury discrimination before trial. The Court remanded the question of prejudice to the lower court. *See also* Peter W. Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 STAN. L. REV. 1, 16 n.79, 32 n.153 (1978).

with the absence of any decision attempting to measure the effect on case outcome of racial discrimination in the selection of a trial jury, a sentencing jury, or a venire[30] — leaves the Court's position on these matters confused.[31]

B. *Consequences of Indecision*

The Court's inconsistency has complicated the review of discrimination claims in two ways. First, without guidance from the Court, current standards of review are difficult to apply to jury discrimination. Absent consensus that racial composition can affect verdicts, or criteria with which to assess the probability of such an effect, judges' estimates of prejudice from jury discrimination lack coherence and predictability.[32]

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30. The Court came close to measuring the effect of discrimination during voir dire at least once. In Amadeo v. Zant, 486 U.S. 214, 228 n.6 (1988), the Court noted that it did not need to reach the question of whether defendant was prejudiced by the failure of defense counsel to challenge the government's peremptory strike practices because any objection to the existence of prejudice had been waived by the state in earlier proceedings. *See also* Teague v. Lane, 489 U.S. 288, 298 (1989) (holding that petitioner's defaulted *Swain* claim was procedurally barred because the petitioner had not attempted to show cause for his default).

31. Similar uncertainty faces courts applying prejudice tests to other types of jury selection errors. The Court has insisted that both sex discrimination in jury selection and "*Witherspoon* error," *see infra* note 128, require reversal without regard to prejudice when properly raised. *See* Gray v. Mississippi, 481 U.S. 648, 666-68 (1987) (judge's erroneous decision to exclude for cause a venireperson due to her views against the death penalty was not harmless, even when government could have exercised peremptory challenge against same juror). Yet the Court has never attempted to determine in a particular case whether an attorney's failure to raise such error created "prejudice." *See* Steven C. Bennett, *Ineffective Assistance of Counsel in Voir Dire and the Admissibility of Testimony of* Witherspoon *Excluded Veniremen in Post-Conviction Evidentiary Hearings*, 49 LA. L. REV. 841, 858-61 (1989) (arguing that courts should presume prejudice when a defendant raises a claim of ineffective assistance based on counsel's failure to object to improper exclusion of a juror who opposes the death penalty). *But cf.* United States v. Humphreys, 982 F.2d 254, 261 (8th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3789 (U.S. Apr. 21, 1993) (No. 92-1791) (no automatic reversal when jury included felon); United States v. Hefner, 842 F.2d 731 (4th Cir.), *cert. denied*, 488 U.S. 868 (1988) (denying relief when trial judge should have disqualified grand jury foreman due to former felony conviction).

32. For example, a split panel of the Eleventh Circuit Court of Appeals recently granted a writ of habeas corpus releasing a black defendant who had been indicted, convicted, and sentenced to 99 years for burglary by all-white juries. The defendant's trial attorney had not challenged the illegal exclusion of blacks from these juries by the government. The court of appeals concluded that, if the jury that sentenced the defendant had been selected without race discrimination, it probably would have included blacks and imposed a more lenient sentence. But the court found no "objective reason" to conclude that a grand jury containing black members would not have indicted the defendant on the same charge. The court also concluded that, due to the lack of trial transcript, it was unable to make "the kind of judgment of probabilities" necessary to decide whether a properly selected petit jury would have acquitted the defendant. Hollis v. Davis, 941 F.2d 1471, 1482-83 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1478 (1992).

Another case involving a defaulted *Swain* claim and an appeal to racial prejudice during closing argument recently prompted a panel of the Eighth Circuit Court of Appeals to disagree about whether the defendant had made a sufficient showing of impact to overcome his default. The dissenting judge asserted that the two errors, combined with evidence that "was far from overwhelming," "make it likely that [the defendant] is actually innocent of capital murder." Blair v. Armontrout, 976 F.2d 1130, 1146-48 (8th Cir. 1992) (Heaney, J., concurring in part and

Even judges considering timely raised claims of jury discrimination — claims that are traditionally exempt from harmless error review — may now have to grapple with these questions. According to the Court's most recent decisions, a litigant must suffer an "actual" and "real" injury before he can successfully raise a claim based on the rights of those excluded from jury service.[33] Whether a defendant complaining of jury discrimination has suffered an "actual injury" may depend on the risk that the decision of his jury was in part a product of its racial composition.[34]

Second, the inconsistency of the Court threatens the stability of review standards themselves. The Court's rules for reviewing error in criminal proceedings have become increasingly unsettled.[35] Standards

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dissenting in part), *cert. denied,* 113 S. Ct. 2357 (1993). The majority concluded that the defendant failed to prove that "no reasonable juror would have found him eligible for the death penalty" had discrimination not occurred, characterizing the evidence against him as "strong." *Blair,* 976 F.2d at 1140. For conflicting reviews of the evidence, see Blair v. Armontrout, 916 F.2d 1310, 1313-15, 1334-35 (8th Cir. 1990), *cert. denied,* 112 S. Ct. 89 (1991).

Another court of appeals apparently modified the Court's definition of prejudice under *Strickland.* In Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989), the court held that the petitioner established prejudice from his trial attorney's failure to raise a *Batson* claim, not because there was a reasonable probability of a different outcome *at trial* if the attorney had raised the claim, but because a timely objection at trial would have required automatic relief *on appeal.* 865 F.2d at 64. Of course, Davis v. United States, 411 U.S. 233 (1973), and Francis v. Henderson, 425 U.S. 536 (1976), would have been decided differently had the Supreme Court adopted this approach.

33. The prosecutor's race-based peremptory challenges in *Powers* created such an injury, the Court reasoned, by "damag[ing] *both the fact* and the perception of [the] guarantee" of the jury as a "vital check against wrongful exercise of power by the state." Powers v. Ohio, 111 S. Ct. 1364, 1371 (1991) (emphasis added); *see also* Georgia v. McCollum, 112 S. Ct. 2348, 2357 (1992).

34. Indeed, the injury suffered by a white defendant whose white grand jury foreperson was chosen as a result of race discrimination may not be as "real" an injury as that suffered by the defendant in *Powers.* For an example of the conflict that these questions have created already, see Ramseur v. Beyer, 983 F.2d 1215 (3d Cir. 1992) (en banc), *cert. denied,* 113 S. Ct. 2433 (1993). Discrimination in the selection of the grand jury foreperson is still subjected to "prejudice" review in some jurisdictions. *See* Turner v. State, 573 So. 2d 657, 665-66 (Miss. 1990) (en banc), *cert. denied,* 111 S. Ct. 1695 (1991).

35. In the past three Terms alone, the Court has considered restrictions on the scope of appellate or collateral relief for constitutional error in at least eight separate cases. *See* Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) (rejecting an extension of harmless error review to certain erroneous burden of proof instructions); Withrow v. Williams, 113 S. Ct. 1745 (1993) (narrowly rejecting a restriction on habeas review of *Miranda* claims); Brecht v. Abrahamson, 113 S. Ct. 1710 (1993) (revising harmless error standard for reviewing error in habeas proceedings); Lockhart v. Fretwell, 113 S. Ct. 838 (1993) (interpreting prejudice requirement for ineffective assistance claims); Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) (requiring petitioners show prejudice in order to expand the factual record); Coleman v. Thompson, 111 S. Ct. 2546 (1991) (extending prejudice requirement to certain defaulted claims); McCleskey v. Zant, 111 S. Ct. 1454 (1991) (extending prejudice requirement to petitioners who "abuse the writ"); Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (extending harmless error review to the admission of coerced confessions); *see also* United States v. Olano, 113 S. Ct. 1770, 1776 (1993) (interpreting "plain error" to include not only error that causes the conviction or sentencing of an actually innocent defendant, but also error that both "affects substantial rights" and "seriously affects the fairness, integrity or public reputation of judicial proceedings") (quoting FED. R. CRIM. P. 52(b) and United States v. Atkinson, 297 U.S. 157, 160 (1936)); Yates v. Evatt, 111 S. Ct. 1884 (1991)

for reviewing jury discrimination appear especially unpredictable. The Court has not addressed what review standards must be applied to many of the jury selection techniques that it has only recently declared to be illegal. Even settled rules for reviewing jury discrimination appear vulnerable. For instance, in two recent decisions involving the scope of harmless error review, the Court conspicuously omitted jury discrimination from its list of errors exempted from harmless error standards.[36]

The Court's selection of rules for reviewing jury discrimination may continue to depend, at least in part, on empirical claims about the effects of discrimination. Its resolution of these competing claims will inevitably influence ongoing experiments with postconviction reform. For example, if the Court ultimately concludes that judges cannot detect when jury discrimination influences outcome, it may decide that rules requiring judges to try are arbitrary, misguided, and wasteful. If the Court determines that jury discrimination poses no significant risks for defendants, it may limit habeas corpus relief for defendants who allege jury discrimination in the same way that it has limited relief for defendants who raise other errors it considers irrelevant to verdict "accuracy."[37] Conversely, persuasive proof that juror race can influence verdicts and that judges can detect that influence may undermine the Court's basis for exempting claims of jury discrimination from harmless error review.[38] At the very least, settling the empirical disputes would encourage the Court to evaluate the strength of other restrictions on its remedial choices.[39]

(explaining the application of harmless error review to a jury charge containing an unconstitutional presumption).

36. *See Sullivan,* 113 S. Ct. at 2081; *Brecht,* 113 S. Ct. at 1717. Lower courts continue to consider efforts to extend harmless error review to jury discrimination. *See, e.g.,* United States v. Broussard, 987 F.2d 215, 221 (5th Cir. 1993) (rejecting harmless error review of *Batson*-type error "because it would be virtually impossible to determine that these rulings, injurious to the perceived fairness of the petit jury, were harmless").

37. *See infra* notes 226-27, 251-52 and accompanying text.

38. *See* Reid Hastie, *Introduction* to INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 3, 5 (Reid Hastie ed., 1993); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy,* 38 EMORY L.J. 1005, 1071, 1092-94 (1989); John Monohan & Laurens Walker, *Empirical Questions Without Empirical Answers,* 1991 WIS. L. REV. 569, 581.

39. *See* DONALD BLACK, SOCIOLOGICAL JUSTICE 96-97 (1989); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation,* 139 U. PA. L. REV. 541, 609 (1991); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 742-57 (1993). The Court, however, often ignores or rejects social science studies about jury behavior. *See* J. Alexander Tanford, *The Limits of Scientific Jurisprudence: The Supreme Court and Psychology,* 66 IND. L.J. 137, 138-40, 169-71 (1990) [hereinafter Tanford, *Scientific Jurisprudence*] (documenting and explaining Court's hostility to research concerning juror behavior); J. Alexan-

C. *Lessons from Social Science: Studies Examining the Influence of Jury Discrimination on Jury Decisions*

Social psychologists who research jury behavior[40] use several methods to explore how juries make decisions. The most obvious method — monitoring actual jury deliberations — is illegal.[41] As a substitute, some researchers conduct archival studies, reviewing court records in order to find correlations between verdicts and juror characteristics. Others gather information about juror behavior by surveying potential jurors or by interviewing jurors after their cases are over. Many researchers simulate trials, controlling and manipulating case types and juror attributes, evaluating mock juror preferences at various stages, and observing mock jury deliberations. Studies of groups other than juries also offer indirect information about the effect of juror demographics on jury decisionmaking.

Because these studies are often simulated and are limited in number,[42] their results must be viewed with caution.[43] Yet jury re-

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der Tanford, *Thinking About Elephants: Admonitions, Empirical Research and Legal Policy*, 60 U.M.K.C. L. REV. 645 (1992) [hereinafter Tanford, *Thinking About Elephants*].

40. Most jury researchers are social psychologists. Social psychology involves the study of human social behavior, or how individual personality, attitudes, motivations, and behavior influence — and are influenced by — social groups. ELLIOT ARONSON, THE SOCIAL ANIMAL 5-8 (1992).

41. 18 U.S.C. § 1508 (1988). After the Chicago Jury Project taped several deliberations in 1954 in its effort to gather information about jury decisionmaking, state legislatures responded to the "bugging" of juries by prohibiting the recording of deliberations; since then, actual deliberations have been taped only once. Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323, 324-26 (1991); *see also* Marilyn C. Ford, *The Role of Extralegal Factors in Jury Verdicts*, 11 JUST. SYS. J. 16, 33 (1986) (stating that nearly all states prohibit observation of jury deliberations).

42. The number of studies that have examined the effect of juror race on verdicts is relatively small. *See* Brian L. Cutler, *Introduction: The Status of Scientific Jury Selection in Psychology and Law*, 3 FORENSIC REP. 227, 229 (1990) ("Calls for more systematic [externally valid studies] emanating from virtually every early review of jury selection were not answered. . . . Little jury selection research emerged . . . .").

The results of some jury studies may be unavailable because their authors performed them for commercial purposes. An industry of jury consulting firms that offer clients "scientific jury selection" has sprouted from the study of correlations between juror characteristics and verdicts. *Id.* at 229-30; *see also* Hastie, *supra* note 38. Jury experts do not limit themselves to advising trial attorneys on voir dire techniques. Applying their insights to other aspects of trial strategy, they offer a broad range of services as "trial consultants." *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 79-94 (1986); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229, 251-52 (1990).

The consulting firm that assisted one of the police officers acquitted of state charges of assaulting Rodney King advertised the case as an example of its jury selection expertise. Advertisement, NATL. L.J., Jan. 18, 1993, at 9. The same firm was appointed, at state expense, to assist the black defendants charged with beating a white truck driver during the unrest following the first King verdicts. Gail D. Cox, *Consultant Appointed in Denny Case*, NATL. L.J., May 3, 1993, at 38.

43. Researchers conducting mock trial studies, for instance, may fail to compare predeliberation and postdeliberation preferences or otherwise to account for the effect of deliberations, fail to

search, with all its shortcomings, provides a different and perhaps less partisan description of jury behavior than the hunches of judges who estimate the effects of jury discrimination. Judges may be hesitant to link jury discrimination to case outcome when it requires the release of defendants they think are dangerous,[44] when they make no effort to consider the alternative viewpoints that jurors of different races could have brought to the case, or when they believe that admitting that juror race can affect verdicts is unwise or unconstitutional. Certainly researchers carry their own predispositions.[45] But it seems fair to expect that the biases of researchers have less influence on the results of

give mock jurors standard jury instructions, use exclusively undergraduate students as mock jurors, limit the time mock jurors deliberate, substitute transcripts or tapes for live testimony, or make little attempt to create a sense of real-world consequence for the mock jurors whose responses they test.

Little agreement exists about whether or how much these methodological deficiencies skew results. For commentary on deliberations, see Diane L. Bridgeman & David Marlowe, *Jury Decision Making: An Empirical Study Based on Actual Felony Trials,* 64 J. APPLIED PSYCHOL. 91 (1979) (deliberation is not significant in forming juror opinion or determining verdicts); Martin F. Kaplan & Lynn E. Miller, *Reducing the Effects of Juror Bias,* 36 J. PERSONALITY & SOC. PSYCHOL. 1443, 1453 (1978) (effects of some biases ameliorated by deliberation); Robert J. MacCoun, *Experimental Research on Jury Decision-Making,* 244 SCI. 1046, 1048 (1989) (close cases show enhanced bias after deliberation); Yvonne H. Osborne et al., *An Investigation of Persuasion and Sentencing Severity with Mock Juries,* 4 BEHAV. SCI. & L. 339, 346 (1986) (postdeliberation shifts are significantly more pronounced for "heterogeneous" juries than for "homogeneous" juries). On the use of undergraduate student subjects, compare Arthur H. Patterson, *Scientific Jury Selection: The Need for a Case Specific Approach,* 11 SOC. ACTION & L., 105, 106 (1986) ("Comparability between responses of mock jurors, whose judgments have no real meaning, and the verdicts of actual jurors, is largely unknown.") and Richard L. Wiener et al., *The Social Psychology of Jury Nullification: Predicting When Jurors Disobey the Law,* 21 J. APPLIED SOC. PSYCHOL. 1379, 1396 (1991) (finding community residents relied much more on their own sentiments about responsibility and less on legal judgments than undergraduate students) with MacCoun, *supra,* at 1046 (citing studies finding little or no difference between verdicts by student and adult jury-eligible respondents). On the presentation of evidence, compare Vicki S. Helgeson & Kelly G. Shaver, *Presumption of Innocence: Congruence Bias Induced and Overcome,* 20 J. APPLIED SOC. PSYCHOL. 276 (1990) (bias reduced by accurate simulated trial setting) and Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies,* 10 BEHAV. SCI. & L. 179, 191 (1992) (studies demonstrating greater methodological rigor more consistently uncovered bias in sentencing decisions) with Geoffrey P. Kramer & Norbert L. Kerr, *Laboratory Simulation and Bias in the Study of Juror Behavior: A Methodological Note,* 13 LAW & HUM. BEHAV. 89 (1989) (concluding that there is no support for the contention that effect of variables such as defendant characteristics becomes weaker as simulation becomes more realistic and complex). For more on the external validity of jury studies, see JOHN GUINTHER, THE JURY IN AMERICA xxi-xxviii (1988); Robert M. Bray & Norbert L. Kerr, *Methodological Considerations in the Study of the Psychology of the Courtroom, in* THE PSYCHOLOGY OF THE COURTROOM 287 (Norbert L. Kerr & Robert M. Bray eds., 1982); Valerie P. Hans & Neil Vidmar, *Jury Selection, in* THE PSYCHOLOGY OF THE COURTROOM, *supra,* at 39, 56-59; Wayne Weiten & Shari S. Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics,* 3 LAW & HUM. BEHAV. 71 (1979).

44. *See, e.g., Powers,* 111 S. Ct. at 1382 (Scalia, J., dissenting) ("If for any reason the State is unable to reconvict Powers for the double murder at issue here, later victims may pay the price for our extravagance.").

45. *See, e.g.,* Mary M. Gergen, *Toward A Feminist Metatheory and Methodology in the Social Sciences, in* FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE 91-92 (Mary M. Gergen ed., 1988).

jury studies than the predispositions of judges have on judicial predictions about the effect of juror race in actual cases.[46]

The studies described in this article confirm that juror race affects jury decisions in some cases. The studies are less reliable as predictors of those cases that are most or least likely to be affected by juror race, but they illustrate patterns that judges can use when estimating the effect of jury discrimination on jury decisions.

1. *Why Juror Race Influences Jury Decisions*

Before reviewing the studies that document *when* the racial background of a juror may affect her judgment of a defendant's culpability, it is essential to examine the theories developed by social psychologists to explain *why* this effect occurs. First, jurors, like all of us, are influenced by stereotypes about racial groups and members of racial groups. Negative racial stereotypes produce a "reverse halo effect": members of negatively stereotyped groups are assumed to possess negative traits, and positive information about them is devalued.[47]

> [S]tereotypes operate as a source of expectancies about what a group as a whole is like . . . as well as about what attributes individual group members are likely to possess . . . . Their influence can be pervasive, affecting the perceiver's attention to, encoding of, inferences about, and judgments based on that information. And the resulting interpretations, inferences, and judgments typically are made so as to be consistent with the preexisting beliefs that guided them.[48]

To the extent that a juror's belief in various racial stereotypes depends

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46. Jury researchers typically formulate hypotheses and questions that test those hypotheses, then tabulate responses and interpret the results. While biases surely influence a researcher's interpretation of subject responses, the data provides some check on researcher bias. No such verification is available for judicial predictions about juror behavior.

47. ARONSON, *supra* note 40, at 136-37.

48. David Hamilton et al., *Stereotype-Based Expectancies: Effects on Information-Processing and Social Behavior,* J. SOC. ISSUES, Summer 1990, at 35, 43. For other descriptions of effects of racial stereotypes on juror cognition, see Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use,* 55 J. PERSONALITY & SOC. PSYCHOL. 726 (1988); Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity,* 52 J. PERSONALITY & SOC. PSYCHOL. 871, 878-79 (1987) (concluding that stereotypes lead to selective attention toward stereotype-consistent information; inconsistent information is overlooked, poorly integrated, or reinterpreted in a way that reconciles it with stereotyped expectancies; and "stereotypes can bias the mental representation that is constructed by subjects, thereby biasing subsequent judgments and recall performance").

> "[A] white juror sitting in a jury box listening to the testimony of a black witness would sift and evaluate and appraise that testimony through a screen of preconceived notions about what black people are. . . . The black juror, because of more similar life experiences to the black witness would . . . appraise that testimony from a distinctively different vantage point . . . ."

VAN DYKE, *supra* note 6, at 32 (quoting Transcript of Hearing at 438-39, State v. Seale (New Haven, Conn. Oct. 15, 1970)).

on her racial background,[49] her assessment of the credibility or culpability of parties, or of the credibility of witnesses and attorneys, may vary with her race and the race of those whom she judges.

In addition, "in-group bias" may also cause jurors of different races to evaluate parties, witnesses, and attorneys differently. Variously described as "own-race bias," "ethnocentrism," or "the similarity hypothesis," this tendency to empathize with or subconsciously favor members of one's own race stems from the psychological need to maintain a positive self-image.[50]

Juror race may also affect verdicts in more specific ways. Recent studies investigating juror decisionmaking have concluded that each juror, using her own life experiences, organizes the information she receives about a case into what for her is the most plausible account of what happened and then picks the verdict that fits that story best. Jurors may interpret the same evidence differently depending on which stories they choose.[51] Because racial background may influence a juror's judgment of whether any given story is a reasonable explanation of events, black and white jurors may reach different conclusions after evaluating the same evidence.[52]

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49. The prevalence of internalized negative stereotypes about one's own racial group is unknown. *See* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 363-64 (3d ed. 1992) (noting that, prior to the civil rights movement, blacks excluded from trial juries may have been those who have adopted the majority's negative attitude towards blacks in order to achieve economic or political success and thus may have been more ready to convict blacks than many whites; but suggesting that more modern "progressive black jurors" would act differently); Martha Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered,* 101 HARV. L. REV. 10, 67 (1987).

50. *See* Marilyn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis,* 86 PSYCHOL. BULL. 307 (1979); *see also* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 28 (1988) ("the similarity hypothesis"); Johnson, *supra* note 13, at 1640 ("own-race bias"); Cookie W. Stephan & Walter G. Stephan, *Habla Ingles? The Effects of Language Translation on Simulated Juror Decisions,* 16 J. APPLIED PSYCHOL. 577, 587 (1986) ("ethnocentrism").

51. Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making,* 51 J. PERSONALITY & SOC. PSYCHOL. 242, 246-54 (1986); *see also* Ronald J. Allen, *The Nature of Juridical Proof,* 13 CARDOZO L. REV. 373, 396-406 (1991); Fulero & Penrod, *supra* note 42, at 252-53; Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model,* 13 CARDOZO L. REV. 519 (1991) [hereinafter Pennington & Hastie, *Cognitive Theory*]; Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making,* 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992). For alternative models of juror decisionmaking, see Hastie, *supra* note 38.

52. *See* LANCE W. BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 171 (1981); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model,* 13 CARDOZO L. REV. 559, 571-72 (1991) (a major cause of different juror stories is the different background information that jurors bring to their deliberations; due to the limits on litigants' ability to present evidence exposing these differences, "protection against the class-biased discounting of unfamiliar, but in fact plausible stories must be found largely in the diversity of the jury"); *see also* VAN DYKE, *supra* note 6, at 33 (black juror informed other jurors that Los Angeles police pick up black men routinely without reason in the area where defendant was arrested); Nancy Pennington & Reid Hastie,

A juror's inability to understand the testimony of defendants and witnesses from another race or culture may also explain why juror race sometimes influences jury decisions.[53] Consider the following description of a case of a young black man accused of first-degree murder:

> His defense was based on the claim that the victim had been the aggressor and that the killing was self-defense. This story required the construction of a plausible basis for the victim's aggressive behavior. The defense attempted to show that the deceased had displayed his hostility to the defendant even before the defendant was attacked physically. The deceased, according to one witness, had "put him in the dozens." This phrase refers to a ritualized form of verbal aggression that occurred in that particular [African-American] subculture. When the defense lawyer attempted to clarify this key element in the story for the benefit of the jury, the prosecution successfully blocked all testimony from the witnesses on the grounds that they were not semantics experts. . . . [A]s a consequence, both judge and jury were left completely in the dark on at least one crucial point in the case.[54]

Two other psychological propensities aggravate these biasing effects of juror race. The first is the "false consensus" effect — the tendency to see one's own judgment as the common response while viewing alternative judgments as deviant or inappropriate.[55] The sec-

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Practical Implications of Psychological Research on Juror and Jury Decision Making, 16 PERSONALITY & SOC. PSYCHOL. BULL. 90, 97 (1990) (jurors from wealthier suburbs found defendant's possession of a knife remarkable, leading them to infer the defendant had culpable intent; jurors from poorer neighborhoods were more willing to believe the defendant was carrying the knife as a habit or for protection).

53. *See* HENNEPIN COUNTY ATTORNEY'S TASK FORCE ON RACIAL COMPOSITION OF THE GRAND JURY, FINAL REPORT, Apr. 31, 1992 (explaining that, "[w]ith minority witnesses and white grand jurors, there are inevitably challenges in intercultural communication").

54. BENNETT & FELDMAN, *supra* note 52, at 175-76 (quoting Daniel H. Swett, *Cultural Bias in the American Legal System,* 4 LAW & SOCY. REV. 79, 98 (1969)). The verbal behavior described by the witness in the case above remains a part of black culture. *See* HENRY LOUIS GATES, JR., THE SIGNIFYING MONKEY 64-88 (1988).

A similar misunderstanding may have occurred in a case in which a defendant convicted of murder argued that his victim had given him *el ojo* ("the eye") in a bar fight. The victim and the defendant were both Mexican American, but no Mexican Americans served on either the jury that indicted or the jury that tried the defendant. As one observer explained, "Hell, in the Mexican community eye contact can kill you. It sends the other guy a message that says what the hell are you lookin' at, and if you don't like it, do something about it. In a bar that can lead to a killing. But if you don't know that you can't relate to what it means." THOMAS WEYR, HISPANIC U.S.A.: BREAKING THE MELTING POT 83 (1988).

For more illustrations of gaps in cultural understandings, see BENNETT & FELDMAN, *supra* note 52, at 169-83; HANS & VIDMAR, *supra* note 42, at 140-42; JACK KATZ, SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS TO DOING EVIL 266, 271-72 & n.121 (1988); Deborah Denno, *Psychological Factors for the Black Defendant in a Jury Trial,* 11 J. BLACK STUD. 313, 319-20 (1981).

55. Self-interest and limited access to alternative responses combine to create this effect. Life experience, background, and attitudes all contribute to limit the information about alternative responses that we remember. *See* ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 92-95, 102-04, 120 (1988); Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments, in* JUDGMENT

ond is conservatism — after forming a belief, one is unlikely to relinquish it, even after exposure to information that undermines or destroys its logical basis.[56]

2. *Studies Examining When Juror Race Makes a Difference*

These theories explain why juror race may affect jury decisions. Together with the studies that follow, they offer persuasive evidence that jury discrimination can and does influence jury decisions. Because judicial competency to measure that influence remains controversial, I have organized the empirical evidence according to popular *judicial* belief about when juror race matters.

In order to find out what judges think about the influence of race on jury decisions, I examined cases in which judges evaluated whether a litigant had a motive to exclude jurors on the basis of race. Trial judges frequently must determine whether litigants strike veniremembers from juries because of their race.[57] In making this assessment, courts have identified case attributes that can support a prima facie showing of racial discrimination sufficient to require a litigant to justify his strike. Indicators that a judge believes would motivate an attorney to decide when juror race matters represent factors that the judge herself would use if she had to make the same decision.[58] I also examined cases in which judges weighed the importance

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UNDER UNCERTAINTY: HEURISTICS AND BIASES 129, 140-44 (Daniel Kahneman et al. eds., 1982); Lee Ross et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1977).

56. Ross & Anderson, *supra* note 55, at 144-45. In addition, juror race may affect jury decisions because a juror of another racial group may "inhibit the direct expression of racial bias in the jury room and thus mute the social reinforcement of racial reasons" for the jury's decision. Golash, *supra* note 16, at 170; *see also* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1545, 1569 (1989); Paul Gustafson, *Judges Study Ways to Raise Minority Count in the Jury Box*, STAR TRIB. (Minneapolis-St. Paul), Nov. 30, 1992, at A1 (quoting Diane Wiley, president of the National Jury Project-Midwest, as stating that post-trial interviews with jurors have led her to believe that "the level of discussion is very different when there is a minority person on a jury").

57. *See* Powers v. Ohio, 111 S. Ct. 1364, 1368 (1991); Batson v. Kentucky, 476 U.S. 79, 96 (1986); *see also* Lemley v. State, 599 So. 2d 64, 70 (Ala. Crim. App. 1992) (judge should exercise the power to question motives of litigants sua sponte whenever she suspects litigant has exercised peremptory challenges in a racially discriminatory manner).

58. The attitudes of judges about jury behavior probably mirror those of trial attorneys. *See* Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1164-65. Attorneys continue to believe that juror race matters, at least in certain types of cases. *See, e.g.*, Horton v. Zant, 941 F.2d 1449, 1457 n.22 (11th Cir. 1991); Edwards v. Scroggy, 849 F.2d 204, 208 (5th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989); *see also* Margaret P. Jendrek, *Judge-Jury Options: Factors Involved in Counsel Decisions*, 11 FREE INQUIRY IN CREATIVE SOC. 175, 176 (1983) (results of survey responses from 182 defense attorneys in three states show that a much higher percentage recommend jury trial over bench trial when clients are black, especially when jury pool is drawn from a community with a significant black population); Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 68

to defendants of questioning jurors about racial bias during voir dire. The Court has identified case attributes that create such a high risk that a juror's racial bias will influence the verdict that due process requires that the defendant be allowed to question jurors about racial bias.[59] While cases assessing prejudice from racial composition error measure the influence of various unconscious biases that correlate with race, the voir dire cases purport to estimate the influence of consciously held racist views. The same case attributes would appear to increase both effects. Finally, I have drawn upon due process cases in which judges assessed the likelihood that jury decisions were affected by the race-based misconduct of jurors, judges, or attorneys.[60]

Comparing these judicial predictions with the conclusions of jury researchers generates interesting results. Many judicial assessments of which cases are most likely to be influenced by jury discrimination are confirmed by the research, others are not. The studies show that judges already have some ability to predict when juror race matters most and offer guidance for improving those predictions.

a. Hypothesis: black and white jurors assess guilt differently when the defendant or victim is black. Judges commonly recognize a risk of prejudice from jury discrimination when the defendant and those excluded from the jury share the same race.[61] The absence of racial identity between a defendant and those excluded also has been noted by judges denying that such a risk exists.[62] Several courts have suggested that the risk of prejudice from jury discrimination error is especially high when blacks are excluded from juries that judge black defendants accused of crimes against white victims,[63] sometimes not-

(1986) (study of peremptory challenges from 1976 to 1981 in a Louisiana parish demonstrates that prosecutors and defense counsel agreed black jurors favor acquittal).

59. *See* Turner v. Murray, 476 U.S. 28, 36-37 (1986); Rosales-Lopez v. United States, 451 U.S. 182, 191-92 (1981); Ham v. South Carolina, 409 U.S. 524, 527 (1973).

60. *See generally* Steven D. DeBrota, Note, *Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine,* 64 IND. L.J. 375 (1989); Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line,* 88 COLUM. L. REV. 1298 (1988).

61. *See, e.g., Powers,* 111 S. Ct. 1364, 1378 (Scalia, J., dissenting) ("[A] peremptory strike on the basis of group membership implies nothing more than the undeniable reality (upon which the peremptory strike system is largely based) that all groups tend to have particular sympathies and hostilities — most notably, sympathies towards their own group members.").

62. *See, e.g., Powers,* 111 S. Ct. at 1377, 1381 (Scalia, J., dissenting).

63. *See, e.g., Rosales-Lopez,* 451 U.S. at 191 n.7 (plurality opinion) (finding that a judge need not defer to a defendant's request when "there is no rational possibility of racial prejudice. But since the courts are seeking to assure the appearance and reality of a fair trial, if the defendant claims a meaningful ethnic difference between himself and the victim, his *voir dire* request should ordinarily be satisfied."); Hollis v. Davis, 912 F.2d 1343, 1353 (11th Cir. 1990), *cert. denied,* 112 S. Ct. 1478 (1992); Huffman v. Wainwright, 651 F.2d 347, 350 (5th Cir. 1981).

Justice Marshall was particularly outspoken about this risk. *See* Mallett v. Missouri, 494 U.S. 1009, 1009 (1990) (Marshall, J., dissenting from denial of certiorari) (arguing that a black

ing that such cases can trigger the racial fears of white jurors.[64]

Although any broad generalization that in-group or own-race bias determines findings of guilt or innocence in every case appears insupportable,[65] a significant number of studies have found that changing the racial composition of juries *does* change verdicts. These researchers have found that white jurors are more likely than black jurors to convict black *defendants* and that they are also more likely to acquit defendants charged with crimes against black *victims.*[66]

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defendant accused of murdering a white state trooper was denied his constitutional rights when the judge transferred the case to a vicinage without black jurors); *Turner,* 476 U.S. at 45 (Marshall, J., dissenting); Ross v. Massachusetts, 414 U.S. 1080, 1085 (1973) (Marshall, J., dissenting from denial of certiorari).

64. *See* Turner v. Murray, 476 U.S. 28, 35 (1986) ("Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty."); *Rosales-Lopez,* 451 U.S. at 192 (plurality opinion); Ristaino v. Ross, 424 U.S. 589, 597 (1976); United States v. Greer, 968 F.2d 433, 444 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 1390 (1993); *see also* Darnell F. Hawkins, *Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment,* 65 SOC. FORCES 719, 726-27 (1987) (black-on-white crime represents threat to white authority; lesser punishment for whites who kill blacks conforms to a value system that allows whites to injure blacks; whites may believe that whites and their property are more valued than blacks and their property).

65. Several researchers who have studied the correlations between verdicts and various characteristics of defendants, victims, jurors, and cases have concluded that juror race was not significant in predicting the verdict or sentence outcomes of the actual or mock juries they studied. *See* REID HASTIE ET AL., INSIDE THE JURY 128-29 (1983) (little if any correlation between race and predeliberation verdict preferences of 828 jurors); KASSIN & WRIGHTSMAN, *supra* note 50, at 29-31 (collecting studies finding juror demographic characteristics unrelated to verdicts in any consistent manner); RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 45-46 (1980) (finding "only slight and not consistent differences in the verdicts of jurors with different class, ethnic, and sexual characteristics"); John R. Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection,* 4 LAW & HUM. BEHAV. 89, 95 (1980) (finding no apparent relationship between the race and verdict preferences of 305 registered voters); Michael J. Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical,* 17 JURIMETRICS J. 3, 16 (1976) (study of 480 jurors showed that the four best predictor variables, including demographics and attitudinal variables, accounted for less than 13% of verdict variance).

Researchers in some of these studies observed that juror race or other characteristics could create statistically significant effects in different types of cases. *See, e.g.,* HANS & VIDMAR, *supra* note 42, at 92; HASTIE ET AL., *supra,* at 130; KASSIN & WRIGHTSMAN, *supra* note 50, at 29-30; Hepburn, *supra,* at 98; *see also* Shari S. Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know,* 73 JUDICATURE 178, 181 (1990) (asserting that anybody who "provides a profile of the good defense juror suitable for all cases and applicable to all communities is offering the most blatant voodoo voir dire advice"); Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?,* 40 AM. U. L. REV. 703, 723-24 (1991); Steven D. Penrod, *Predictors of Jury Decision Making in Criminal and Civil Cases: A Field Experiment,* 3 FORENSIC REP. 261, 274-75 (1990) (recent mock trial study involving 367 people who had been called for jury duty controlled for many juror characteristics other than race and found little ability to predict verdicts using these variables, but concluded that other, unusual types of cases "may tap well-springs of bias that simply do not come into play in the more mundane cases used in this study").

66. In 1985, in a provocative article entitled *Black Innocence and the White Jury,* Johnson, *supra* note 13, Professor Sheri L. Johnson reviewed much of the pre-1985 empirical evidence supporting her conclusion that "jurors . . . will tend to convict other-race defendants under circumstances in which they would acquit same-race defendants." *Id.* at 1640. Recently judges and scholars have relied on the studies cited in Professor Johnson's article. *See, e.g.,* Georgia v. McCollum, 112 S. Ct. 2348, 2364 (1992) (O'Connor, J., dissenting); *Developments, supra* note 6.

A 1978 study found that a mock juror was more likely to vote to convict when the victim in the videotaped rape trial shared the juror's race.[67] A study published in 1979 tested the pre- and postdeliberation verdicts of black and white mock jurors after they had viewed a videotaped trial in which the defendant was charged with assaulting a white police officer.[68] Varying the defendant's race and the racial mix of the jury, the author found that black jurors were more likely to acquit the defendant, regardless of his race.[69] Even though both black and white jurors shifted their votes from guilty to not guilty during deliberations when judging the white defendant, only juries with black members exhibited this shift when considering the black defendant.[70]

In a pair of mock jury studies published the same year, another researcher varied the race of the victim, defendant, and juror, as well as the strength of the evidence. He concluded that both black and white mock jurors deemed defendants of races other than their own more culpable than same-race defendants when evidence of guilt was not compelling. In addition, black mock jurors, but not white mock jurors, had a tendency to grant same-race defendants the benefit of the doubt even when the evidence was strong.[71]

Consequently, I treat most of those studies in less detail than studies that were not reviewed by Professor Johnson or that appeared after her article went to press. The latter studies have received remarkably little attention in legal literature.

67. Marina Miller & Jay Hewitt, *Conviction of a Defendant as a Function of a Juror-Victim Racial Similarity,* 105 J. SOC. PSYCHOL. 159, 160 (1978) (80% of black mock jurors voted to convict when victim was black, compared to 48% when victim was white; 65% of white mock jurors voted to convict when victim was white, compared to 32% when victim was black). Earlier research suggested black jurors were generally more lenient than white jurors in criminal cases. One author reported that the results of interviewing over 1500 jurors who served on criminal cases in the late 1950s revealed that "Negroes and persons of Slavic and Italian descent were more likely to vote for acquittal." Dale W. Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744, 748 (1959). In 1967, one researcher found that blacks were more willing to acquit on grounds of insanity than whites. RITA J. SIMON, THE JURY AND THE DEFENSE OF INSANITY 111, 118 (1967) (race of defendant not specified). Archival studies reported in 1977 showed that two separate metropolitan areas experienced significant drops in conviction rates after changing to selection methods that produced more black jurors. VAN DYKE, *supra* note 6, at 34-35 (discussing effects of changes in jury selection procedures in Baltimore and Los Angeles). Although the changes in conviction rates were not conclusively linked to the change in the racial composition of the juries, many of the officials involved believed there was such a link. *Id.*

68. J.L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts,* 5 LAW & PSYCHOL. REV. 103 (1979).

69. *Id.* at 109.

70. *Id.*

71. Denis C.E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility,* 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 136-43 (1979). The experiment tested 244 white mock jurors and 186 black mock jurors using three different scripts that described the evidence against a defendant charged with aggravated rape. In the first script, the victim testified that she was not sure whether it was the defendant who assaulted her, an eyewitness testified that it was not the defendant whom he saw assaulting the victim, and the arresting officer testified that he had arrested the defendant because of his "suspicious presence near the scene of the

In 1982, after examining data from courtroom observations and post-trial interviews with 331 jurors who had served in thirty-eight forcible sexual assault trials between 1978 and 1980, a jury researcher concluded that the confidence of both black and white jurors about the guilt of a defendant decreased as the number of blacks on juries increased, regardless of the strength of the evidence. She noted that black jurors "may be predisposed to support the defense and sympathize with the defendant . . . . These attitudes appear to influence other jurors as the proportion of black jurors on the jury increases."[72]

In the same year, two researchers examined the predeliberation verdict preferences of black and white mock jurors who listened to a taped trial of a defendant charged with sexually assaulting a child. The experiment varied the race of the defendant and victim. White mock jurors were more likely than black mock jurors to vote to convict the black defendant accused of assaulting the white victim. Black mock jurors were more likely than white mock jurors to vote to convict a defendant of either race who was charged with assaulting a victim of his own race.[73]

In 1983 a jury researcher reported that Anglo jurors were more likely than Hispanic jurors to vote to convict a Hispanic defendant and less likely than the Hispanic jurors to vote to convict the Anglo defendant.[74] After comparing the individual predeliberation preferences of jurors with the juries' verdicts, the researcher found that deliberation by juries that included jurors from both groups eliminated this disparity; Hispanic jurors changed their votes to "guilty" on

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crime." A second script pitted the victim's identification of the defendant against the defendant's denial of any responsibility for the crime and included "ambiguous" testimony from the eyewitness and arresting officer. In the third "strong-evidence" script, the victim identified the defendant as her assailant, a police report stated that the defendant had previously admitted to the crime while claiming the victim "asked for it," and the eyewitness identified the defendant at trial as the assailant who he saw attack the victim. The white mock jurors' "mean rating of culpability" of the black defendant in the strong evidence condition was 24.4, compared to 21.7 for the white defendant. The black mock jurors' mean culpability assessment of the black defendant in the strong evidence condition was only 19.1, compared to 25.2 for the white defendant.

An additional study published in 1980 surveyed 197 jurors after their trials and found that a greater percentage of black female jurors were ready to convict before deliberations than black men, white women, or white men. The researchers speculated that the propensity of black female jurors to convict may be attributed to their high victimization rates. However, juror race was not related to the juries' postdeliberation verdicts. Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent Are They Related to Jury Verdicts?*, 64 JUDICATURE 22, 27 (1980).

72. Christy A. Visher, Jurors' Decisions in Criminal Trials: Individual and Group Influences 160-62 (1982) (unpublished Ph.D. dissertation, Indiana University (Bloomington)).

73. Linda A. Foley & Minor H. Chamblin, *The Effect of Race and Personality on Mock Jurors' Decisions*, 112 J. PSYCHOL. 47, 49 (1982).

74. Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAV. SCI. 275 (1983).

predominantly Anglo juries, and Anglo jurors changed their votes to "not guilty" on predominantly Hispanic juries.[75]

A 1984 archival study of the relationship between racial composition and actual verdicts in Dade County, Florida found that juries with at least one black juror were less likely than all-white juries to convict black defendants.[76] A 1986 experiment involving Hispanic and non-Hispanic mock jurors also demonstrated the biasing effects of ethnicity. The authors concluded that non-Hispanics rated the defendant guilty at a greater rate than Hispanics when the defendant testified in Spanish, with a translator, instead of in English.[77]

In sum, attempts to measure the relationship between verdicts and juror race demonstrate that, whenever a connection exists, it is likely to be the specific kind of connection often predicted by judges: white jurors are harsher with black defendants and more lenient with those charged with crimes against black victims than black jurors. It follows that jury discrimination against black jurors is less likely to prejudice white defendants and those charged with crimes against black victims and more likely to prejudice black defendants.

b. Hypothesis: the biasing effects of race vary with the strength of the evidence. Judges commonly consider the strength of the evidence supporting the verdict when they assess the impact of error on the outcome of a criminal proceeding. Perhaps no principle has wider acceptance among those reviewing procedural error, including errors in jury selection: the more persuasive the evidence of guilt, the less likely it is that error affected the result.[78]

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75. *Id.* at 282-85; *see also* Johnson, *supra* note 13, at 1631 (reviewing study that showed differences in guilt assessments by white, Cuban, and black junior high school students).

76. Sydney P. Freedberg, *Report Shows Race a Factor in Verdicts,* MIAMI HERALD, May 11, 1984, at 1C.

A study published a year later found that, in judging a rape case in which the defense was either consent or denial of sexual contact, jurors were less likely to convict the defendant if the victim was black. Gary D. Lafree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials,* 32 SOC. PROBS. 389, 397 (1985). Although the study did not note the race of the jurors, its results suggest that juror race affects verdicts. The researchers opined that the reason for this effect was juror belief that black women were more likely to consent to sex or more sexually experienced and therefore less harmed by rape. *Id.* at 401-02; *see also* Hubert S. Feild, *Rape Trials and Jurors' Decisions,* 3 LAW & HUM. BEHAV. 261, 264 (1979).

77. The study also found that these biasing effects were counteracted by specific instructions from the judge to ignore the fact of translation. Stephan & Stephan, *supra* note 50, at 577. Although the curing ability of an admonishment to ignore elsewhere has been repeatedly disproven, courts continue to rely on jury instructions as sufficient protection against prejudice from racially sensitive errors. *See generally* Richard G. Singer, *Forensic Misconduct by Federal Prosecutors — and How It Grew,* 20 ALA. L. REV. 227, 260-62 (1968); Tanford, *Thinking About Elephants, supra* note 39, at 645; *see also* 21 U.S.C. § 848(o)(1) (1988) (requiring federal courts in capital cases to instruct juries not to recommend a death sentence unless the jury concludes that it would do so regardless of the race of the defendant or victim).

78. *See, e.g.,* Davis v. United States, 411 U.S. 233, 243-44 (1973); Blair v. Armontrout, 976 F.2d 1130, 1140 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 2357 (1993); Singleton v. Lockhart, 871

The assumption that juror race will have less influence on jury decisions when the evidence strongly supports guilt is consistent with the theory that explains how stereotypes and other cognitive biases operate[79] as well as with the findings of most empirical studies.[80] However, several studies found that varying juror race will lead to different verdicts even when the evidence is considered persuasive by the researchers.[81] The inability of the strength of the evidence to account completely for the effect of juror race on verdicts may be due in part to the researchers' own race-based assessments of the strength of the evidence. Like these researchers, judges may overestimate how convincing incriminating evidence would appear to jurors of racial and ethnic backgrounds different than their own.

Thus, although judges reviewing prejudice from jury discrimination are probably correct in placing primary weight on the strength of the evidence of guilt, they should consider circumstances that could prompt black and white jurors to assess the strength of evidence differently. The following section reviews some of those circumstances.

c. Hypothesis: specific case attributes heighten the effect of juror race on jury decisionmaking. Among the case attributes that might cause jurors of different racial backgrounds to assess evidence in criminal cases differently are "racially charged" accusations or defenses, the

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F.2d 1395, 1400-01 (8th Cir.), *cert. denied,* 493 U.S. 874 (1989); Huffman v. Wainwright, 651 F.2d 347, 350 (5th Cir. Unit B. July 1981); Clink v. Khulmann, No. 91-CV-3585, 1992 U.S. Dist. LEXIS 11284, at *17 (E.D.N.Y. July 10, 1992) ("In light of the compelling evidence presented at trial, there is no reason to believe that petitioner would have been acquitted by a rational jury of any race, color or creed."); *see also* Timothy Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review,* 19 TEX. TECH. L. REV. 921, 998-99 (1988) (arguing that overwhelming evidence renders racial discrimination in selection of civil jury harmless).

79. *See* Pennington & Hastie, *Cognitive Theory, supra* note 51, at 555-56 (extralegal information will have a substantial effect when it is difficult to construct a story; when a story is easy to understand, unrelated extralegal information will have little impact).

80. HANS & VIDMAR, *supra* note 42, at 138 (juror race is only a factor when the evidence for guilt or innocence is very close); Bodenhausen & Lichtenstein, *supra* note 48, at 871 (stating that "stereotypes will be influential whenever other evidence fails to provide clear and direct implications for the judgment"); Hamilton et al., *supra* note 48, at 56; MacCoun, *supra* note 43, at 1048 (studies show bias is attenuated by deliberation in cases with strong evidence but enhanced by deliberation in close cases); Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency,* 54 J. PERSONALITY & SOC. PSYCHOL. 21, 31 (1988); *see also* MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 68 (1978) (studies are unanimous in showing that evidence is a substantially more potent determinant of jurors' verdicts than the individual characteristics of jurors); Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions,* 20 LAW & SOCY. REV. 423, 435-37 (1986) (although not controlling for juror race, other extralegal variables made more of a difference in weak cases when the prosecutor failed to offer enough "hard evidence").

81. H.S. FEILD & L.B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 135-36 (1980); Ugwuegbu, *supra* note 71, at 142; Visher, *supra* note 72.

presence of a black defense attorney, reliance on black defense witnesses, and exposure to racial slurs.

Courts and commentators have suggested that particular charges or defenses are likely to prompt black and white jurors to decide cases differently.[82] Judges suspect racial overtones will influence jurors when cases involve violence between police and black citizens,[83] black men charged with sex offenses against white victims,[84] alleged misconduct by black political figures,[85] defendants who have been active in civil rights activities,[86] or crimes popularly perceived as motivated by racial hatred or fear.[87]

Researchers have yet to study each of these case types. However,

82. Ristaino v. Ross, 424 U.S. 589, 597 (1976) ("Racial issues" are "inextricably bound up with the conduct of the trial," when the accused's defense involved his civil rights activities and his prominence as an activist would inevitably be revealed.) (construing Ham v. South Carolina, 409 U.S. 524 (1973)); Huffman v. Wainwright, 651 F.2d 347, 350-51 (5th Cir. Unit B July 1981) (determining prejudice from venire discrimination requires evaluation of evidence, noting racial overtones); *see also* Meltzer, *supra* note 13, at 257 (positing a case in which a jury had to decide whether a racial epithet constitutes adequate provocation to reduce murder to manslaughter). Courts will also note the lack of racial overtones as additional justification for rejecting defendants' assertions of prejudice. *See, e.g., Ristaino,* 424 U.S. at 597-98; Davis v. United States, 411 U.S. 233, 244 (1973); Evans v. Maggio, 557 F.2d 430, 434 (5th Cir. 1977).

83. *See, e.g.,* Mallett v. Missouri, 494 U.S. 1009 (1990) (Marshall, J., dissenting from denial of certiorari) (arguing black defendant accused of murdering white state trooper was denied his constitutional rights when the judge transferred his trial to a vicinage with no blacks); *see also* Rohter, *Judge in Miami, supra* note 6 (officer charged with death of black victims); *supra* text accompanying notes 1-5 (officers tried for beating Rodney King).

84. *See, e.g.,* Huffman v. Wainwright, 651 F.2d 347, 350 (5th Cir. Unit B July 1981); Butler v. State, No. 1163, 1988 Tenn. Crim. App. LEXIS 472, at *9 (June 23, 1988) (Birch, J., concurring) (finding a reasonable probability that the verdict or sentence would have been different but for defense counsel's failure to question potential jurors about racial bias in trial of black university professor convicted of forcing white teenage student to perform fellatio), *revd. on other grounds,* 789 S.W.2d 898 (Tenn. 1990); *see also* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences,* 65 N.Y.U. L. REV. 479, 535-36 (1990); Massaro, *supra* note 13, at 559-60.

85. *See* Christopher B. Daly, *Barry Judge Castigates Four Jurors: Evidence of Guilt Was Overwhelming,* WASH. POST, Oct. 31, 1990, at A1 (alluding to racial divisiveness concerning the acquittal of former Washington, D.C. Mayor Marion Barry); Jill Nelson, *After the Verdict, Food for Thought,* WASH. POST, Aug. 11, 1990, at C4 ("To [those interviewed], the verdict wasn't about... innocence or guilt. It was about the vindication of a reality as perceived by many black Americans."); Elsa Walsh & Barton Gellman, *Chasm Divided Jurors in Barry Drug Trial: Differing Outlooks Led to Deadlock,* WASH. POST, Aug. 23, 1990, at A1; *see also In re* Ford, 987 F.2d 334 (6th Cir.) (declining to review challenge that venire change in case involving alleged fraud by popular black elected official was motivated by race), *cert. denied,* 113 S. Ct. 180 (1992); Patrick Boyle, *Race Still Called a Factor in How Juries View Cases,* WASH. TIMES, May 21, 1991, at A10 (discussing role of juror race in suit of white police officers against primarily black police administration and in trial of former Washington, D.C. Mayor Marion Barry on charges of perjury and drug abuse); Samuel Francis, *Criminal Justice Hues and Cries,* WASH. TIMES, Sept. 4, 1992, at F1 (discussing case in which black jurors allegedly refused to convict black state legislator for racial reason); Roberto Suro, *Black Dallas Official Is Acquitted in Tense Trial on Assault Charge,* N.Y. TIMES, May 12, 1992, at A16.

86. *See* State v. Gorman, 554 A.2d 1203, 1218 (Md. 1989) (Eldridge, J., dissenting) (citing cases), *vacated,* 111 S. Ct. 1613 (1991).

87. *See, e.g.,* Carlyle C. Douglas & Mary Connelly, *The Goetz Case: Jury Sees Justification, Some See Injustice,* N.Y. TIMES, June 21, 1987, at D6; *cf.* People v. Johnson, 583 P.2d 774, 776

some studies have found that white jurors were more likely than black jurors to convict black defendants charged either with sexually assaulting white victims[88] or with assaulting police officers.[89] The belief that black and white jurors may have different reactions to evidence in cases involving violent confrontations between blacks and police — what one commentator termed "black and blue" encounters[90] — is also supported by decades of commentary observing the different attitudes of whites and blacks toward police.[91] One recent study revealed that black jurors are much less likely than white jurors to believe the testimony of police officers when it conflicts with that of the defendant.[92] These studies validate judicial predictions that certain race-sensitive claims or defenses will enhance the influence of jury discrimination on verdicts.

Some judges and commentators have suggested that black defense

(Cal. 1978) (Richardson, J., dissenting) (prosecution witness' use of the word "nigger" should allow prosecutor to use race as a factor in jury selection).

88. Ugwuegbu, *supra* note 71, at 144. Other studies have found black jurors more likely than white jurors to convict defendants charged with sexually assaulting black victims. FEILD & BIENEN, *supra* note 81, at 126; Miller & Hewitt, *supra* note 67; *cf.* LaFree et al., *supra* note 76. At least one black feminist theorist has predicted this effect when black women are included on juries of defendants charged with raping black women. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139, 157-60.

89. *See* Bernard, *supra* note 68, at 107-11.

90. Tracy Maclin, *"Black and Blue Encounters" — Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?,* 26 VAL. U. L. REV. 243 (1991) (quoting Don Wycliff, *Black and Blue Encounters,* CRIM. JUST. ETHICS, Summer/Fall 1988, at 2).

91. *See, e.g.,* MINIMIZING RACISM IN JURY TRIALS (Ann F. Ginger ed., 1969):

> [T]he single most dominant factor from today's urban black experience that sets him apart from his white counterpart is contact with the police . . . [and it is] the chief complaint of all black communities, and resonant with overtones of brutality. This chief component of black experience, the white American, whether racist or not, does not and cannot share.

Id. at 10; *see also* CORAMAE R. MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 133-35 (1993); Church, *supra* note 3, at 22 (poll after Rodney King verdict showed 23% of whites, compared to 48% of blacks, "felt that in an everyday encounter with police they ran a risk of being treated unfairly"); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism,* 42 U. MIAMI L. REV. 127, 156 & n.89 (1987); *King Case Aftermath: A City in Crisis,* L.A. TIMES, May 2, 1992, at A1 (quoting psychology professor Gary Moran, specialist in jury research, as stating, " 'An awful lot of white folks . . . just regard certain areas of our cities as being so dangerous' that they are willing to excuse what [Moran] believes are abuses on the part of the police").

92. *See Racial Divide Affects Black, White Panelists,* NATL. L.J., Feb. 22, 1993, at S8, S9. Telephone interviews of nearly 800 jurors who had served in state and federal trials across the country were conducted during the fall of 1992. The results revealed that 42% of the white jurors interviewed said that, given a conflict of testimony between a law enforcement officer and a defendant, the police officer should be believed. Forty-eight percent disagreed, and 9% did not know. In contrast, only 25% of black jurors who were interviewed thought that the police officer's testimony should be believed, while 70% disagreed. *Id. See also* Rosen, *supra* note 14, at 15, 16 (concluding that black jurors in Washington, D.C. "have grown so mistrustful of [police] that even trivial inconsistencies in testimony are enough to convince them that the police are lying," and that "black jurors empathize with defendants of all races because they resent having been unfairly hassled by the police").

attorneys trigger or aggravate the in-group bias that may influence the judgment of white jurors.[93] Studies examining the effect of attorney race on jury outcome are scarce and have not controlled for juror race. However, two studies indicate that white jurors may be more likely to convict defendants who have black counsel than defendants represented by white counsel. In 1981, 127 high school students served as mock jurors in a study that varied the race and sex of the defense attorney. The authors found that these mock jurors were more likely to convict the white male defendant if he was represented by a black attorney than if he was represented by a white attorney.[94] In a study reported in 1987, researchers asked mock jurors to read a transcript of a trial of a white defendant and decide whether he was guilty. In the transcript that some mock jurors read, the judge interrupted and corrected the defendant's attorney during his opening statement. The defense attorney was identified as black by a photo attached to the transcript. While reading the transcript, some of the mock jurors overheard a planted juror remark to another, "God, Mike, I don't believe this. That nigger defense lawyer doesn't know shit!" Despite expressing "non-verbal indications of shock and disapproval" after hearing the comment, the mock jurors who heard it convicted the white defendant at a higher rate than those who did not. The authors concluded that racial attitudes prompted by the race of the defense attorney and racial slurs may actually change verdicts even when the defendant is white.[95] Further experiments varying juror and prosecu-

93. *See* Powers v. Ohio, 111 S. Ct. 1364 (1991):

> Active discrimination by a prosecutor . . . invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated *if race is implicated in the trial,* either in a direct way as with an alleged racial motivation of the defendant or a victim, or *in some more subtle manner as by casting doubt upon* the credibility or dignity of a witness, or even upon *the standing or due regard of an attorney who appears in the cause.*

Powers, 111 S. Ct. at 1371 (emphasis added); *see also* United States v. Brown, 817 F.2d 674, 675-76 (10th Cir. 1987); State v. Gorman, 554 A.2d 1203, 1218 (Md. 1989) (Eldridge, J., dissenting) (white jurors are inclined to discriminate against a white defendant if his attorney or chief witness is black), *vacated,* 113 S. Ct. 1613 (1991); Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware,* 8 LAW & PSYCHOL. REV. 83, 104 (1984) ("Racial and cultural differences between the jury and the witnesses, clients, or attorneys could also have an effect on a jury's decision."); *cf.* Clay Hathorn, *Funding Equal Justice: State Commissions Studying Bias in Courts Hampered by Budget Constraints,* A.B.A. J., Aug. 1992, at 38 (Massachusetts study found that black attorneys are sometimes mistaken for defendants and restrained by bailiffs when they attempt to approach the bench).

94. David L. Cohen & John L. Peterson, *Bias in the Courtroom: Race and Sex Effects of Attorneys on Juror Verdicts,* 9 SOC. BEHAV. & PERSONALITY 81, 85-86 (1981).

95. Shari L. Kirkland et al., *Further Evidence of the Deleterious Effects of Overheard Derogatory Ethnic Labels: Derogation Beyond the Target,* 13 PERSONALITY & SOC. PSYCHOL. BULL. 216, 219-25 (1987). The study used 86 white female and 55 white male undergraduate psychology students. The fact that the subjects who heard the comment were both "outwardly appalled" and apparently influenced by it to convict may mean either that the influence of race on decisionmaking is unconscious or that the subjects consciously chose to react differently in public than in their anonymous responses.

tor race, accounting for the effect of deliberations[96] and controlling for other case variables, are needed before judges can justifiably take attorney race into account when they estimate the probable influence of jury discrimination on verdicts.[97]

A related concern of courts and commentators is that black defense witnesses increase the likelihood that black jurors might make a difference in the outcome of a trial.[98] While there are no studies that test the hypothesis that a defendant who relies upon the credibility of black witnesses fares better if there are more black jurors on his jury, individual cases have demonstrated that white jurors may misunderstand the testimony of black witnesses.[99] Judges should at least be open to arguments that white jurors did not understand the testimony of particular witnesses as black jurors might have.

Some judges have suggested that direct or indirect invitations to jurors to use race in their decisions aggravate the risk of prejudice from jury discrimination.[100] As long as judges and prosecutors con-

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96. *Cf.* Kaplan & Miller, *supra* note 43, at 1453 (finding that predeliberation certainty of guilt of defendant due to annoying conduct of defense attorney was ameliorated by deliberation).

97. The authors of the 1981 study suggested promoting equal representation of minority jurors as one way to counteract the racial bias they found. Cohen & Peterson, *supra* note 94, at 86.

The implications of these studies for black trial attorneys are troubling but beyond the scope of this article. Attorney gender does not seem to have the same impact. *See* Emily Campbell et al., *Gender and Presentational Style: When the Verdict of a Trial Is Unaffected by an Attorney's Personal Characteristics and Behavior, Justice Is Served,* 31 WASHBURN L.J. 415, 431 (1992) (prosecuting attorney's gender had no effect on verdicts in mock jury study); Janet Sigal et al., *The Effect of Presentation Style and Sex of Lawyer on Jury Decision-Making Behavior,* 22 PSYCHOL. Q.J. HUM. BEHAV. 13, 17 (1985) (finding no effect on verdict when varying the gender of defense attorney).

98. *See* Turner v. Murray, 476 U.S. 28, 42 (1986) (Brennan, J., concurring in part and dissenting in part) (observing that the "same juror [might] be influenced by those same prejudices in deciding whether, for example, *to credit or discredit white witnesses as opposed to black witnesses at the guilt phase*") (emphasis added); *cf.* Love v. Jones, No. 88-1052-AH-C, 1992 U.S. Dist. LEXIS 4600 at *8-9 n.3 (S.D. Ala. Mar. 6, 1992) ("There were no racial overtones to this case. Love was charged with and convicted of shooting his own brother. Most, if not all, of the witnesses who testified were black. Thus, there was no reason for the prosecutor to exercise his strikes on the basis of race."); WASHINGTON STATE MINORITY AND JUSTICE TASK FORCE, FINAL REPORT 41 (1990) [hereinafter WASHINGTON REPORT] (hypothesizing that white jurors give less credibility to testimony of minority witnesses and victims than black jurors); Timothy Kaine, *Race, Trial Strategy and Legal Ethics,* 24 U. RICH. L. REV. 361, 362-63 (1990) (questioning the ethics of a trial lawyer's preference for a white expert witness when jury is predominantly white).

99. *See* Colbert, *supra* note 13, at 114 n.561; Roger S. Kuhn, *Jury Discrimination: The Next Phase,* 41 S. CAL. L. REV. 235, 241-42 (1968); *cf.* Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing,* 45 STAN. L. REV. 443, 450 (1993) (whites were insensitive to the risks Anita Hill took when speaking out against an African-American man).

100. *See, e.g.,* Blair v. Armontrout, 976 F.2d. 1130, 1147 (8th Cir. 1992) (Heaney, J., dissenting) (concluding that a defendant who raised a *Swain* claim was innocent of the death penalty, especially in light of the prosecutor's racially inflammatory comment during the closing argument), *cert. denied,* 113 S. Ct. 2357 (1993); *cf.* Andrews v. Shulsen, 485 U.S. 919, 920 (1988) (Marshall, J., dissenting from a denial of certiorari) (arguing that racial bias may have tainted the

tinue to appeal to racial prejudice in criminal cases,[101] and as long as jurors continue to invoke racism in their deliberations,[102] verdicts influenced by both illegal selection practices and improper race-based comments are likely to recur.

Again, judges' suspicions appear to be consistent with the little evidence that is available. One study suggests that negative comments about blacks may prompt white jurors to evaluate black defendants more negatively.[103] Still, researchers have not tested the effect of racial slurs on the decisions of black jurors, and conclusions that negative racial remarks heighten the risk of prejudice from jury discrimination remain tenuous.[104]

d. Studies of decisionmaking factors that vary the influence of jury race on jury decisions. A judge's assessment of the effect of jury discrimination may also be influenced by the type of jury illegally selected and by the relative change in racial composition caused by the illegal selection procedures.

i. Hypothesis: the effect of juror discrimination varies depending upon the type of jury decision: indictments and sentences. Some judges classify the probability of prejudice from jury discrimination according to which jury proceeding or juror was affected by that discrimination. Judges have suggested that the probability of prejudice is very low when discrimination affects only the selection of a grand jury foreperson, depending on that person's duties, that it is higher when the grand jury itself is affected, higher still for the trial jury, and highest of all for the sentencing jury.[105] Empirical evidence supports only

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conviction in a case in which a juror handed the bailiff a napkin with drawing of a man on a gallows above the inscription "Hang the Niggers").

101. *See, e.g.*, Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 865 (1992) (listing examples).

102. Although juror testimony about events during actual deliberations is generally prohibited by evidentiary rules designed to protect the sanctity of jury deliberations, a few states have permitted jurors to testify about race-based incidents during deliberations. *See Developments, supra* note 6, at 1596 n.3. *See generally* Kenneth E. Kraus, Note, *Racial Slurs by Jurors as Grounds for Impeaching a Jury's Verdict:* State v. Shillcutt, 1985 WIS. L. REV. 1481.

103. *See* Jeff Greenberg & Tom Pyszczynski, *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, 21 J. EXP. SOC. PSYCHOL. 61 (1985) (noting that an ethnic slur influenced white judges' evaluation of a black speaker in a debating contest).

104. I mention in passing one other uncommon case attribute that the Court has noted when assessing whether racial composition affected outcome: disparate treatment of black and white codefendants. *Cf.* Davis v. United States, 411 U.S. 233, 235, 244 (1973) (no prejudice in part because grand jury also indicted white codefendants).

105. Courts have also discounted the risk of prejudice when discrimination affects the selection of the commission that in turn selects the jury list from which the venire is chosen. *See* Ford v. Seabold, 841 F.2d 677, 689-90 (6th Cir.) (jury commissioners do not participate as jurors and thus have no direct influence over the outcome of any criminal cases), *cert. denied*, 488 U.S. 928

some of these distinctions.

Studies show that there are good reasons for judges to believe that jury discrimination has little influence on indictment decisions.[106] Direct research on the effect of juror race on indictment decisions is scarce and inconclusive.[107] After examining the indictment decisions of thirty-eight grand juries in an urban Texas county between 1972 and 1975, one author concluded that increased racial heterogeneity on grand juries resulted in higher, not lower, indictment rates.[108] In another article, the same author concluded that grand juries with minority jurors were more likely than all-white juries to return a "no-bill" in drug sale, assault, rape, and murder cases; less likely to return a "no-bill" in theft and burglary cases; and just as likely to indict in drug possession cases.[109]

Studies examining group decisionmaking and trial juries provide additional support for skepticism about the influence of discrimination on indictment decisions. First, research suggests that the low burden of persuasion — probable cause — that a prosecutor must meet in

(1988); Smith v. Commonwealth, 734 S.W.2d 437 (Ky. 1987) (refusing postconviction relief when defendant claimed underrepresentation of women and young people on jury commission), *cert. denied,* 484 U.S. 1036 (1988). On the influence of jury commissions on jury composition, generally, see Robert A. Carp & Claude K. Rowland, *The Commissioner Method of Selecting Grand Jurors: A Case of a Closed and Unconstitutional System,* 14 HOUS. L. REV. 371 (1977).

106. I assume that prejudice from grand jury discrimination may still be defined as the impact of the discrimination on the *original indictment decision.* Many judicial suggestions that grand jury discrimination is harmless may stem from the belief that a subsequent finding of guilt beyond a reasonable doubt by a legally composed trial jury conclusively establishes probable cause to indict. *See, e.g.,* Davis v. United States, 411 U.S. 233 (1973). *See generally* United States v. Mechanik, 475 U.S. 66 (1986) (violation of grand jury secrecy harmless due to subsequent guilty verdict); LAFAVE & ISRAEL, *supra* note 13, § 15.6(d). Certainly prejudice from grand jury discrimination is improbable when defined as the likelihood that a legally composed grand jury would fail to find probable cause given the evidence that later established guilt beyond a reasonable doubt. *See, e.g.,* Alschuler, *supra* note 13, at 195; Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale,* 125 U. PA. L. REV. 15, 20 (1976); Yale Kamisar, Address to Constitutional Law Conference, *in* 50 Crim. L. Rep. (BNA) 1086, 1090 (1991); Meltzer, *supra* note 13, at 256-57. The Court, however, has not yet gone this far and still appears to assume that prejudice from grand jury discrimination may result despite subsequent conviction. *See* Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986).

107. The scarcity may be due to the fact that such information would be useless to trial attorneys, who do not participate in the selection of grand jurors.

108. Claude K. Rowland, *The Relationship Between Grand Jury Composition and Performance,* 60 SOC. SCI. Q. 323, 327 (1979) (racial heterogeneity explained seven percent of the decision variance, a finding the author considered significant). The author speculated that the relationship between the racial heterogeneity and higher indictment rates could be due to the elite, atypical segment of the minority community represented on the grand juries he studied. Whether more modern selection procedures would produce more minority grand jurors, and whether those jurors would act similarly, is unknown. *Id.* at 326.

109. Charles E. Davis & Claude K. Rowland, *Assessing the Consequences of Ethnic, Sexual, and Economic Representation on State Grand Juries: A Research Note,* 5 JUST. SYS. J. 197 (1979) (study of 26 grand juries demonstrated that minority representation correlated with no-bill propensity as follows: crimes of passion (.54); crimes against property (-.38); drug possession (-.07); drug sale (.34)).

grand jury proceedings makes minority views less determinative than they would be in trial proceedings, in which the prosecutor must prove guilt beyond a reasonable doubt.[110] Second, unlike most trial juries that must reach unanimity to convict,[111] most grand juries need not vote unanimously in order to indict.[112] Lacking incentive to reach unanimity, grand jurors are not as likely to consider minority points of view.[113] Third, even without decisional rules that reduce the influence of minority jurors, most grand jury panels are larger than trial juries,[114] making minority viewpoints less influential. Minority influence is greater when there are fewer jurors to persuade.[115] Thus, illegal exclusion of minority viewpoints from grand juries probably has less effect on the jury's decision than illegal exclusion of minority viewpoints from trial juries.[116]

110. For example, in a 1988 mock jury experiment, factors favoring acquittal were more likely to influence deliberations when the jury was instructed to find guilt beyond a reasonable doubt than when it was instructed to find guilt by a preponderance. MacCoun & Kerr, *supra* note 80, at 27.

111. As of 1977, only Oregon, Louisiana, and Puerto Rico allowed nonunanimous felony verdicts. *See* Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding constitutionality of less than unanimous guilty verdicts); Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding constitutionality of guilty verdicts by jury votes of nine to three); VAN DYKE, *supra* note 6, at 287-89; *see also* OKLA. CONST. art. II, § 19 (nonfelony verdicts need not be unanimous); Burch v. Louisiana, 441 U.S. 130 (1979) (striking down provision allowing misdemeanor convictions by jury vote of five to one).

112. *See, e.g.*, FED. R. CRIM. P. 6(a), 6(f) (indictment requires votes of 12 of the grand jurors, who may number between 16 and 23). Most states do not require unanimous votes of their grand juries, although some require more than a simple majority. *See generally* VAN DYKE, *supra* note 6, at 264-70.

113. This is not a novel point. *See* Denno, *supra* note 54, at 323; *see also* KASSIN & WRIGHTSMAN, *supra* note 50, at 201-02 (noting that juries that are not required to reach unanimous decisions are more likely to reach verdicts, but less likely to be sure of the accuracy of those verdicts); SAKS & HASTIE, *supra* note 80, at 85-86; Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1486 n.258 (1991) [hereinafter Guinier, *Two Seats*] (citing studies); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1122 (1991) [hereinafter Guinier, *Tokenism*]; Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decisions Rules*, 7 J. APPLIED SOC. PSYCHOL. 38 (1977). This means that prejudice from jury discrimination in the selection of trial juries may be lower in jurisdictions permitting nonunanimous verdicts. *But see* Robert J. MacCoun, *Getting Inside the Black Box: Toward a Better Understanding of Civil Jury Behavior* (RAND, The Institute for Civil Justice), Dec. 1987, at 20 (unanimity does not change conviction rates).

114. *See* VAN DYKE, *supra* note 6, at 264-70, 286-89 (listing size of grand and trial juries in each state as of 1977).

115. *See* Sarah Tanford & Steven Penrod, *Social Influence Model: A Formal Integration of Research on Majority and Minority Influence Processes*, 95 PSYCHOL. BULL. 189 (1984); *cf.* R. Scott Tindale et al., *Asymmetrical Social Influence in Freely Interacting Groups: A Test of Three Models*, 58 J. PERSONALITY & SOC. PSYCHOL. 438, 446 (1990) (finding "larger majorities [of 3,4, or 5] facing a single-person minority are more likely to remain intact than are two-person majorities").

116. Of course, the petit jury's smaller size makes it more difficult for a defendant to demonstrate that his jury would have included minority members had unconstitutional exclusion not occurred. *See* Ballew v. Georgia, 435 U.S. 223, 236 (1978).

Another difference between grand and petit juries deserves mentioning. One commentator

How discriminatory selection of grand jury forepersons affects indictment decisions is a separate question. The Court's opinions suggest that it believes that discrimination that affects the racial composition of a grand jury has more influence on indictments than discrimination that affects only the race of the foreperson.[117] Intuitively one could predict the opposite; the leader of a group could have more influence over the group's decisions than a random member. Although studies examining the influence of forepersons on *trial* juries demonstrate that the foreperson of a trial jury has little control over the jury's decision,[118] it is not clear whether the foreperson is as inconsequential in the grand jury context. Unlike the foreperson of a trial jury, who is chosen by the other jurors, a grand jury foreperson is usually chosen by the judge and has official duties in addition to facili-

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has observed that due to the enormous control of the prosecutor over grand juries and their decisions — control which is much more overt than in the trial setting — the probability that error will affect the grand jury's decision to indict may be less than the probability that the same error will influence the trial jury's decision to convict. *See* Meltzer, *supra* note 13, at 257. It seems just as plausible to assume that the prosecutor's influence may aggravate rather than moderate the biasing effects of jury discrimination, at least in cases in which a prosecutor makes race-based appeals to the jury.

117. In every case in which the Court has considered grand jury discrimination that affected the racial composition of the grand jury, it has either granted relief or stated that relief would be available. *See* Vasquez v. Hillery, 474 U.S. 254 (1986); Rose v. Mitchell, 443 U.S. 545, 551 nn.3-4 (1979) ("We may assume without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire."); Peters v. Kiff, 407 U.S. 493 (1972) (plurality opinion); Cassell v. Texas, 339 U.S. 282 (1950).

In Hobby v. United States, 468 U.S. 339 (1984), however, the Court denied relief to the defendant who alleged that the trial judge used race to choose which of the legally selected grand jurors would serve as foreperson. The Court asserted that the "role of the foreman of a federal grand jury is not so significant . . . that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment." *Hobby*, 468 U.S. at 345; *see also* 468 U.S. at 345-48 (distinguishing *Peters* as a grand juror case, rather than foreperson case; distinguishing *Rose* as case in which the grand jury foreman was selected in addition to the grand jurors, not selected from among them).

Lower courts continue to struggle with these distinctions. *See* Ramseur v. Beyer, 983 F.2d 1215 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2433 (1993); Nickerson v. Lee, 971 F.2d 1125, 1130-31 & nn.7-10 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993); Kordenbrock v. Scroggy, 680 F. Supp. 867, 903 (E.D. Ky. 1988), *revd.*, 919 F.2d 1091 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1608 (1991). In State v. Cofield, 357 S.E.2d 622 (N.C. 1987), Judge Webb noted:

> I can understand that the "racially motivated exclusion of blacks from a grand jury will, by itself, vitiate any indictment returned by that grand jury against a black defendant." In such a case we can assume that the grand jury could be disposed to give a different brand of justice to blacks. . . . [But w]e cannot assume that if a grand jury is selected in a racially neutral manner it will discriminate against blacks if its foreman is not so selected.

357 S.E.2d at 631 (Webb, J., dissenting).

118. Even though forepersons of trial juries make about 25% of juror statements during deliberations, researchers have concluded that they do not have any significant impact on the verdict. KASSIN & WRIGHTSMAN, *supra* note 50, at 179 (collecting studies). In 1979, after interviewing 65 ex-trial jurors, two researchers reported that not one juror "felt that the foreperson's opinion was important in determining how he or she finally voted." Bridgeman & Marlowe, *supra* note 43, at 94.

tating deliberations and announcing the decision.[119] Because grand juries usually consider several cases over days, weeks, or months, a foreperson may be able to develop greater influence over the jury than the leader of a trial jury.[120] Indeed, one researcher found that, of twenty-three randomly selected ex-grand jurors he interviewed, forty-two percent believed that the foreperson "played a major role in our discussions and acted as a forceful leader." Fifty-two percent believed the foreperson "simply moderated our discussions and had about the same influence as the average grand juror." Only six percent felt that the foreperson "did not play as significant a role as did other members of the grand jury."[121] In light of existing research, the Court's suggestion that illegal selection of a grand jury foreperson makes less of a difference than other types of grand jury discrimination appears uninformed. On balance, however, these studies do confirm that the risk that jury discrimination would shape grand jury indictment decisions will generally be lower than the risk that the same error would influence trial verdicts.

Although judges make most sentencing decisions, juries routinely decide whether or not to impose death sentences and even choose sentence length in a few states.[122] Courts sometimes assume that racial composition is more likely to affect a sentencing decision than a deci-

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119. For example, a foreperson may be required to excuse a grand juror's absence, determine whether an interpreter is required, and administer oaths to witnesses. *Hobby,* 468 U.S. at 356 (Marshall, J., dissenting) (citing HANDBOOK FOR FEDERAL GRAND JURORS (1980)); *see also* Barry L. Creech, Note, State v. Cofield: *Petit Deliberation of Grand Jury Discrimination,* 64 N.C. L. REV. 1179, 1192 (1986) (noting judges' practice of seeking leadership qualities in forepersons rather than simply clerical skills).

120. *See Hobby,* 468 U.S. at 357-58 (Marshall, J., dissenting); *see also* United States v. Cross, 708 F.2d 631, 637 (11th Cir. 1983) ("A foreperson has only one vote on the grand jury, but the selection by the district judge might appear to the other grand jurors as a sign of judicial favor which could endow the foreperson with enhanced persuasive influence over his or her peers."), *remanded for further consideration in light of* Hobby, 468 U.S. 1212 (1984). *But see* United States v. Perez-Hernandez, 672 F.2d 1380, 1389 (11th Cir. 1982) (Morgan, C.J., dissenting) ("I cannot believe that federal grand jury members are innocent and naive lambs and the foreman their shepherd."); State v. Ramseur, 485 A.2d 708, 718 (N.J. Super. Ct. Law Div. 1984) (finding "totally unpersuasive" the testimony of defendant's expert who concluded that "a considerable amount of foreperson influence could have occurred prior to the actual voting of the grand jury"), *modified,* 524 A.2d 188 (N.J. 1987).

121. Robert A. Carp, *The Harris County Grand Jury — A Case Study,* 12 HOUS. L. REV. 90, 107 (1974). Finding that most grand jurors look to their foreman for guidance and instruction and expect him to perform, one foreman was quoted as saying:

> [E]veryone kept asking me, 'Can we do this? Are we supposed to do that?' I finally got so I really studied our [grand jury] handbook every night, and I used to stop by the D.A.'s office every now and then and asked them for advice. In time I was able to keep one step ahead of the other grand jurors, and I guess that way I earned some of their respect as a leader.

Id. at 108.

122. Kentucky, Texas, and Arkansas, for instance, still allow juries to choose the term of years that convicted defendants will serve. ARK. CODE ANN. § 5-4-103 (Michie 1987) (to be replaced Jan. 1, 1994, by Act of Mar. 16, 1993, § 1, 1993 Ark. Acts 511 (bifurcating guilt determination and sentencing but still allowing jury to impose sentence)); KY. REV. STAT. ANN.

sion about guilt or innocence, reasoning that assigning penalties is a more subjective process than assigning guilt.[123] Some researchers conclude that jurors are more sensitive to normative pressures when determining sentences than when assessing guilt.[124] Some conclude that juror ethnicity affects sentencing even though it had no effect on jurors' assessment of guilt.[125] Both conclusions suggest that juror race plays a larger role in sentencing decisions than it does in decisions about guilt or innocence.[126] Exactly what role it plays may depend on the type of sentencing a jury performs.

If the jury must choose between a life sentence and a death sentence, existing research suggests that, as the proportion of white jurors on the jury increases, the probability that the jury will impose the death penalty also increases. A 1990 survey of nearly 1400 people eligible for jury service studied the sentencing preferences of respondents who identified themselves as black, white, or Hispanic. The authors concluded that death-qualified[127] black and Hispanic jurors were much less likely than death-qualified white jurors to recommend a sentence of death.[128]

Other studies have found that in-group bias disappears when jurors

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§ 532.055(2) (Michie/Bobbs-Merrill Supp. 1992); TEXAS CODE CRIM. PROC. ANN. § 37.07(2)(b) (West Supp. 1993).

123. *See* Turner v. Murray, 476 U.S. 28, 37-38 (1986) (deciding defendant has right to pose questions about racial bias to jurors who will sentence him, but not to jurors who will decide his guilt); Williams v. Chrans, 945 F.2d 926, 944 (7th Cir. 1991) (finding that *Batson* protects the truthfinding function of the criminal process especially in capital sentencing cases and that "[b]ecause of the great discretion entrusted to a jury in a capital sentencing hearing, a unique opportunity exists for racial prejudice to operate but remain undetected"), *cert. denied,* 112 S. Ct. 3002 (1992); Hollis v. Davis, 941 F.2d 1471, 1482-83 (11th Cir. 1991) (only sentencing, not conviction or indictment decision, was probably influenced by jury discrimination), *cert. denied,* 112 S. Ct. 1478 (1992); *see also* Byrd v. Delo, 942 F.2d 1226, 1234 (8th Cir. 1991) (Lay, C. J., dissenting) (stating that the risk of racial prejudice infecting sentencing proceedings is especially serious); *cf.* Blair v. Armontrout, 916 F.2d 1310, 1351-52 (8th Cir. 1990) (ordering new sentencing due to "especially influential role" race plays in capital sentencing decision), *cert. denied,* 112 S. Ct. 89 (1991).

124. *See, e.g.,* Mark Constanzo & Sally Constanzo, *Jury Decision Making in the Capital Penalty Phase,* 16 LAW & HUM. BEHAV. 185, 189-90 (1992).

125. *See* Harmon M. Hosch et al., *A Comparison of Anglo-American and Mexican-American Jurors' Judgments of Mothers Who Fail To Protect Their Children from Abuse,* 21 J. APPL. SOC. PSYCHOL. 1681, 1688-90 (1991) (probation preferences affected by juror race, but not conviction preferences); *see also* Sweeney & Haney, *supra* note 43, at 191 (arguing that "ambiguous norms" of sentencing may allow latent racism to surface); Frank P. Williams III & Marilyn D. McShane, *Inclinations of Prospective Jurors in Capital Cases,* 74 SOC. SCI. REV. 85, 87 (1990) (death penalty preferences affected by juror race, but not conviction preferences).

126. Williams & McShane, *supra* note 125. *But see* Johnson, *supra* note 13, at 1622 (arguing guilt, not penalty, decisions "probably would be more vulnerable to the influence of unconscious stereotypes").

127. *See infra* note 128.

128. Williams & McShane, *supra* note 125, at 87. Interestingly, when they did choose the death sentence, black and Hispanic jurors were more likely to choose death for defendants who shared their own race or ethnicity than they were for white defendants. *Id.* The researchers did

choose a term of years or probation; indeed, these studies suggest that black jurors and jurors of Mexican descent are more likely to assign *harsher* sentences to convicted defendants of their own race or ethnicity than white or Anglo jurors.[129] These studies, together with the other studies showing the relationship between convictions and juror race and ethnicity,[130] suggest that juror race and ethnicity may affect sentencing and determinations of guilt in different ways. Racial or ethnic similarity between juror and defendant may actually result in harsher sentencing if the jury sets the length of sentence.[131] This hy-

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not specify in the questionnaire the race or ethnicity of the victim. *Id.* at 86. The reliability of this study is weakened by this omission. *Id.* at 89.

Several archival studies have demonstrated that jurors are more likely to impose the death penalty if the defendant is black, and much more likely to impose a death sentence when the victim is white. *See* McCleskey v. Kemp, 481 U.S. 279, 286-87 (1987); U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5-6 (1990); DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 399-400 (1990); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION 43-94 (1989); Constanzo & Constanzo, *supra* note 124, at 187; Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida,* 43 FLA. L. REV. 1, 29-31, 33 (1991). Although these studies did not control for juror race, the members of the juries studied were probably mostly white. *See* GROSS & MAURO, *supra,* at 113. Black jurors are much more likely than white jurors to be eliminated from capital juries because a larger percentage of blacks express qualms about the death penalty during voir dire. *See, e.g.,* Williams & McShane, *supra* note 125, at 87-88. In capital cases, venire members who hold strong enough views against the death penalty may be excluded for cause. *See* Wainwright v. Witt, 469 U.S. 412, 424-26 (1985); Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968). Those remaining are commonly referred to as "death-qualified." *See also* Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty,* 54 SOC. PSYCHOL. Q. 67 (1991). One author has suggested that the victim-based discrimination demonstrated by capital juries results from the tendency of prosecutors to strike black jurors from juries in interracial cases or in cases involving white victims. Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade After* Furman *in Texas,* 69 SOC. SCI. Q. 853, 871 (1988).

129. First, Feild and Bienen's 1980 study showed that, even though in rape cases black jurors were harsher on white defendants than were white jurors, when the evidence was strong against the defendant black jurors gave *longer* sentences than white jurors to defendants of both races. FEILD & BIENEN, *supra* note 81, at 125-27. Similarly, another researcher found that, when assigning sentences to black and white burglars and embezzlers after reading brief descriptions of their crimes, black subjects gave significantly longer sentences than white subjects to defendants of both races. Randall A. Gordon, *Attributions for Blue-Collar and White-Collar Crime: The Effects of Subject and Defendant Race on Simulated Juror Decisions,* 20 J. APPL. SOC. PSYCHOL. 971, 976, 981 (1990). A third study explored the effect of cultural background on the decisions of mock jurors regarding mothers accused of failing to protect their children from physical and sexual abuse. It found a similar pattern. Hosch et al., *supra* note 125, at 1681, 1688. The authors found no significant difference between the tendencies of Anglo and Mexican-American subjects to convict, and no difference in sentence length when imposed. However, Anglo mock jurors were about 10% more likely to recommend probation than Mexican-American mock jurors. *Id.* at 1688.

130. *See supra* notes 67-77 and accompanying text.

131. *Cf.* Charlan Nemeth & Ruth H. Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors,* 90 J. SOC. PSYCHOL. 221, 228-29 (1973) (hypothesizing that a juror's identification with a defendant leads to punishment when the defendant's guilt is clear, leniency when it is not).

Another study found that black and white subjects made sentencing decisions differently. Responding to a survey that requested them to set sentences for various defendants, blacks sub-

pothesis, although intriguing, has limited value to most courts reviewing claims of jury discrimination because only a few jurisdictions allow jurors to choose sentence length.

At best, these studies raise questions about the degree to which in-group or own-race bias affects the sentencing decisions of juries. While there appears to be some support for the common judicial assumption that striking blacks from juries increases the likelihood that black defendants or defendants convicted of killing white victims will be sentenced to death, the evidence appears to refute assumptions that white jurors are more likely than black jurors to assign longer sentences to convicted black defendants.

ii. Hypothesis: the effect of juror race varies with the degree of racial heterogeneity on the jury. Occasionally, judges have suggested that jury results are unaffected by (1) adding only one black juror to an otherwise all-white panel; or (2) increasing the number of black jurors on an already racially mixed jury.[132]

Experts in group dynamics would probably agree with the first suggestion. Several studies have confirmed that a minority of one rarely influences a jury's verdict or succeeds in "hanging" a jury.[133] Other studies have concluded that three or more jurors in a minority position are required to influence the decision of a jury of twelve.[134]

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jects were more lenient than white subjects, but they also were influenced more by mitigating circumstances surrounding the crime and by offender characteristics. J.L. Miller et al., *Perceptions of Justice: Race and Gender Differences in Judgments of Appropriate Prison Sentences,* 20 LAW & SOCY. REV. 313, 332 (1976).

132. *See, e.g.,* Vasquez v. Hillery, 474 U.S. 254, 276 (1986) (Powell, J., dissenting) (stating that the addition of only one black grand juror would not have made much of a difference); *cf.* State v. Chase, 600 A.2d 931, 934 (N.H. 1991) (rejecting defendant's argument that he demonstrated prejudice if he could show a reasonable likelihood that only one juror would have voted to acquit).

Before *Batson,* lower court judges who were assessing prejudice from jury discrimination occasionally reasoned that, if blacks already were represented significantly on the panel, the addition of a few more would not have made much difference. *See, e.g.,* Patterson v. Austin, 728 F.2d 1389, 1398 (11th Cir. 1984) (Gibson, J., concurring) (because six of twelve jurors were black, defendant could not meet prejudice requirement).

133. *See* Robert T. Roper, *Jury Size and Verdict Consistency: "A Line Has To Be Drawn Somewhere"?,* 14 LAW & SOCY. REV. 977, 989-90 (1980) ("viable minorities" of two or more jurors are more likely than a single minority juror to hang a jury, or influence remaining jurors to change verdict, suggesting that the effect would increase as the proportion of minority jurors increases); Tanford & Penrod, *supra* note 115, at 213; *see also* Colbert, *supra* note 13, at 126; Tindale et al., *supra* note 115, at 444 (finding that, in mock juries of varying size between three and six, a two-person minority favoring acquittal had significantly more influence on the verdict than a minority of one). Henry Fonda's character in the movie *Twelve Angry Men* was the exception, not the rule. *See, e.g.,* Johnson, *supra* note 13, at 1698. In the movie, Henry Fonda played the lone holdout juror who eventually managed to convince eleven other jurors to acquit. TWELVE ANGRY MEN (United Artists 1957).

134. *See, e.g.,* Johnson, *supra* note 13, at 1699; *see also* BELL, *supra* note 49, at 406 (arguing that the role of the only two blacks on one grand jury "was to legitimate a process which they could not influence"); Gary Moran & John C. Comfort, *Neither "Tentative" nor "Fragmentary":*

Additional studies have shown that black jurors themselves believe that they have significantly less impact on deliberations than white jurors.[135] Judges measuring prejudice from jury discrimination may therefore be justified in predicting a low risk of influence from discrimination when statistics project that a legally selected jury would have included at most one minority juror.

On the other hand, no study has tested or documented the hypothesis that there is some threshold proportion or number of black jurors beyond which additional black jurors would have no impact on case outcome.[136] Consequently, there is no empirical support for judicial assumptions that a marginal decrease in an already significant number of minority jurors will have little effect on a jury's decision.

3. *What These Studies Mean for the Review of Jury Discrimination Claims*

These studies demonstrate that jury discrimination can and does affect jury decisions. Moreover, by confirming that juror race is more likely to influence decisions in "close" cases and by identifying certain situations in which the effect of juror race on a jury's decision is especially probable or improbable, jury research indicates that assigning probabilities of prejudice is possible. Certainly, the effect of racial composition error on verdicts is complex and difficult to predict. Yet in particular cases the cumulative weight of these studies, combined with the individual facts of a proceeding,[137] may be enough to per-

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Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment, 71 J. APPL. PSYCHOL. 146, 149 n.9 (1986) (need at least one-third of members of group to have an influence); Tanford & Penrod, *supra* note 115, at 212 (one or two is not enough in groups of eight or more).

135. Gary Moran & John C. Comfort, *Scientific Juror Selection: Sex as a Moderator of Demographic and Personality Predictors of Impaneled Felony Juror Behavior*, 43 J. PERSONALITY & SOC. PSYCHOL. 1052, 1057 n.7 (1982); *see also* Davis, *supra* note 55, at 1568-70 (black juror felt his views were "unheeded" by white jurors); Mills & Bohannon, *supra* note 71, at 28 (blacks and females perceived themselves as less effective in deliberations than white males); *cf.* ARONSON, *supra* note 40, at 26-27 (suggesting that lack of influence and higher incidence of conformity by blacks in groups correlates with lack of acceptance by other group members).

136. *Cf.* Visher, *supra* note 72, at 180 (the confidence of both black and white jurors in the guilt of the defendant was highest in juries with eleven or more whites, lower in juries with nine or ten whites, and lower still when only seven or eight of the jurors were white).

137. *See, e.g.*, Hollis v. Davis, 912 F.2d 1343 (11th Cir. 1990) (relying on inquiry from jury about sentence length in finding prejudice), *cert. denied*, 112 S. Ct. 1478 (1992). Deadlock during deliberation is also a sign of less than overwhelming evidence of guilt, and it also may support a finding of prejudice. *See, e.g.*, Patton, *supra* note 78, at 997 (*Batson* error not harmless in civil cases when there is proof that the verdict was not unanimous or the jury deadlocked during deliberations); *cf.* Cornell v. Nix, 976 F.2d 376, 385 (8th Cir. 1992) (Ross, J., dissenting, joined by McMilan and Gibson, JJ.) (dissenters from decision denying relief to petitioner raising defaulted *Brady* claim relied on deadlock to conclude that suppressed evidence would have led jury to acquit defendant), *cert. denied*, 113 S. Ct. 1820 (1993); State v. Shillcutt, 350 N.W.2d 686, 702 (Wis. 1984) (Abrahamson, J., dissenting) (a six-hour deadlock against conviction of black de-

suade a judge that jury discrimination either created a "reasonable probability" of prejudice or, conversely, was harmless "beyond a reasonable doubt."[138]

D. *Helping White Judges Think Like Black Jurors*

One objection to concluding from these studies that judges are able to estimate the effect of jury discrimination on jury outcomes deserves separate treatment. The primarily white, male, middle-class judges[139] who review claims of jury discrimination are susceptible to the same psychological tendencies that cause white and black jurors to differ in their interpretations of evidence. Because white judges may perceive the evidence in a given case differently than most black jurors would,[140] they may have difficulty identifying the circumstances in which prejudice from jury discrimination is most likely to occur. Indeed, many judges and scholars assume that a judge who is black, female, or a member of another "outsider" group will bring not only symbolic representation to the bench, but also unique perspectives[141]

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fendant charged with keeping a place of prostitution was broken when one juror remarked "Let's be logical, he's a black, and he sees a seventeen year old white girl — I know the type").

138. For example, the studies would support a finding of a high probability of prejudice from jury discrimination if a black defendant could establish that he was convicted and sentenced to death for killing a white police officer by an all-white jury that heard racial epithets during trial and deliberations, when the case turned on the defendant's claim of self-defense and evidence of guilt was close — primarily a swearing match between black defense witnesses and the officer's partner — and when legal selection procedures would probably have produced a jury with at least three blacks. Conversely, the studies suggest a low probability that a white defendant indicted for sexually abusing a black child would be prejudiced by discriminatory selection practices that reduced the number of blacks on the grand jury by one.

139. *See, e.g.*, WASHINGTON REPORT, *supra* note 98, at 79 (only one minority judge in Washington state district courts or courts of appeals); BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 103 (1991) (reporting that in 1985 3.8% of state and 7% of federal judges were black); Higginbotham, *supra* note 84, at 574 n.460 (reporting that only 6 of the 348 federal judicial appointments President Reagan made as of July, 1988 were black); *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission*, 19 FLA. ST. U. L. REV. 591, 596, 613 (1991) [hereinafter *Report and Recommendation*] (minorities virtually absent from state appellate bench); Ellen J. Pollock & Stephen J. Adler, *Justice For All? Legal System Struggles To Reflect Diversity, but Progress Is Slow*, WALL ST. J., May 8, 1992, at A1 (of 356 state supreme court justices, 14 are black men, one is a black woman, and one male justice is Hispanic).

140. *Cf.* Blair v. Armontrout, 976 F.2d 1130 (8th Cir. 1992) (only two of three judges believed that the evidence against the defendant who had raised a *Swain* claim was strong), *cert. denied*, 113 S. Ct. 2357 (1993). Cross-cultural misunderstandings in the legal system between the overwhelmingly white judiciary and persons of color are presently under scrutiny in several states. *See, e.g.*, WASHINGTON REPORT, *supra* note 98, at 50, 53 (over 40% of minority lawyers and court personnel responded that they sometimes or often observed judges failing to communicate effectively with minorities.).

141. Judges themselves have taken this position. *See* Quang Ngoc Bui v. State, No. 1911509, 1992 Ala. LEXIS 1234 (Nov. 13, 1992) (giving special deference to a black trial judge's finding that prosecutor did not intend to discriminate against black venirepersons), *cert. denied*, 113 S. Ct. 2970 (1993); PERRY, *supra* note 139, at 137-38 (Justice Powell once argued that "a member

that will translate into more enlightened justice.[142] If the views of those excluded from jury service are inaccessible to judges who attempt to predict the effect of that exclusion on jury decisions, any outcome-based test for relief from jury discrimination is an exercise in futility.[143]

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of a previously excluded group can bring insights to the Court that the rest of its members lack," noting Justice Marshall's unique contributions due to his direct experience with segregation); BRUCE WRIGHT, BLACK ROBES, WHITE JUSTICE 177 (1987); *see also* Denno, *supra* note 54, at 318-20 ("White judges are prone toward misinterpreting some aspects of a [black] defendant's background (e.g., member of a street gang) because they are ignorant of cultural needs or norms."); Gary Fontaine & Laurence J. Severance, *Intercultural Problems in the Interpretation of Evidence: A Yazuka Trial,* 14 INTL. J. INTERCULTURAL REL. 163, 170-71 (1990); Kit Kinports, *Evidence Engendered,* 1991 U. ILL. L. REV. 413, 420-22; Lewis H. La Rue, *A Jury of One's Peers,* 33 WASH. & LEE L. REV. 841, 848 (1976) (suggesting all-white judiciary cannot get past the assumption that it is "possible and normal for whites to be fair and honest towards blacks"); *Report and Recommendation, supra* note 139, at 611-12 (agreeing that diversity of the bench is essential for the continued acceptance of rule of law, Florida's legislature passed a bill establishing minimum representation of minorities on judicial nominating committees); Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges,* 61 S. CAL. L. REV. 1878, 1928-33 (1988); *Judge Calls Trial Ouster an Insult to Blacks,* N.Y. TIMES, Sept. 6, 1992, at A41 (black judge criticized his removal after the prosecution exercised its peremptory challenge to oust him from the trial of three black youths charged with beating white truck driver Reginald Denny).

142. Interestingly, three out of four studies comparing the decisions of black and white judges show that a judge's race has little, if any, effect on sentence and conviction patterns. *Compare* Cassia Spohn, *Decision Making in Sexual Assault Cases: Do Black and Female Judges Make a Difference,* 2 WOMEN & CRIM. JUST. 83, 91 (1990) [hereinafter Spohn, *Female Judges*] (no significant racial differences); Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities,* 24 LAW & SOC. REV. 1197 (1990) (study of sentencing decisions of 13 black and 25 white judges in Detroit from 1976 to 1978 found that both black and white judges sentenced violent offenders to prison more often when the offenders were black than when they were white, that there is no correlation between victim race and sentence severity for either black or white judges, and that black judges were only slightly less likely than white judges to sentence black male offenders to prison) *and* Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges,* 22 AM. J. POL. SCI. 884, 888, 890 (1978) (study of conviction and sentencing rates from 1968 to 1974 of 16 black judges and 75 white judges found both black and white judges convicted a higher percentage of black defendants than white defendants and both black and white judges sentenced black defendants more severely than white defendants, controlling for crime severity) *with* Susan Welch et al., *Do Black Judges Make a Difference?,* 32 AM. J. POL. SCI. 126 (1988) (study of sentencing patterns of 10 black judges and 130 white judges in cases involving over 3400 male felons between 1968 and 1979 found that black judges sentence white offenders to prison more often than white judges and that judges of both races are less severe on defendants of their own race).

Perhaps a judge's assessments of culpability are shaped more by her legal training and by her possession of qualities rewarded by judgeships than by her racial identity. *Cf.* Pollack & Adler, *supra* note 139, at A2 (appointments require political connections; elections against white candidates are difficult to win). For studies testing the effect of judge gender, see Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition,* SOC. SCI. J., Apr. 1977, at 77 (finding no effect); Spohn, *Female Judges, supra,* at 98 (finding that black female judges imposed much longer sentences in sexual assault cases than black male judges, and no difference in sentence lengths imposed by male and female white judges).

143. This concern has prompted similar conclusions in other contexts. *See* BENNETT & FELDMAN, *supra* note 52, at 181-82; Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court,* 101 HARV. L. REV. 1388, 1433 (1988) (asking judges to assess which offenses are egregious enough to justify a jury's decision to impose the death penalty creates "an opening for the unavoidable corruption — the exercise of race-based empathy — that

This argument does not foreclose the use of outcome-oriented standards to review claims of jury discrimination. Judicial review of jury discrimination is no more vulnerable to the race-based biases of judges than other routine judicial tasks. Many rules of evidence, criminal procedure, and civil procedure are based on a pragmatic and deeply rooted optimism about the ability of judges to separate reasonable from unreasonable beliefs.[144] In countless facially neutral yet determinative decisions, judges apply their own personal norms of behavior to predict what reasonable people, and reasonable jurors, would do.[145] The apparent neutrality of all of these judicial tasks is undermined by the assumption that standards of reasonableness for members of one race are not familiar to those of another race.[146]

Yet, judicial estimates of the effect of jury discrimination are least, not most, likely to be affected by the unconscious influences of race. When a judge must decide whether black jurors may have reached a more lenient decision than white jurors, she may be prompted by the very question, or by the parties, consciously to question and explain her own assumptions about the beliefs and behavior of jurors of different racial backgrounds. Litigating the absence or presence of the effect of discrimination provides an opportunity for the parties to educate a judge about different perspectives. By contrast, such an opportunity is rarely available in other situations in which trial judges predict the beliefs of a "reasonable" juror or person.[147]

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gave rise to the need for a remedy in the first place"); Minow, *supra* note 49, at 32; *see also* HANS & VIDMAR, *supra* note 42, at 141 ("We need a criterion other than the judge's opinion to assess the incidence of jury prejudice because judges are as susceptible [to race-based bias] as jurors.").

144. *See* WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 146, 231-32 nn.19-20 (1985) (discussing premises of the work of Wigmore and Llewellyn).

145. Kinports, *supra* note 141, at 431 & n.106, discusses a murder case in which a "perspective of people of color" might have changed both the decision of the trial judge to admit evidence that the tops of three women's stockings were discovered in the black defendant's room and the decision of the appellate court affirming the judge's ruling. One of the victim's stockings was missing and the top of the other had been torn off, but none of the stockings found in the defendant's room matched the torn stocking. The appellate court reasoned that the defendant's "interest in women's stocking tops . . . tend[ed] to identify [him] as the person who removed the stockings from the victim," apparently unaware that "many black men wore stocking tops at that time to straighten their hair." *See also id.* at 434 (the outcome of balancing tests under FED. R. EVID. 403 "may well vary depending on the judge's background and outlook"); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 262-63 (1987). In addition to relevancy rulings, reasonableness predictions are essential to decisions about the sufficiency of evidence, directed verdicts, summary judgment, motions for new trials, and all harmless error decisions.

146. *See, e.g.*, BENNETT & FELDMAN, *supra* note 52, at 177-78; Massaro, *supra* note 13, at 536-37.

147. The racially triggered cognitive biases that influence judicial predictions about human behavior usually operate unchecked. *See* Theodore Eisenberg & Sheri L. Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1161 nn.70-71 (1991); Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Uncon-*

Judges have tried to open their minds and hearts to alternative perspectives in other contexts.[148] Courts have already assumed that male factfinders can imagine what women employees would consider offensive[149] after being educated by lay and expert testimony[150] and proper instructions.[151] Other courts have adopted a "reasonable black person" standard in employment discrimination cases involving racial harassment.[152] If judges assessing prejudice from jury discrimination heard evidence about the potential differences between black and

scious Racism, 39 STAN. L. REV. 317 (1987). In addition, appellate review of most "reasonableness" judgments is deferential. Leubsdorf, *supra* note 145, at 275. Even judges who repeatedly make racially stereotyped remarks or use racial slurs in conversations with court personnel, with attorneys, and in settlement conferences may be viewed by appellate courts as performing their judicial duties free from actual racial bias. *See In re* Stevens, 645 P.2d 99 (Cal. 1982) (en banc); Leubsdorf, *supra* note 145, at 256-61 & nn.96, 107-08.

148. *See, e.g.*, Minow, *supra* note 49.

149. *See* Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991) (adopting a reasonable woman standard for sexual harassment claims); *see also* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1219 nn.152-53, 1232 n.201 (1990); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1209 n.33 (1992). *See generally* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993); Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law — Will It Really Make a Difference?*, 26 IND. L. REV. 227, 258 (1993); Deborah S. Brenneman, Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281 (1992); Eric J. Wallach & Alyse L. Jacobson, *"Reasonable Woman" Test Catches On*, NATL. L.J., July 6, 1992, at 21.

150. *See* Bettina B. Plevan & Seth M. Popper, *An Expert Can Gauge Perceptions*, NATL. L.J., Nov. 9, 1992, at 25 (discussing judicial reception of expert testimony on the responses of women to allegedly offensive work environments).

151. *See* Debra A. Profio, Ellison v. Brady: *Finally, A Woman's Perspective*, 2 UCLA WOMEN'S L.J. 249, 261 (1992). Not all are as optimistic. *See* Robert Unikel, Comment, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 367 n.260 (1992). The Court may soon resolve this issue for sexual harassment claims under Title VII. *See* Brief for Petitioner at 34-40, Harris v. Forklift Sys., Inc., 926 F.2d 733 (6th Cir. 1992) (No. 92-1168), *cert. granted*, 113 S. Ct. 1382 (1993).

152. Stingley v. Arizona, 796 F. Supp. 424, 428 (D. Ariz. 1992); Rodgers v. Western-Southern Life Ins. Co., 792 F. Supp. 628, 635 (E.D. Wis. 1992); Harris v. International Paper Co., 765 F. Supp. 1509, 1515-16 (D. Me.), *modified on other grounds*, 765 F. Supp. 1529 (D. Me. 1991); *cf.* Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 658-59 (6th Cir. 1991) (employing the perception of the minority viewer of advertisement). At least one commentator has even suggested that white male judges have an easier time imagining themselves black than imagining themselves female. John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 743-44 (1971). A similar construct has been proposed for analyzing a person's reasonable expectation of privacy, *see* Maclin, *supra* note 90 (proposing that the Supreme Court consider race in assessing police encounters), and underlies the feminist critique of the use of facially neutral standards of reasonableness for self-defense, as well as arguments that factfinders should consider a defendant's identity as a victim of abuse in considering whether her conduct against her abuser was reasonable. *See generally* JOHN MONOHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW, CASES AND MATERIALS 346-423 (2d ed. 1990); Anne Coughlin, *Excusing Women*, 82 CAL. L. REV. (forthcoming 1994).

white jurors, their decisions would be more informed.[153]

There is more of an opportunity for judges consciously to identify their own cognitive biases in this context and, because some biases can be minimized by conscious acknowledgment of uncertainty,[154] there is even some hope that judges will be better than jurors at getting beyond these biases. Ultimately, a reviewing judge does not have to agree with the view that a defendant claims black jurors would have adopted toward the evidence against him; she need only find a reasonable probability that the black citizens excluded from jury service would have adopted it had they participated as jurors.[155]

I am not claiming that judges can acquire the perspectives of those they judge by listening to experts argue or by reading a study or two.[156] There are good reasons to believe that most attempts to educate one person about the different experiences and different understandings of another person will have only limited success,[157] especially across racial and ethnic divides. But the well-defined opportunity to confront, discuss, and litigate the effect that juror race may have on verdicts[158] undercuts the futility argument as a basis for re-

153. *See* BENNETT & FELDMAN, *supra* note 52, at 179 (suggesting that providing jurors with information about how other social classes behave would assist in closing the gap between the stories constructed by jurors of different backgrounds; arguing this information could be presented at trial in the form of expert testimony); Fontaine & Severance, *supra* note 141 (same); Lempert, *supra* note 52, at 571-72 (same). Washington mandates "cultural awareness training" for its judges. WASHINGTON REPORT, *supra* note 98, at 192; *see also* Gobert, *supra* note 17, at 325-27 (suggesting "impartiality training" for jurors as a way to minimize race-based gaps in understanding); *cf.* Lynn H. Schafran, *Educating the Judiciary About Gender Bias: The National Judicial Education Program To Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts,* 9 WOMEN'S RTS. L. REP. 109 (1985) (describing judicial education efforts).

154. *See* DAWES, *supra* note 55, at 142. A judge trained in inductive reasoning may be more willing to question her own initial assessment that a fact was established if she learns that the basis for her initial assessment was only one of several alternative interpretations. *Cf.* Richard E. Nisbett et al., *Improving Inductive Inference, in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 55, at 445.

155. *See, e.g.,* Williams v. Chrans, 945 F.2d 926, 944 (7th Cir. 1991) (court attempts to imagine how black jurors could have been more empathetic and receptive to defendant's mitigating evidence), *cert. denied,* 112 S. Ct. 3002 (1992).

156. Nor do I go as far as some who have argued that peremptory challenges of minority jurors are permissible because expert witnesses can effectively convey the minority experience and point of view. *See* Stephen A. Saltzberg & Mary E. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation,* 41 MD. L. REV. 337, 369 (1982).

157. *Cf.* Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity,* 16 VT. L. REV. 1005, 1021 (1992) (criticizing use of objective standard of "reasonable woman" as incapable of avoiding male biases because men will resort to their own perspectives of reasonableness in judging women).

158. Defense counsel availed themselves of a similar opportunity in United States *ex rel.* Free v. McGinnis, 818 F. Supp. 1098 (N.D. Ill. 1992), *vacated,* No. 89-C-3765, 1993 WL 130236 (N.D. Ill. Apr. 15, 1993). The petitioner's challenge alleged that constitutional deficiencies in the Illinois death penalty jury instructions confused his jury. Studies on juror comprehension of similar instructions during the penalty phase had been prepared by jury scholar Hans Zeisel after

jecting harmless error and prejudice standards of review. Certainly the Court has not hesitated to mandate judicial assessments that are just as speculative.[159] Persuasive reasons for preferring outcome-neutral tests to outcome-dependent tests for reviewing jury discrimination must be found elsewhere.

II. Policy Objections to Measuring Discrimination's Effects

A. *Traversing the Slippery Slope: Recognizing that Race Affects Verdicts While Avoiding the Use of Racial Quotas to Select Juries*

The specter of racial quotas for triers of fact has already deterred some judges and academics from endorsing rules that recognize that jury discrimination affects jury decisions,[160] and it may provide an additional reason for some to reject outcome-based review standards in favor of rules that do not depend on a connection between juror race and case outcome.[161] For more than a century the Court has refused to recognize any constitutional right to proportional racial representation on juries.[162] Acknowledging that jury discrimination may affect

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the petitioner's trial. After a hearing during which jury experts — including Hans Zeisel, Valerie Hans, and Shari Seidman Diamond — testified, the federal magistrate concluded that the studies, combined with information about petitioner's proceeding, demonstrated that the instructions given petitioner's jury were constitutionally deficient. 818 F. Supp. at 1123-30.

159. *E.g.*, Arizona v. Fulminante, 111 S. Ct. 1246, 1255 (1991) (White, J., dissenting) (disagreeing with majority's application of harmless error review to coerced confessions; arguing that it is impossible to know what credit and weight the jury gives to a confession); Coleman v. Alabama, 399 U.S. 1, 18 (1970) (White, J., concurring) (harmless error review of denial of counsel at preliminary examination will involve speculation about attorney knowledge and witness testimony). While the difficulties of detecting the influence of juror race need not preclude the use of outcome-oriented tests, they might at least influence whether the defendant or the prosecution should bear the burden of proving prejudice or lack of prejudice. *See* Richard L. Gabriel, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1276-89 (1986).

160. *See, e.g.*, Alschuler, *supra* note 13, at 155-56; Saltzberg & Powers, *supra* note 156, at 337; Underwood, *supra* note 13, at 730-31, 741. Over a century ago, Justice Field argued that finding that a black defendant suffers constitutional harm when members of his race are excluded from jury service leads to the "absurd" result that judges must share the race of criminal defendants. Virginia v. Rives, 100 U.S. 313, 335 (1879) (Field, J., dissenting). For a recent example of commentary against the effects of "creeping racialism," see *Quota Juries: What's the Color of Fairness?*, OTTAWA CITIZEN, Aug. 19, 1992, at A10.

161. Some judges have presumed prejudice when reviewing defaulted claims of racial composition error without explanation. *See* Preston v. Maggio, 741 F.2d 99 (5th Cir. 1984), *cert. denied*, 471 U.S. 1104 (1985); Birt v. Montgomery, 725 F.2d 587, 605-07 (11th Cir.) (Hatchett, J., dissenting), *cert. denied*, 469 U.S. 874 (1984); State v. Belcher, No. 92AP-1719, 1993 Ohio App. LEXIS 2953 (Ct. App. June 10, 1993) (by failing to object to *Batson* error, appellant was deprived of a fair trial).

162. *See* Holland v. Illinois, 493 U.S. 474 (1990); Taylor v. Louisiana, 419 U.S. 522, 538 (1975); Apodaca v. Oregon, 406 U.S. 404, 413 (1972); Ballard v. United States, 329 U.S. 187, 192-93 (1946); Strauder v. West Virginia, 100 U.S. 303 (1880).

verdicts would undercut the Court's premise that single-race adjudication can be neutral or impartial. After all, the harm suffered by a defendant deprived of a racially heterogeneous jury is the same regardless of the reason for the absence of minority jurors. But recognizing the effect of discrimination on jury decisions does not mean that juries and judicial panels with statistically engineered racial heterogeneity are just around the corner. The slope is not that steep.

Admitting that prejudice may result from jury discrimination while refusing to provide proportional racial representation in the jury box or on the bench is obviously costly. It involves acknowledging a most unpleasant reality: some defendants may be imprisoned or executed solely because of the race of those who judged them, even though those who judged were legally selected. The mere recognition of such a condition is difficult;[163] justifying its continuation appears unthinkable. Yet adopting a racially autonomous system of justice[164] or mandating racial representation on venires, on juries, or on the bench[165] involves costs as well.[166] I will not attempt here to quantify the cost of forgoing either alternative and instead tolerating the risk that some defendants will be condemned to prison or death because of the *legal,* yet skewed, racial composition of their juries.[167] Whatever

163. *See* Stephen L. Carter, *When Victims Happen To Be Black,* 97 YALE L.J. 420, 446 (1988); Kennedy, *supra* note 143, at 1418.

164. *See, e.g.,* MINIMIZING RACISM IN JURY TRIALS, *supra* note 91, at 70-71 (suggesting that a system of "home rule" in black communities is the only real way for black defendants to secure fair trials).

165. One advantage that an affirmative right to racially similar jurors has over present remedies for exclusion is that it prevents acquittals of defendants who otherwise might be convicted by racially mixed juries. *See* Colbert, *supra* note 13, at 118. The Court has redressed this imbalance slightly by allowing the prosecution to seek preconviction relief from a defendant's purposeful exclusion of venirepersons on the basis of race. Georgia v. McCollum, 112 S. Ct. 2348 (1992).

166. The Court has always considered these costs intolerable. *See, e.g.,* Holland v. Illinois, 493 U.S. 474, 513, n.10 (1990) (Stevens, J., dissenting). Commentators, however, continue to debate the constitutional and pragmatic viability of racial quotas for juries. *Compare* Colbert, *supra* note 13, at 124-25; *Developments, supra* note 6, at 1586-87; Johnson, *supra* note 13; Kuhn, *supra* note 99, at 319-21; Massaro, *supra* note 13, at 553-64 (arguing that defendant's Sixth Amendment interests are better preserved by guaranteeing peers on juries, but terming the task of defining peers "daunting") *and* Diane Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels,* 3 BLACK L.J. 80 (1973) *with* Alschuler, *supra* note 13, at 169 *and* Andrew Kull, *Racial Justice,* NEW REPUBLIC, Nov. 30 1992, at 17, 20-21 (discussing and rejecting race-specific jury selection measures).

167. If lawmakers perceive that the costs of racial imbalance are borne primarily by black defendants and black victims, they may underestimate those costs. *See* Williams, *supra* note 91, at 140 ("[S]ocial costs to blacks are simply not seen as costs to whites."). *Cf.* MANN, *supra* note 91, at 219:

> How many studies will it take to achieve the necessary and appropriate policies to alleviate the disparate treatment of U.S. racial minorities? If only one Native, Hispanic, Asian, or African American is imprisoned, shot, gassed, electrocuted, hanged, or lethally injected because of a racist system, of what use are studies after the fact?

this cost, the cost of tolerating both this risk *and* the risk of prejudice due to intentional or systematic racial discrimination is even higher. Postconviction relief for defendants who raise valid claims of jury discrimination serves punitive and deterrent functions not served by an affirmative right to racially similar jurors. It punishes the government for proven violations of the constitutional rights of those excluded from jury service.

This marginal benefit explains a remedial approach that recognizes that jury discrimination affects jury decisions but rejects affirmative rights to racially representative juries and judges. It is a solution that rights at least the worst of the wrongs. Similar remedial distinctions are commonplace in the law.[168] Admitting that jury discrimination may determine the outcome of some cases can therefore inform, without settling, ongoing debates over innovative race-conscious efforts to diversify our juries and judges.

B. *Assuming Blacks and Whites Would Disagree: Equal Protection, the Inference of Prejudice, and Interest Balancing*

1. *The Conflict*

The Equal Protection Clause poses another barrier that may prevent the application of outcome-based review standards to claims of jury discrimination. In order to estimate prejudice from jury discrimination, a judge must predict whether the beliefs of those excluded from jury service would have differed from the beliefs of those included, a prediction that she must necessarily base on race.[169] Thus,

168. The harms of intentional and unintentional discrimination may seem the same to the target of discrimination, but the Court has held that the Constitution provides a remedy for one but not the other. The same can be said of the state-private action distinction. La Rue, *supra* note 141, at 848; Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEXAS L. REV. 1401, 1421-42 (1983); *see also* Massaro, *supra* note 13, at 537 (claiming that society would rather tolerate inequities that result from racial underrepresentation on the bench and not impose racial quotas for judges, hoping that time will eventually provide greater opportunity for members of all groups to become judges). An analogous debate resulted in the "compromise" in § 2 of the Voting Rights Act, which denies to groups protected under the Act any right to proportional representation in elected office, while at the same time recognizing the harm that results to members of these groups when that representation is lacking. *See, e.g.*, Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 358-59 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2334 (1993). Similar cost balancing would justify rejecting race as "cause" while simultaneously recognizing prejudice from jury discrimination.

Of course, commentators have criticized most of these distinctions as hopelessly underinclusive. The slope from recognizing the effect of racial composition on jury decisions to jurymandering by percentages gets considerably steeper if one rejects a discriminatory intent requirement for equal protection violations. *See generally* Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH L. REV. 953 (1993).

169. Assumptions about juror behavior on the basis of race, including those supported by

evaluations of harm or prejudice from jury discrimination involve racial stereotyping and potentially conflict with antidiscrimination principles.[170]

One state supreme court has held that it is unconstitutional for judges to use prejudice tests to review claims of jury discrimination. In *Ex parte Yelder,*[171] a black defendant asked the Supreme Court of Alabama to reverse his conviction, arguing that his trial attorney should have challenged the prosecutor's intentional exclusion of blacks from his jury. Although well-established law required the defendant to show prejudice before the court could find ineffective assistance, the court was clearly disturbed by the idea of predicting the decision of a jury with more black jurors. The court held that prejudice must be presumed in such cases, explaining that any attempt to measure the effect of *Batson* error[172] would involve race-based predictions of juror behavior that themselves violate the Equal Protection Clause.[173]

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studies reviewed in this article, are necessarily general and imperfect, given the profound differences among persons of the same racial background and the malleable boundaries of racial identity. *See, e.g.,* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification,* 65 S. CAL. L. REV. 1769 (1992); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory,* 42 STAN. L. REV. 581 (1990); *cf.* Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein,* 41 DEPAUL L. REV. 1021, 1035-39 (1992) (discussing essentialist problems with the "reasonable woman" standard and suggesting steps to minimize those problems).

Justice Marshall tells a story illustrating how race can be an imperfect predictor of juror behavior. *See* Gary A. Hengstler, *Looking Back — Reflections on a Life Well-Spent,* A.B.A. J., June, 1992, at 57.

170. *See* Rosen, *supra* note 14, at 15 (the "radically separatist premise" that "jurors can never overcome their racial loyalties and prejudices" is "constitutionally offensive"); *cf.* Radtke v. Everett, 501 N.W.2d 155, 165-67 (Mich. 1993) (rejecting gender-conscious "reasonable woman" standard for sexual harassment claims because it can retrench the very attitudes it is attempting to counter).

171. 575 So. 2d 137 (Ala.), *cert. denied,* 112 S. Ct. 273 (1991).

172. *See supra* notes 15-16 and accompanying text.

173. 575 So. 2d at 138-39 (adopting dissenting opinion in *Yelder,* 575 So. 2d 131, 136 (Ala. Crim. App. 1990), which stated that asking defendant to establish prejudice from his attorney's failure to raise a *Batson* claim requires reliance upon the "pernicious assumption that *Batson* condemns, that is, that if blacks had not been struck from a black defendant's jury, the defendant would more likely have been found not guilty"). Alabama also has eliminated any requirement that appellants who fail to challenge jury discrimination at trial establish on direct appeal that the error affected trial outcome. *See, e.g., Ex parte* Bankhead, 585 So. 2d 112 (Ala. 1991) (plain error for trial court not to hold *Batson* hearing when record demonstrated prima facie case of intentional discrimination); *see also* Wright-Bey v. State, 444 N.W.2d 772, 777 (Iowa Ct. App. 1989) (Schlegel, J., dissenting) (stating that, because it is "far beyond [a defendant's] ability" to prove that he would have been acquitted but for his counsel's failure to raise his jury discrimination claim, using prejudice as a test for allocating relief in these cases is inappropriate).

Some scholars have also suggested recently that even the remedial use of predictions of juror behavior based on race is illegal. *See* Alschuler, *supra* note 13, at 191-93 ("If prosecutors may not act on the perception that black jurors are more likely than white jurors to acquit black defendants, the Supreme Court also should be precluded from acting on this perception."); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished,* 65 TEMP. L. REV. 369, 416 (1992) (arguing that the key question is not the empirical validity of racial stereotypes about

The U.S. Supreme Court has not yet addressed the equal protection implications of prejudice or other outcome-based tests for reviewing claims of jury discrimination. It was willing in the past to apply prejudice tests to defaulted claims of jury discrimination[174] and to assume that juror race may influence jury decisions[175] without discussing equal protection. This suggests that postconviction attempts to measure the effect of jury discrimination are not themselves unconstitutional. This conclusion is also supported by the 1990 decision in *Metro Broadcasting, Inc. v. F.C.C.*[176] In *Metro* a majority of Justices listed jury cases as support for the decision to uphold a minority-preference program for broadcast licenses that was based upon the assumption that the race of a license owner would affect broadcast content.[177]

On the other hand, there are contrary signals in later Supreme Court opinions. Language in the Court's recent cases condemning pretrial assumptions by litigants and judges that juror race can affect juror behavior suggests that the same assumptions may be equally impermissible after trial.[178] In addition, this past Term, in *Shaw v. Reno,*[179] the Court disapproved of similar race-based predictions about

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jurors, but whether burdens and benefits should be allocated pursuant to a scheme that accepts such information as relevant); Underwood, *supra* note 13, at 733 ("Surely a Court that prohibits litigants from relying on a race-based generalization to challenge jurors should not rely on that same generalization itself. A race-based generalization about the likely views of jurors cannot lawfully be the basis for any legal rule."); *see also* Unikel, *supra* note 151, at 349-61, 369 (arguing sex- or race-based standards of reasonableness reinforce inequality and, as a group-based concept, are inconsistent with individualism).

174. Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973).

175. *See supra* notes 15-16 and accompanying text.

176. 497 U.S. 547 (1990).

177. The Court rejected an equal protection challenge to the program, accepting Congress' assumption that minority owners of broadcast licenses would bring something different to the airwaves than white license owners. The majority explained:

> While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.
>
> . . . We have recognized . . . that the fair cross-section requirement of the Sixth Amendment forbids the exclusion of groups on the basis of such characteristics as race and gender from a jury venire because "[w]ithout that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors *disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition.*" . . . It is a small step from this logic to the conclusion that including minorities in the electromagnetic spectrum will be more likely to produce a "fair cross section" of diverse content.

497 U.S. at 582-83 (citations omitted; emphasis added).

178. *See, e.g.,* Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) (quoting Ristaino v. Ross, 424 U.S. 589, 596 n.8 (1976)); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991) ("[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.").

179. 113 S. Ct. 2816 (1993).

voters. The *Shaw* majority — composed of Justice Thomas and the four Justices who dissented in *Metro*[180] — explained that, when a state considers race when constructing voting districts, it "reinforces the perception that members of the same racial group . . . think alike," and it quoted recent jury cases for support.[181] The Court termed this message "pernicious," noting that it threatens to "balkanize us into competing racial factions . . . and to carry us further from the goal of a political system in which race no longer matters . . . ."[182] As a result, the Court concluded that state efforts to create voting districts that contain a majority of voters of one race must meet strict scrutiny.[183]

2. *Why Remedial Tests Measuring the Effects of Proven Jury Discrimination Are Constitutional: The Absence of Unequal Burden or Injury*

The Constitution does not forbid judicial attempts to determine which convictions and sentences are most likely to have been affected by proven jury discrimination. Structuring remedial rules so that relief is granted only to defendants whose convictions and sentences appear to have been affected by jury discrimination does not trigger any of the typical objections leveled at race-based remedies.

At the risk of oversimplifying, theorists supporting a "colorblind" interpretation of the Equal Protection Clause rely on three general arguments to condemn the use of racial classifications, even for remedial purposes: racial classifications offend individualistic ideals that each person should be judged by merit, not by group membership; they punish the blameless, while aiding the undeserving, on account of race; and they perpetuate inequality by increasing racial hostility and reinforcing stereotypes.[184] Judicial attempts to measure the effects of

180. The dissenters in *Metro* objected to the Court's willingness to use race as a proxy for belief. *See* 497 U.S. at 602, 620 (O'Connor, J., dissenting):

> Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think. . . . [E]ven if the Court's equation of race and programming viewpoint has some empirical basis, equal protection principles prohibit the government from relying upon that basis to employ racial classifications. . . . The Constitution's text, our cases, and our Nation's history foreclose such premises.

Justice Kennedy likened the race-based predictions of the majority to the racist premises supporting apartheid in South Africa and also alluded to Nazi policy. 497 U.S. at 633 n.1 (Kennedy, J., dissenting).

181. *Shaw*, 113 S. Ct. at 2822.

182. 113 S. Ct. at 2827, 2832.

183. 113 S. Ct. at 2832.

184. *See, e.g.*, 113 S. Ct. at 2832; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133-34 (1975); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach*

jury discrimination escape all three criticisms.

Race-based remedies typically allocate benefits or privileges to persons on the basis of their race. It is this disparity in advantage that has been the primary source of these criticisms. Race-based assumptions about jurors in prejudice tests do not operate this way. Unlike other race-conscious remedial programs that the Court has considered, and unlike the race-conscious jury selection techniques it has invalidated in earlier cases, race-conscious methods of allocating relief for jury discrimination do not make it more difficult for members of any racial group to obtain privileges or benefits.

Such methods do not assist only black defendants; a defendant of any race may obtain relief as long as the discrimination likely had some impact on the jury's decision in his case.[185] Rather than disadvantaging the "blameless" because of their race, race-conscious review standards for jury discrimination penalize no one but the government, a proven offending party. They benefit no one but the defendant, one of those harmed directly by the constitutional offense. Because relief requires assurance that there is some probability that jury discrimination deprived the defendant of a more lenient jury decision, no windfall to the defendant results.

Postconviction predictions that jurors of one race may be more likely to convict or charge in a particular case than jurors of another

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from the Voting Rights Act, 69 VA. L. REV. 633, 636-40 (1983); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1, 5-11 (1976); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination,* 125 U. PA. L. REV. 540, 550 (1977); William VanAlstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution,* 46 U. CHI. L. REV. 775 (1979); Cynthia V. Ward, *Commentary, The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix,* 91 COLUM. L. REV. 581, 590-96 (1991); *see also* Flagg, *supra* note 168, at 1009-13.

185. Although the Supreme Court has not yet decided a case involving a white defendant's objection to the intentional or systematic exclusion of white jurors on the basis of race, discrimination against whites appears to be subject to the same rules as discrimination against blacks. *See Shaw,* 113 S. Ct. at 2824-25; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989); Echlin v. LeCureux, 995 F.2d 1344, 1350 (6th Cir. 1993) ("The *Powers* court made it clear . . . that the race of both the defendant and of the excluded juror are irrelevant to equal protection analysis); Virgin Islands v. Forte, 865 F.2d 59, 64 (3d Cir. 1989); Roman v. Abrams, 822 F.2d 214, 228 (2d Cir. 1987) (discussing the prejudicial effect of prosecutor's elimination of white jurors from trial of white defendant), *cert. denied,* 489 U.S. 1052 (1989); Owes v. State, No. CR 92-481, 1993 Ala. Crim. App. LEXIS 975, at *5 (July 9, 1993); State v. Knox, 609 So. 2d 803 (La. 1992); Brashear v. State, No. 597, 1992 Md. App. LEXIS 129, at *9 (Ct. Spec. App. June 1, 1992); BELL, *supra* note 49, at 390 & n.60.

The Court has yet to decide whether Georgia v. McCollum, 112 S. Ct. 2348 (1992), prohibits *black defendants* from challenging white jurors because of their race. *See* Georgia v. Carr, 113 S. Ct. 30 (1992) (remanding case to Georgia Supreme Court to consider legality of black defendant's use of peremptory challenges to strike white persons from jury in light of *McCollum*); Williams v. State, No. CR-91-1259, 1993 Ala. Crim. App. LEXIS 159 (Feb. 12, 1993) (divided court holds such strikes prohibited); State v. Knox, 609 So. 2d 803 (La. 1992) (such strikes prohibited); People v. Gary M., 526 N.Y.S.2d 986, 994 (Sup. Ct. 1988) (barring race-conscious strikes of whites).

race also do not advantage or disadvantage those judged by their race — the jurors. Such predictions do not affect the opportunities of members of any particular race to serve as jurors, nor do they stigmatize jurors by implying that they are racist or culpable. A judicial pronouncement that the racial background of jurors in a particular case may have influenced their judgment connotes no cognitive or moral weakness on the part of those jurors.[186] Even if it did, linking juror race to case outcome does not imply that some races are more susceptible to this weakness than others. If recognizing the link between race and decisionmaking condemns any of us, it condemns all of us.[187]

Finally, review standards that admit a link between juror race and outcome may ameliorate, not aggravate, racial hostility. Verdicts popularly perceived as attributable to juror race risk becoming objects of protest rather than teachers of values. Correction and recognition of these instances of perceived injustice may diminish racial tensions.[188]

3. *Assuming Strict Scrutiny Applies: Why Some Remedial Tests Measuring the Effects of Jury Discrimination Are Nevertheless Constitutional*

The analysis above, however, may no longer persuade a majority of current Supreme Court Justices to dismiss summarily an equal protec-

186. Jurors have no moral duty, or even capacity, to resist the unconscious influence of psychological pressures such as socially reinforced stereotypes and in-group bias, or to acquire knowledge beyond what their own life experience provides. By suggesting that racially relative judgments need not subject those who make them to blame, I am not suggesting that our society has no moral or constitutional duty to regulate their effects. *See* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies,* 141 U. PA. L. REV. 149, 203-08 (1992); Flagg, *supra* note 168, at 985-91; Lawrence, *supra* note 147, at 328-44.

187. *Cf.* Metro Broadcasting, Inc. v. F.C.C., 497 U.S. at 547, 601 (1990) (Stevens, J., concurring) (noting minority preference scheme does not imply any judgment concerning the abilities of owners of different races, does not stigmatize the disfavored class, and falls within the "extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment").

188. The public reactions following the state verdicts exonerating the police officers in the King and McDuffy cases illustrate the degree of hostility that verdicts perceived to be race based can generate. Following both verdicts, demonstrations of frustration led to violence. *See generally* BRUCE PORTER & MARVIN DUNN, THE MIAMI RIOT OF 1980, at 181-84 (1984). Juror fear that violence would result from an acquittal in another police brutality case recently prompted an appellate court to grant a new trial to the convicted police officer and then prompted a series of venue disputes. Larry Rohter, *Retrial of a Policeman Could Test Judiciary,* N.Y. TIMES, Aug. 15, 1991, at A1; *see also* Art Harris, *Pickens County Flare-up: The Story of Two Blacks Found Guilty,* WASH. POST, Feb. 6, 1982, at A6 (describing protests following the conviction and sentencing of two black activists for improperly notarizing absentee ballots of elderly and illiterate voters); Phil Reeves, *Black "Murderer" Who Did Not Kill Faces Needle of Death,* THE INDEPENDENT, July 30, 1992, at 8 (describing protests over death sentence by all-white jury in the case of Andrews v. Shulsen, 485 U.S. 919 (1988), involving a black defendant charged with murdering white victims, in which someone slipped a note to a juror during sentencing which read "Hang the nigger[]s.").

tion objection to its race-conscious review standards. After *Shaw,* these standards may have to withstand strict scrutiny. If the Court was certain in *Shaw* that race-based assumptions about voter behavior perpetuate offensive racial stereotypes and threaten increased racial balkanization, it is likely to conclude that race-based predictions about juror behavior will have similar effects. The race-based predictions of juror behavior implicit in race-conscious standards for reviewing jury discrimination claims may appear to the Court to be just as "odious" as race-based predictions of voter behavior,[189] and jurors may appear to be just as susceptible as legislators to signals that they should act as racial representatives. *Shaw* suggests that the use of race alone — regardless of its remedial purpose[190] or its lack of impact on the opportunities of racial groups to obtain benefits or privileges[191] — is enough to demand strict scrutiny.

Assuming that strict scrutiny does apply in this context,[192] the fol-

189. *See* Shaw v. Reno, 113 S. Ct. 2816, 2824-25 (1993) ("Classifications on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' " (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943))).

190. The Court clearly has rejected arguments that race-conscious remedial efforts deserve less exacting scrutiny under the Equal Protection Clause. *See Shaw,* 113 S. Ct. at 2829 (declaring that "equal protection analysis 'is not dependent on the race of those burdened or benefited by a particular classification' " (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989))); *Croson,* 488 U.S. at 490-93.

191. In *Shaw,* the Court discounted allegations that the redistricting plan did not impair or dilute the voting strength of any racial group. 113 S. Ct. at 2828. Its decision to apply strict scrutiny apparently rested entirely on its conclusion that the plan endorsed racial stereotypes and race-based partisanship. 113 S. Ct. at 2830.

192. No doubt some academics will soon join the dissenting Justices in *Shaw* in criticizing the Court's latest blow to race-conscious remedies. For a sampling of pre-*Shaw* critique, see, e.g., DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); T. Alexander Aleinikoff, *A Case for Race-Consciousness,* 91 COLUM. L. REV. 1060, 1110-25 (1991); Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Policies, in* THE POLITICS OF LAW 195 (David Kairys ed., 2d ed. 1990); Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331, 1381-84 (1988); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Guinier, *Tokenism, supra* note 113, at 1108, 1127; Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion,* 40 AM. U. L. REV. 1307, 1341 (1991); Gary Peller, *Race Consciousness,* 1990 DUKE L.J. 758; Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal,* 79 COLUM. L. REV. 1023 (1979); David A. Strauss, *The Myth of Colorblindness,* 1986 SUP. CT. REV. 99; Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times,* 104 HARV. L. REV. 525 (1990).

One might plausibly argue that the Court's own remedial programs need not be examined as closely as legislative action. *See Croson,* 488 U.S. at 513-14 (Stevens, J., concurring) (suggesting judicially crafted, race-based remedies deserve more deference than legislative schemes); United States v. Paradise, 480 U.S. 149, 196 n.4 (1987) (Stevens, J., concurring) (stating that the question of whether the *judicially* designed race-based remedy in that case passes equal protection is "dramatically different from the question whether a statutory racial classification can be justified as a response to a past societal wrong"); Keyes v. School Dist. No. 1, 895 F.2d 659, 665 (10th Cir. 1990), *cert. denied,* 498 U.S. 1082 (1991); Mann v. City of Albany, 883 F.2d 999, 1006-07 (11th Cir. 1989); Vaughns v. Board of Educ., 742 F. Supp. 1275, 1296-97 (D. Md. 1990) (strict scrutiny of *Croson* not applicable to school desegregation remedial plan), *affd. sub nom.* Stone v.

lowing arguments explain why the Court's race-conscious tests for remedying jury discrimination are constitutional, as long as the Court continues to confine such tests to postconviction review of claims of jury discrimination that defendants fail to raise before trial. The strict scrutiny analysis that follows is also helpful for another reason, even if one believes that these rules need not survive the rigors of strict scrutiny in order to be constitutional. Strict scrutiny requires courts to identify and weigh each governmental interest that is advanced by race-conscious review standards and to compare the relative efficacy of race-neutral and race-conscious standards in advancing those interests. Consequently, it involves cost-benefit judgments. These judgments provide a better basis for choosing between outcome-dependent and outcome-independent standards of review than do concerns about constitutionality, futility, or the consequential use of race to select factfinders. Constitutional questions aside, interest balancing provides the most plausible rationale for the Court's decisions to grant relief automatically to a defendant who raises his claim of jury discrimination on time, but to deny relief to a defendant who defaults unless he proves that the jurors excluded may have changed the jury's decision.

a. The conflicting governmental interests at stake. For race-conscious rules to pass strict scrutiny, they must be reasonably necessary to achieve compelling governmental interests.[193] In order to evaluate the constitutionality of race-conscious methods of allocating relief for jury discrimination, one must first identify the governmental interests that alternative remedial schemes promote or impair.

Vacating the convictions and sentences of defendants who prove that their juries were selected illegally serves several governmental interests. Even absent some likelihood that discrimination affected the jury's decision, postconviction relief punishes those responsible for racial discrimination against potential jurors,[194] demonstrates official intolerance of racial discrimination,[195] and helps protect and promote a diversity of views in a forum essential to democratic government.[196]

Prince George's County Bd. of Educ., 972 F.2d 1337 (4th Cir. 1992), *cert. denied,* 113 S. Ct. 973 (1993).

193. *Shaw,* 113 S. Ct. at 2824-25. Race-conscious standards for allocating postconviction relief for jury discrimination include any test that requires the defendant to prove, or the government to disprove, some probability that the discrimination affected case outcome. Race-neutral standards include automatic relief, granting no relief at all, or allocating relief according to some race-neutral factor.

194. This interest is not advanced by affirmative rights to racial representation on juries.

195. *See, e.g.,* Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991); Holland v. Illinois, 493 U.S. 474, 488 (1990) (Kennedy, J., concurring).

196. *See* Akhil R. Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1187-89 (1991); Guinier, *Two Seats, supra* note 113, at 1430 n.62, 1485-86 (drawing an analogy between

In addition, because jury trials educate jurors in self-governance,[197] deterring discriminatory jury selection practices helps to ensure that all citizens have an equal opportunity for the civic education jury service provides.[198] I will refer to these goals collectively as the governmental interest in deterrence.

Other governmental goals are hindered, not advanced, by granting a defendant relief for proven jury discrimination without regard to the effect of that discrimination on the jury's decision. Specifically, the Court has identified three governmental interests that are undermined whenever a judge vacates the conviction or sentence of a defendant who failed to raise his claims of procedural error until after conviction. According to the Court, stricter rules for allocating relief to defendants who fail to raise errors on time (1) remove an incentive for defendants and their attorneys to withhold claims deliberately;[199] (2) promote the finality of criminal judgments;[200] and (3) preserve respect

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the right to participate in the political process protected by § 2 of the Voting Rights Act and "the citizenship-status affirming right" of serving as jurors and drawing analogies between juries and elected bodies); Underwood, *supra* note 13, at 749 (characterizing the electorate and the jury as the central institutions of representative government).

197. Amar, *supra* note 196, at 1186-87.

198. *See* Duncan v. Louisiana, 391 U.S. 145, 187-88 (1968) (Harlan, J., dissenting) (jury service fosters respect for the law and acceptance of criminal verdicts as just).

199. This undesirable behavior, commonly known as "sandbagging," was clearly a major concern of the Court in its early cases imposing some extra showing of prejudice as a prerequisite to relief for defaulted claims. *See, e.g.*, Davis v. United States, 411 U.S. 233, 241 (1973) ("Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult."); *see also* Sawyer v. Smith, 497 U.S. 227, 256 (1990) (Marshall, J., dissenting) (arguing that the Court's treatment of procedural defaults "is premised on 'the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct' ") (quoting Reed v. Ross, 468 U.S. 1, 13 (1984)).

Insisting on a postconviction showing of prejudice certainly discourages defense attorneys from withholding meritorious claims of jury discrimination until after the jury returns its verdict or until the prosecution's case has deteriorated. Rarely would an attorney have any preverdict confidence in her ability to prove prejudice from jury discrimination after conviction, especially because proof would depend primarily on factors unknown before trial, such as the strength of the evidence, particular testimony, or other appeals to racial stereotypes during the trial. Counsel will not gamble that after the trial she could carry her burden of proving prejudice from jury discrimination when a timely objection would obviate such a difficult task. *See also* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130, 1196-97 (1986); Patton, *supra* note 78, at 984-86 (failure to raise *Batson* error at trial makes it much harder to prove purposeful discrimination later); Tague, *supra* note 29, at 44 & n.222 (suggesting grand jury discrimination is one of only a few issues that might justify what are otherwise unwarranted fears of sandbagging).

200. Courts now consider finality in criminal litigation to be the primary interest promoted by procedural rules that result in default. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 490-92 (1986).

for procedural rules.[201] A judge jeopardizes additional governmental interests, in the Court's view, when she grants postconviction relief to a defendant who argues that his attorney's failure to challenge illegal procedures denied him the right to effective assistance of counsel. The difficulties involved in creating and implementing outcome-neutral standards of performance for defense counsel, as well as the fear of overburdening defense counsel to the detriment of their clients, have persuaded the Court to limit relief for ineffective assistance claims to those cases in which there is a reasonable probability that the error by defense counsel changed case outcome.[202]

Granting relief for jury discrimination without regard to the effect of the discrimination on case outcome also appears to undermine the goal of ensuring the factual accuracy and reliability of criminal convictions and sentences — a purpose that has become the driving force behind much of the criminal procedure jurisprudence of the present Court.[203] This relatively modest goal of correcting only error that results in inaccurate judgments now overshadows other reasons that the Court previously used to justify granting postconviction remedies, such as deterring constitutional violations. Yet, as I explain in Part III, reversing only the verdicts that judges perceive to be affected by discrimination does not advance factual accuracy. Judicial attempts to measure the relative accuracy of the differing verdicts that jurors of different races may reach is, at best, hopeless and, at worst, oppressive. We presently have no basis upon which to prefer one race's view of truth over another's. Still, limiting relief to cases in which judges perceive case outcome to be a product of jury discrimination does advance the *appearance* of accuracy. Absent a persuasive reason to find that the decision of a jury with more black jurors is more accurate than the decision of a jury with more whites, or vice versa, what appears to be the most "accurate" case outcome is the verdict that a legally selected jury would have reached. Using such a verdict as a baseline for accuracy remains troubling, but, to borrow Justice Ste-

201. The Court has relied on the importance of federal respect for state procedures, or "comity," to justify limits on federal collateral review of state convictions. Coleman v. Thompson, 111 S. Ct. 2546, 2564 (1991). Enforcing procedural default rules also advances the government's interest in "channeling the resolution of claims to the most appropriate forum." *Coleman*, 111 S. Ct. at 2565; *Carrier*, 477 U.S. at 491; *Reed*, 468 U.S. at 10.

202. Strickland v. Washington, 466 U.S. 668, 692-97 (1984).

203. *See, e.g.*, Brecht v. Abrahamson, 113 S. Ct. 1710, 1729 (1993) (O'Connor, J., dissenting) (terming "accurate determinations of guilt and innocence" the "central goal of the criminal justice system"); Ogletree, *supra* note 21, at 162; Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1372 (1991) ("The theme of accurate adjudication lies at the very heart of the Burger and Rehnquist Courts' vision of constitutional criminal procedure."); Cynthia Bauman, Note, Arizona v. Fulminante: *Coerced Confessions and the Harm in Harmless Error Analysis*, 23 LOY. U. CHI. L.J. 103, 123 (1991).

vens's phrase from an analogous context, it may be "the best we can do."[204] Restricting relief only to those defendants who show that their verdicts deviated from this baseline furthers the appearance of accuracy, a proxy for actual accuracy that may be equally compelling as a governmental goal.[205] Just as tolerating verdicts that are perceived to be a result of jury discrimination appears especially unfair, overturning verdicts that lack such a connection may undermine public confidence in the reliability of jury proceedings in criminal cases.[206]

b. Weighing the interests in context and accommodating those that are most compelling. An examination of the contextual importance of these conflicting interests demonstrates why current rules requiring judges to measure the effects of jury discrimination would pass strict scrutiny. As long as deterring jury discrimination is a more compelling governmental goal than ensuring reliability or its appearance, granting relief in every case of proven discrimination seems more sensible than granting relief only when there is a risk that discrimination influenced case outcome.[207]

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204. Holland v. Illinois, 493 U.S. 474, 513 n.10 (1990) (Stevens, J., dissenting). Especially because presently tolerated selection procedures continue to result in the underrepresentation of minorities on juries, I do not mean here to endorse the Court's current criteria for determining which selection procedures are constitutional.

205. A criminal justice system that appears reliable serves many important functions, including crime control. On the theory that trials articulate behavioral norms and confirm values rather than find truth, see Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 141-43 (1987); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985); *see also* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 61-92 (1988); Daniel W. Shuman & Jean A. Hamilton, *Jury Service — It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 S.M.U. L. REV. 449, 469 (1992) (survey found that jurors and nonjurors both ranked "accurate fact-finding" as the most important factor for a fair trial, 29% ranking this as the most important, more important than factors such as the opportunity to tell one's side of the story and having a good judge); June L. Tapp, *The Jury as a Socialization Experience: A Socio-Cognitive View*, 2 ADVANCES IN FORENSIC PSYCHOL. & PSYCHIATRY 1 (1987) (evaluating the effect of jury service on ex-jurors' sense of law abidingness and legal compliance).

206. This assumes a public that includes not just those excluded from jury service, but also larger communities, including those thought to respond to the incentives of a "reliable" criminal justice system. Even if one were to limit the relevant audience to blacks, it is not at all clear that most blacks would agree that postconviction relief in every case of jury discrimination, without regard to prejudice, promotes reliability. Black crime victims, in particular, may disagree. *See* Ramseur v. Beyer, 983 F.2d 1215, 1245-46 (3d Cir. 1992) (Alito, C.J., concurring) (even if the grand jurors sorted by race felt that the judge's procedure was wrong, they may not want the defendant to benefit from the wrong done to them), *cert. denied*, 113 S. Ct. 2433 (1993); *cf.* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, AND UNEQUAL 183, 190-91 (1992) (compared to the general population, the number of blacks who become victims of crime is disproportionately high); KATZ, *supra* note 54, at 248-54 (discussing prevalence of, and motivations for, black-on-black crime); CATHERINE J. WHITAKER, U.S. DEPT. OF JUSTICE, SPECIAL REPORT: BLACK VICTIMS 1-8 (1990) (between 1979 and 1986, blacks suffered more violent crime, suffered more injury from those crimes, and were more likely to report violent crime to police than whites).

207. A review standard that conditions relief for timely raised claims of jury discrimination

Few would dispute that rectifying the harms of proven jury discrimination and deterring future discrimination are compelling governmental interests.[208] Indeed, the Justices continue to value deterrence over reliability when reviewing claims of jury discrimination that a defendant raised on time, despite their recent suggestion in *Arizona v. Fulminante* that the primary purpose of appellate relief is not deterrence, but rectifying unreliable judgments.[209] For proof of the Court's priorities, one need look no further than *Powers v. Ohio,*[210] a case decided only a week after *Fulminante.* In *Powers,* without even a passing reference to *Fulminante* or to the harmless error principles explained in that case, the Court reversed the conviction of a white defendant who objected to the illegal exclusion of blacks from his jury. The Court made it clear that the remedy was necessary not to promote reliability or its appearance, but to prevent harm to jurors and society.[211] Race-conscious, outcome-dependent review of jury discrimination is far from "necessary" to advance such interests.

Conversely, under some circumstances deterrence may be a less important governmental objective of postconviction review than reliability, the appearance of reliability, or other interests advanced by withholding relief. Under such circumstances, outcome-dependent standards that grant relief only when procedural errors jeopardize reliability better achieve governmental aims. For the Court, these altered priorities exist whenever a defendant fails to raise his claim of jury discrimination until after trial. In cases of default, the Court considers deterrence less compelling than the goals of preventing sandbagging,

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on a certain probability of prejudice or harm may result in relatively few reversals, especially in cases involving grand jury discrimination. *See supra* text accompanying notes 110-21. Even claims of discrimination affecting trial and sentencing juries frequently would be deemed harmless. *See* Powers v. Ohio, 111 S. Ct. 1364, 1381 (1991) (Scalia, J., dissenting) (suggesting *Powers* claimants are "unquestionably guilty").

208. *See, e.g.,* Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); United States v. Paradise, 480 U.S. 149, 165 (1987); *see also* Charles Fried, *Affirmative Action After* City of Richmond v. J.A. Croson Co.*: A Response to the Scholars' Statement,* 99 YALE L.J. 155, 161 (1989) ("The principal, perhaps the only, state interest sufficiently compelling to meet [strict scrutiny] is the remedying of identified acts of discrimination, though those who benefit from the remedy need not be the actual victims of discrimination.").

209. *See supra* notes 20-21. The *Fulminante* majority ignored earlier suggestions that exempting grand jury discrimination from harmless error review was necessary because it is the only effective way to deter such conduct. Vasquez v. Hillery, 474 U.S. 254, 260-62 (1986); Rose v. Mitchell, 443 U.S. 545, 556 (1979).

210. 111 S. Ct. 1364 (1991).

211. 111 S. Ct. at 1368-70. The Court reasoned that those excluded from jury service have no effective means of vindicating their rights on their own, noting that the "barriers to a suit by an excluded juror are daunting" because jurors have little financial incentive to bring claims for past discrimination and proving the threat of future discrimination would be difficult. 111 S. Ct. at 1373.

ensuring finality, and promoting respect for procedural rules.[212] These objectives, combined with the interest in promoting the appearance of reliability are, in the Court's view, compelling reasons to withhold postconviction relief from defendants who default. In the default context, race-conscious standards that measure the effect of juror race on case outcome become reasonably "necessary" to advance the governmental interests most compelling to the Court and would probably withstand strict scrutiny.[213]

C. *The Future of Prejudice or Harmless Error Review of Jury Discrimination*

Interest balancing, whether conducted independently or as part of a strict scrutiny analysis, remains the only reasonable basis for choosing between outcome-dependent and outcome-independent standards for reviewing claims of jury discrimination. Social science research counters the Court's contention in *Vasquez v. Hillery*[214] and *Fulminante*[215] that judges can never measure the effect of jury discrimination. Fears that inferences of prejudice from jury discrimination are either unconstitutional or bound to result in racial quotas are also unpersuasive as reasons to choose outcome-driven standards of relief rather than alternative tests.

While the forgoing analysis may explain the Court's choices, it also exposes them to attack. For instance, one might prefer that the Court follow its own advice in *Fulminante* and allocate postconviction relief

212. The Court's relatively recent reassessment of the importance of these interests prompted its rejection of the more liberal "deliberate bypass" test of Fay v. Noia, 372 U.S. 391, 438-39 (1963), in favor of the present "cause and prejudice" standard for reviewing defaulted claims. The Court's explanation is blunt:

> *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after *Fay* that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991). In describing the evolution of its "cause and prejudice" test for defaulted claims, the Court characterized the government's interest in finality of criminal judgments as "important," "vital," or "strong" eight times in four pages. 111 S. Ct. at 2562-65. It is a small step from this observation to the conclusion that the government's interest in ensuring finality in criminal proceedings has become "compelling." *See also* Brecht v. Abrahamson, 113 S. Ct. 1710, 1720-22 (1993).

213. The Court might reach a similar conclusion were it to review the constitutionality of its requirement that judges find prejudice before granting relief for a defense attorney's failure to challenge illegal jury selection procedures. The benefits of forgoing more detailed, categorical constitutional standards for attorney performance and the interest in promoting reliability or its appearance may appear, in combination, more pressing to the Court than the public interest in deterring jury discrimination or correcting attorney incompetence.

214. 474 U.S. 254 (1986).

215. 111 S. Ct. 1246 (1991).

in criminal cases only when reliability or its appearance mandates relief, even on direct review. Alternatively, one might object that the Court is wrong to consider finality, comity, prevention of sandbagging, or fears of overburdening defense counsel when crafting review standards for postconviction relief for defendants whose attorneys fail to raise constitutional error on time.[216]

Even if one agrees with the Court about which interests provide a valid basis for granting or withholding various forms of postconviction relief, one might still disagree about the relative importance of those goals or question whether the Court's present scheme best achieves them.[217] Central to decisions in this area is some basis, as yet unexplored, for assessing the comparative success of postconviction reme-

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216. Many critics do not accept that sandbagging, finality, and comity are compelling reasons to limit habeas relief. *See, e.g.*, Stephanie Dest, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263 (1989); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 290-93 (1988); Meltzer, *supra* note 199, at 1196-99; Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 896-98, 1023-26 (1984); *see also* Kimmelman v. Morrison, 477 U.S. 365, 382 n.7 (1986) (explaining why sandbagging is a false concern for Fourth Amendment claims). Comity or other federalism concerns that might influence federal courts to hesitate in interfering with state judgments would be irrelevant to a court creating rules for reviewing claims of defendants convicted in its own system.

Others have questioned the Court's decision to limit right-to-counsel violations to attorney errors that a defendant can show have "prejudiced" case outcome. These critics argue that meaningful standards of performance are possible to construct; that eliminating the prejudice standard would not adversely affect criminal defense practice; and that, once a defendant shows that his lawyer's performance was below constitutionally prescribed standards, a court should grant relief regardless of the effect of the deficient performance on case outcome. *See* Strickland v. Washington, 466 U.S. 668, 710-12 (1986) (Marshall, J., dissenting); Thomas Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition after* Strickland, 17 LOY. U. CHI. L.J. 203, 212 (1986); Comment, *How To Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 434-35 (1988).

217. For example, automatic relief might not be necessary in order to provide sufficient deterrence of *Batson* error if judges are unlikely to be persuaded that *Batson* error is harmless. Alternatively, if the incidents of proven *Batson* error are significantly less than the incidents of actual discrimination, automatic reversal may be the only way to deter future violations sufficiently. *See* Joshua E. Swift, Note, Batson's *Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 358, 367 (1993); Stephanie B. Goldberg, Batson *and the Straight-Face Test*, A.B.A. J., Aug. 1992, at 82. Also, relief without regard to harm could be necessary to deter discrimination that is less likely to affect verdicts, such as grand jury discrimination.

One might also conclude that prejudice from an attorney's failure to challenge jury discrimination must be presumed, as it is when defendants allege conflict of interest, because "case-by case inquiry into prejudice is not worth the cost" or because such violations are "easy for the government to prevent." Strickland v. Washington, 466 U.S. 668, 692 (1984). Many overworked, underpaid defense counsel may routinely fail to raise claims of jury discrimination, *see* Craig Haney, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15 LAW & HUM. BEHAV. 183, 200 (1991), yet reviewing courts attribute the vast majority of these failures not to substandard performance, but to sound trial strategy. *See* Gregory G. Sarno, Annotation, *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Right to and Incidents of Jury Trial*, 3 A.L.R. 4TH 601, §§ 11-17 (1981 & Supp. 1992).

Of course, the Court may be hesitant to adopt any proposal that would make review standards even more complex, in particular the rules governing the review of ineffective assistance claims or habeas relief for defaulted claims. *See* Jeffries & Stuntz, *supra* note 13, at 717-18.

dies and other remedies in deterring prosecutors, judges, and legislators from discriminating on the basis of race.[218]

Definitive prescriptions for the optimal mix of race-conscious and race-neutral remedial rules for reviewing claims of jury discrimination would require detailed and careful evaluation of these complex questions. But, even if the results of that analysis remain uncertain, the process of reaching those results is at least more definite. I have examined three considerations that others suggest preclude the use of prejudice or harmless error tests for reviewing jury discrimination: lack of impact on outcome or inability to detect that effect, the historical prohibition of the use of race in selecting factfinders, and constitutional barriers to race-conscious rules. All three turn out not to be determinative.

Although reviewing jury discrimination with harmless error or prejudice tests is at least a potentially sound practice, no similar justification exists for the Court's insistence that judges allocate relief for jury discrimination depending on whether the discrimination affected the factual accuracy of the jury's decision. The remainder of this article examines the unique difficulties involved in determining whether jury discrimination impairs or enhances the factual accuracy of jury decisions.

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218. The risk of reversal supposedly causes prosecutors to think twice before exercising peremptory challenges on the basis of race, judges to include blacks as grand jury forepersons, and legislators to amend selection procedures to be less discriminatory. On this topic, see Vasquez v. Hillery, 474 U.S. 254, 274-82 (1986) (Powell, J., dissenting) (arguing that the questionable deterrence provided by long-delayed habeas relief for grand jury discrimination is not worth its costs); William H. Diamond, *Federal Remedies for Racial Discrimination in Grand Juror Selection,* 16 COLUM. J.L. & SOC. PROBS. 85 (1980); Meltzer, *supra* note 199, at 1234-36.

The predicted effect of the Court's decisions on jury selection practices has yet to attract the kind of attention that commentators have devoted to the relationship between police practices and remedies for Fourth and Fifth Amendment violations. *See, e.g.,* Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano,* 23 U. MICH. J.L. REF. 537, 562-69 (1990); Richard A. Posner, *Rethinking the Fourth Amendment,* 1981 SUP. CT. REV. 49. Little consensus exists on the Court on these issues. Compare the majority opinion in Brecht v. Abrahamson, 113 S. Ct. 1710, 1721 (1993) (suggesting choice of review standard has no effect on lower courts already obligated to uphold the Constitution), with Justice White's dissent, 113 S. Ct. at 1727-28 (White, J., dissenting) (emphasizing deterrent role of habeas relief). The Court appears content to punish other sorts of misconduct with sanctions short of reversing convictions or dismissing indictments. *See, e.g.,* Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988) (opining that otherwise harmless prosecutorial misconduct during grand jury "can be remedied adequately" with contempt charges, professional disciplinary proceedings, and chastisement in published opinions); *see also* State v. Gortmaker, 655 P.2d 575, 545-87 (Or. Ct. App. 1982) (denying violation of state constitutional grand jury selection procedures as grounds for reversal of conviction because once trial courts are "correctly appraised of the law," they will follow it), *affd.,* 668 P.2d 354 (Or. 1983), *cert. denied,* 465 U.S. 1066 (1984); FED. R. CRIM. P. 16(d)(2) (noting contempt as an optional remedy for a prosecutor's violation of discovery rules).

III. ACCURACY, INNOCENCE, AND RACIAL COMPOSITION: WHOSE TRUTH COUNTS?

Reviewing criminal judgments for factual accuracy is gaining unprecedented popularity. Yet comparing the accuracy of verdicts of juries of different racial compositions is a standardless task, one that the law should not expect judges to attempt.

A. *The Allure of Accuracy*

Traditionally, courts assessing harmlessness or prejudice have not questioned whether an error-free judgment would have been more accurate than an error-infected judgment.[219] A defendant establishes "prejudice" whenever he demonstrates a reasonable probability that, absent constitutional error, the outcome of the proceeding would have been different. Thus, prejudice tests provide relief for violations of both "truth-obstructing" rights, such as the right to the exclusion of illegally seized evidence,[220] and "truth-furthering" rights, such as the right to cross-examine witnesses.[221]

Innocence tests, by contrast, condition relief not only upon a probability of effect, but upon a certain kind of effect: the error must have impaired the factual accuracy of the outcome.[222] These innocence tests are not simply extrastringent prejudice tests that require a higher probability that juries would have acquitted the defendant of a particular charge given constitutionally prescribed procedures. Instead, they purport to evaluate reliability, to determine whether an error-free acquittal would better reflect historical "truth."[223]

The growing inclination of the Court to remedy only unreliable or inaccurate judgments is especially pronounced in habeas cases.[224] The Court now employs innocence as a filter for habeas relief in two very

219. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365 (1986); Jeffries & Stuntz, *supra* note 13, at 684-85; Maria L. Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663, 701-03 (1985).

220. *Kimmelman*, 477 U.S. at 379-80; Jeffries & Stuntz, *supra* note 13, at 686-88. The terms *truth-furthering* and *truth-obstructing* originated in Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1091-95 (1977).

221. *See generally* Stacy & Dayton, *supra* note 13.

222. Compare this test to Johnson, *supra* note 13, at 1617. Johnson argues that courts need not decide whether different treatment of black and white defendants reflects unwarranted leniency toward white defendants or unwarranted harshness toward black defendants because differential treatment per se violates the Equal Protection Clause.

223. The Court itself refers to the innocence exception for procedural default as one demanding "actual" as distinct from "legal" innocence. Smith v. Murray, 477 U.S. 527, 537 (1986).

224. The amount and intensity of scholarship devoted to what some have called the Court's habeas "revolution" is extraordinary. For a current listing, see Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 799 (1992).

different ways: error-by-error and case-by-case.[225] First, the Court bars relief for defendants who raise errors that it considers unrelated to the truthfinding function of trials. In *Stone v. Powell,*[226] after noting that the exclusionary rule "deflects the truthfinding process and often frees the guilty," the Court essentially eliminated all habeas relief for defendants who allege Fourth Amendment violations.[227] In *Teague v. Lane,*[228] the Court decided that retroactive relief under a "new" rule of criminal procedure is unavailable in habeas corpus proceedings unless the petitioner demonstrates that the rule is a " 'watershed rule[ ] of criminal procedure' implicating the fundamental fairness *and accuracy* of the criminal proceeding."[229]

In addition, the Court allocates relief for all defaulted claims depending upon the impact of the unraised error on verdict accuracy. A defaulting defendant who cannot establish "cause and prejudice" may obtain habeas relief only by showing that the relief is "necessary to prevent a fundamental miscarriage of justice." The Court has explained that a "fundamental miscarriage of justice" results when a "constitutional violation has probably resulted in the conviction of one who is actually innocent . . . ."[230]

The allure of accuracy has extended beyond habeas review. Until this year, the Court had rejected suggestions that "prejudice" — which a defendant must demonstrate in order to obtain relief for either a claim of ineffective assistance or a procedurally defaulted claim — is a reasonable probability that, absent the error, the outcome of the case

225. Kathleen Patchel, *The New Habeas,* 42 HASTINGS L. REV. 941, 956 (1991) (the Court has used the innocence standard in both individualized and categorical inquiries).

226. 428 U.S. 465 (1976).

227. *See* 428 U.S. at 490.

228. 489 U.S. 288 (1989).

229. 489 U.S. at 331; *see also* Sawyer v. Smith, 497 U.S. 227, 241-45 (1990); Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting 489 U.S. at 331); Butler v. McKellar, 494 U.S. 407, 416 (1990).

230. Murray v. Carrier, 477 U.S. 478, 496 (1986); *see also* Smith v. Murray, 477 U.S. 527, 539 (1986) (stating there is no miscarriage of justice "[w]hen the alleged error is unrelated to innocence, and when the defendant was represented by competent counsel, had a full and fair opportunity to press his claim in the state system, and yet failed to do so in violation of a legitimate rule of procedure"); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (the petitioner must "come forward with a colorable showing of innocence").

If the petitioner raises an error that he claims influenced a jury's decision to sentence him to death, he must show he is "actually innocent" of the death sentence by presenting "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty" under the law of the jurisdiction. Sawyer v. Whitley, 112 S. Ct. 2514, 2523 (1992). Lower courts have welcomed the "clear and convincing" standard and have already extended it beyond the sentencing context. *See, e.g.,* Blair v. Armontrout, 976 F.2d 1130, 1135 (8th Cir. 1992) (applying heightened test to convictions as well as sentences), *cert. denied,* 113 S. Ct. 2357 (1993); McCoy v. Lockhart, 969 F.2d 649 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 3056 (1993).

would have been more accurate.[231] In its most recent interpretation of *Strickland*'s[232] prejudice requirement, however, the Court suggested that it may be prepared to adopt precisely this rule. In *Lockhart v. Fretwell*,[233] a majority stated that any review of ineffective assistance claims that focuses only on "mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."[234] Relief without regard to reliability, the Court reasoned, "grant[s a] defendant a windfall."[235]

B. *Accuracy and Jury Discrimination*

Clearly verdict accuracy as a criterion for allocating relief is here to stay. But consider the difficulty of assessing whether jury discrimination affects verdict accuracy. Assume a judge reviewing a defaulted claim of jury discrimination believes that, had the government not excluded blacks from the jury, a legally chosen jury probably would have included more blacks and would have acquitted the defendant. Which verdict is more "accurate" — the conviction of the jury from which blacks had been excluded, or the predicted acquittal by a jury with more black members?

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231. *See supra* note 220.

232. Strickland v. Washington, 466 U.S. 668 (1984).

233. 113 S. Ct. 838 (1993).

234. 113 S. Ct. at 842. A once-convicted defendant also has no right to obtain a jury decision that ignores the evidence. *Strickland*, 466 U.S. at 694-95 (no right to nullification after conviction); Meltzer, *supra* note 13, at 257 n.41. However, it seems wrong to classify the different judgments of black and white jurors as "lawless" nullification rather than factfinding. It is especially difficult to separate the factfinding and law-applying functions of criminal juries from questions of intent. Golash, *supra* note 16, at 171-72. For example, consider the recent alleged "protest" decision of black jurors in Tyler, Texas. The black community in Tyler became outraged when a grand jury of eight whites and two blacks refused to indict the police officers who claimed they accidentally shot a black grandmother, Annie Rae Dixon, as she lay in her bed, during a botched drug raid. Roberto Suro, *Police Shooting Focuses Black Anger in Texas City*, N.Y. TIMES, Aug. 10, 1992, at A10. Five days after the grand jury decision, three black jurors deadlocked against nine white jurors in the unrelated trial of a black man accused of kidnapping, robbing, and raping a white woman. Several jurors admitted the deliberations "became heated along racial lines" and that the *Dixon* case played a role. Although some of the news stories reported a black juror as stating he believed the defendant was guilty but voted to acquit to shake up the system, this story quoted him as stating, "I think that brother might have been guilty. We just said, 'Reasonable doubt,' just like they did on Annie Rae." *Id.*; *see also* Rosen, *supra* note 14.

235. 113 S. Ct. at 843. The majority in *Fretwell* found that no "prejudice" under *Strickland* resulted when defense counsel failed to raise an objection, valid at the time, but later discredited. 113 S. Ct. at 843. Relying on Nix v. Whiteside, 475 U.S. 157 (1986), the Court reasoned that a defendant cannot show *Strickland* prejudice "merely by demonstrating that the outcome would have been different but for counsel's behavior." 113 S. Ct. at 843 n.3; *see also* Jeffries & Stuntz, *supra* note 13, at 722-25 (recommending a similar approach).

I do not mean to overstate the significance of *Fretwell* for the scope of "prejudice" under *Strickland*. The Court could continue to characterize *Nix* and *Fretwell* as "unusual" cases. *See* 113 S. Ct. at 845 (O'Connor, J., concurring).

If, in the well-publicized state prosecution of the officers charged with beating Rodney King, you were among those convinced that a jury with black jurors probably would have convicted, would you be prepared to characterize those hypothetical convictions as more "accurate" than the actual acquittals? In a subsequent federal trial, two of the same defendants were convicted by a jury containing two black jurors. If the defendants could prove on appeal that the prosecutors intentionally excluded white jurors because of their race,[236] would the defendants be *factually* guilty? Consider the drug charges brought against Marion Barry, former Mayor of the District of Columbia. If you believe a white jury would probably have convicted him of more serious crimes than the racially mixed jury that tried him, which verdict is more accurate?[237]

The Court has yet to examine whether jury discrimination could affect the factual accuracy of a particular verdict.[238] Instead, just as the Court has had to muddle through the unseemly and incoherent process of defining when a defendant is "actually innocent" of the death penalty,[239] the Court will have to struggle with defining when, if ever, jury discrimination causes the conviction of one who is actually innocent.

Recent statements in cases discussing the retroactivity of jury discrimination rulings suggest that a majority of Justices believes that jury discrimination has little, if any, impact on accuracy.[240] If this is

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236. I am not aware of any such claim by the convicted defendants.

237. Each of these cases involved widely broadcast video clips, evidence which tends to shape our impression of the cases. *See* Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice,* 70 DENV. U. L. REV. 283, 292-93 (1993) (the various meanings viewers attribute to the Rodney King video tape are socially constructed).

238. Lower courts that have applied innocence tests to claims of racial composition error have almost always found no probability of innocence. *See, e.g.,* Blair v. Armontrout, 976 F.2d 1130, 1140 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 2357 (1993); Bell v. Baker, 954 F.2d 400 (6th Cir.), *cert. denied,* 113 S. Ct. 491 (1992); Byrd v. Delo, 942 F.2d 1226 (8th Cir. 1991); Walker v. Senkowski, 769 F. Supp. 462 (E.D.N.Y. 1991); People v. Myers, 729 P.2d 698 (Cal. 1987). *But see* Hamilton v. Jones, 789 F. Supp. 299, 301 (E.D. Mo. 1992).

239. Sawyer v. Whitley, 112 S. Ct. 2514 (1992); Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing,* 39 STAN. L. REV. 461, 487-88 (1987); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases,* 14 N.Y.U. REV. L. & SOC. CHANGE 59, 83 (1986); *cf.* McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (recommending narrowing the class of death-eligible defendants to those charged with extremely serious crimes for which juries consistently impose the death penalty without regard to the race of victim or offender).

240. In *Teague,* the Court held that a rule prohibiting peremptory challenges of black jurors by the government under the Sixth Amendment is a "far cry from the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty.' " Teague v. Lane, 489 U.S. 288, 314 (1989). It went on to explain that the error does not seriously diminish the likelihood of obtaining an accurate conviction. 489 U.S. at 315; *see also* Sawyer v. Whitley, 112 S. Ct. at 2528 (Blackmun, J., dissenting) (stating innocence tests render the "Fourteenth Amendment right not to be indicted by a grand jury or tried by a petit jury from which members of the

indeed the Court's view,[241] the Court has failed to offer any persuasive reason to support it. The empirical evidence reviewed earlier indicates that a defendant may be able to show that jury discrimination "probably" changed the verdict. Also unwarranted are unspoken concerns that recognizing the effect of juror race would be worse, both constitutionally and pragmatically, than denying that race matters.

Curiously, the apparent reluctance of some Justices to link jury discrimination to verdict accuracy may be rooted in a belief that black jurors are less "accurate" than white jurors; that the greater leniency demonstrated in some cases by black jurors distorts, rather than promotes, truth. There is little doubt that this belief has a following outside the Court.[242] As an example of this rationale at work in the Court's decisions, consider Justice Scalia's majority opinion in *Holland v. Illinois*.[243] Arguing that the race-based peremptory challenges of prosecutors do not result in unfairness, but sometimes increase impartiality, Justice Scalia implied that eliminating the in-group bias of black jurors can enhance accuracy.[244]

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defendant's race have been systematically excluded . . . largely irrelevant"); Sawyer v. Smith, 497 U.S. 227, 248 (1990) (Marshall, J., dissenting) (stating that "the rule of *Batson* . . . does not have a fundamental impact on the accuracy — as opposed to the integrity — of the criminal process"); Allen v. Hardy, 478 U.S. 255 (1986); Daniel v. Louisiana, 420 U.S. 31 (1975).

241. *See* Underwood, *supra* note 13, at 731.

242. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury*, 12 LAW & HUM. BEHAV. 333, 347 (1988) (white telephone survey subjects generally responded that overrepresentation of minorities on juries jeopardizes the jury's fairness); Francis, *supra* note 85, at F1 (characterizing black juror leniency on black defendants in several recent cases as "Afro-racism" and stating that "as long as that mentality persists, Americans of any race can't expect much real justice from a lot of black jurors"); *see also* WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM 96-97 (1987) (accepting the view that all-white juries decide cases differently than biracial juries, but suggesting that biracial juries discriminate against whites).

243. 493 U.S. 474 (1990).

244. In the majority opinion, Scalia stated:

> The "representativeness" constitutionally required at the venire stage can be disrupted at the jury-panel stage to serve a State's "legitimate interest." . . . Here the legitimate interest is the *assurance of* impartiality that the system of peremptory challenges has traditionally provided. . . . Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat[ing] extremes of partiality on both sides" . . . thereby "assuring the selection of a qualified and unbiased jury."

493 U.S. at 483-84 (emphasis added) (citations omitted). Justice Scalia apparently assumed that race-based challenges "assure" impartiality because defendants and prosecutors both have an equal opportunity to eliminate race-based bias. Rarely is the playing field so level. Massaro, *supra* note 13, at 518; *cf.* Pollack & Adler, *supra* note 139, at A2 (reporting that, although two-thirds of the state and federal jurors in Washington, D.C. are black, black jurors remain a minority in the other locations surveyed).

Consider also Justice Powell's comment dissenting from the Court's decision to vacate the conviction of a black defendant indicted over 20 years earlier by a grand jury from which blacks had been excluded: "A defendant has no right to a grand jury that *errs* in his favor." Vasquez v. Hillery, 474 U.S. 254, 277 (1986) (Powell, J., dissenting) (emphasis added). In context, this statement suggests that, had a grand jury with more black members declined to charge the de-

The difficulty with the notion that jury discrimination may actually enhance accuracy is patent. Assuming that judges and jurors have access to factual truth — a necessary premise of those who promote the efficacy of innocence- or accuracy-based tests[245] — then characterizing the difference that racial diversity makes as truth-impairing is perverse. We refuse to tolerate discrimination against black citizens in jury selection in part because it silences, or at least mutes, the voice of blacks in the jury box and implicates the entire judicial system as racist.[246] The life experiences that jurors of different races and ethnicities bring to jury deliberations include different interpretations of fact, different meanings for events, and different standards of behavior. A rule that purposefully devalues these differences erases such perspectives just as deliberately as a rule that intentionally excludes the jurors themselves.[247] White norms are pervasive enough even in their more subtle forms; there is no need to mandate them explicitly.[248] Thus, while innocence tests finessing the indeterminate nature of "truth" may be acceptable when reviewing some types of procedural error,[249]

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fendant, its decision would have been "erroneous" when compared with the subsequent guilty verdict of the legally chosen trial jury. 474 U.S. at 274-78. But it may also suggest that Justice Powell and those who joined him in dissent believed that factual inaccuracy, not just legal inconsistency, results when racially mixed juries exonerate defendants whom all-white juries would punish.

245. *See, e.g.*, Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061, 1065 (1992); Edwin Meese III, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271 (1987); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Jeffries & Stuntz, *supra* note 13; Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 445 (1992) ("Justice Scalia does not see all verdicts that result from [exclusionary selection techniques] as suspect because he believes that jurors, like judges, hunt for an objective factual reality; a hunt that is not tainted by unconstitutional exclusions unless they introduce specific prejudice into a particular trial.").

246. *See* Powers v. Ohio, 111 S. Ct. 1364, 1369 (1991).

247. *Cf.* Neuborne, *supra* note 245, at 445 (jury discrimination "inevitably distorts the contingent reality [that adjudication] is supposed to construct").

248. *See* BENNETT & FELDMAN, *supra* note 52, at 65; Flagg, *supra* note 168; Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1401-03 (1991); Minow, *supra* note 149, at 1213; Minow, *supra* note 49.

I make a limited claim here. Given notions of truth that are racially relative, no convincing reason has been advanced for preferring one among others, at least when selecting remedies for jury discrimination. For thought-provoking discussions of the merits of relativism and its larger consequences for law and science, see generally SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES (1991).

249. Whether "truth finding" is ever a meaningful goal for an adjudicatory scheme, especially our criminal justice system, is beyond the scope of this article. Many scholars have criticized the Court's emphasis on accuracy, arguing that the truth about an alleged crime is inevitably elusive. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 22-23 (1949) (explaining why "facts" found by judges are only opinions); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197-98 (1983); Charles Pulaski, Jr., *Criminal Trials: A "Search for Truth" or Something Else?*, 16 CRIM. L. BULL. 41 (1980); Louis M. Seidman, *Factual*

they have no utility when reviewing jury discrimination. Two specific recommendations follow.

First, when considering whether "manifest injustice" has resulted from the failure of a defense attorney to challenge jury discrimination at trial, a judge should ask only whether the error probably affected outcome and not try to speculate about the probability that the error-infected outcome was less "accurate."[250] Second, given the Court's recent inclination to consider withholding habeas relief for violations of rules it considers truth-impairing, the Court inevitably will revisit whether habeas relief should remain available for defendants who raise claims of jury discrimination based on what are arguably no longer their own rights, but the rights of those excluded from jury service.[251]

Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 457-58 (1980); Stacy, *supra* note 203, at 1406-07 & n.185; Tanford, *Scientific Jurisprudence, supra* note 39, at 163-64, 168; George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy,* 91 MICH L. REV. 1, 4-10, 33 (1992); Adrian A.S. Zuckerman, *Law, Fact, or Justice?,* 66 B.U. L. REV. 487, 492-94 (1986); *see also* Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship,* 88 NW. U. L. REV. (forthcoming 1994) (calling attempts to measure verdicts in terms of accuracy "babble").

Other commentators believe that, even if the effect of certain procedures on accuracy is predictable, rules that grant more protection to rights that enhance truth and less protection to rights that impair truth corrode the latter selectively and unjustifiably. *See* Friedman, *supra* note 216, at 320-21; Stacy & Dayton, *supra* note 13; *see also* J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges,* 63 S. CAL. L. REV. 1015, 1048-49 (1990) (collecting cases emphasizing dominance of truthfinding function).

250. *See, e.g.,* Sawyer v. Whitley, 112 S. Ct. 2514, 2530 (1992) (Stevens, J., concurring) (stating that "miscarriage of justice" must include more than the conviction of an "actually innocent" person). Equating prejudice with impairment of accuracy when reviewing jury discrimination resembles the proposal made by Professors John Jeffries, Jr. and William Stuntz for habeas review of defaulted claims of error in death penalty proceedings. Jeffries & Stuntz, *supra* note 13, at 719-21 (concluding that, because "the concept of factual reliability loses its clarity and hardness" in death penalty proceedings, any nonharmless error compels habeas relief).

251. This past Term, in Withrow v. Williams, 113 S. Ct. 1745 (1993), a narrow majority of the Court refused to extend the rule in Stone v. Powell, 428 U.S. 465 (1976), to restrict habeas review of *Miranda* claims. The Court relied on its decision in Rose v. Mitchell, 443 U.S. 545 (1979), preserving habeas review of a defendant's equal protection claim of racial discrimination in the selection of a state grand jury foreman, but it may have left the door open to later decisions withholding habeas review for other types of jury discrimination claims, particularly *Powers* claims. First, the Court emphasized that habeas review of *Miranda* claims, like habeas review of the claim in *Mitchell,* was not likely to raise state-federal tensions since federal courts had granted relief for such violations for decades. *Powers* claims are brand new. Second, the rules violated in *Miranda* and *Mitchell* protected personal constitutional rights. 113 S. Ct. at 1753; *see also* Teague v. Lane, 489 U.S. 288, 329 n.2 (1989) (Brennan, J., dissenting); Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) (distinguishing *Stone* as a case involving "merely" the exclusionary rule, not a "personal right" like the right to the effective assistance of counsel). By contrast, *Powers* protects the constitutional rights of third parties, not defendants. Third, the *Williams* Court reasoned that precluding review of *Miranda* claims would not reduce the costs of habeas litigation since petitioners would recast their claims as involuntary confession claims anyway. 113 S. Ct. at 1754. Such an option is not available for *Powers* claimants. Fourth, the *Williams* majority noted that excluding confessions taken in violation of *Miranda,* unlike the suppression of illegally seized evidence, enhances reliability. 113 S. Ct. at 1753. As I discussed earlier, it is not at all clear what effect the Court thinks the rule in *Powers* has on the reliability of criminal judgments. *See also* 113 S. Ct. at 1768 (Scalia, J., dissenting) (noting that *Mitchell* involved alleged discrimination by the state *judiciary*). Since *Powers,* prosecutors have asked the

When it does, the Court must not lump together the violations of the various constitutional guarantees prohibiting jury discrimination with the exclusionary rule violations considered in *Stone v. Powell*.[252] Jury discrimination neither impairs nor enhances a factfinder's ability to ascertain truth; *it redefines truth.* Debates about future categorical limitations on habeas relief for jury discrimination claims must proceed without the accuracy-based concepts of *Stone* and focus instead on the deterrent and symbolic purposes of the writ in correcting constitutional error.

Heightened sensitivity to the costs of reversing criminal convictions has led to increased dependency on an unassailable premise: innocent people deserve relief.[253] However appealing, this premise cannot help a court decide when to vacate the conviction or sentence of a defendant who claims that citizens were intentionally or systematically excluded from his jury on the basis of their race.

CONCLUSION

As the Court has expanded its definition of jury selection techniques that violate constitutional standards, it has narrowed the circumstances that entitle defendants to postconviction relief. These two developments are now colliding; the emerging law is uncertain. One trend, however, is plain: divisions over the utility and propriety of applying harmless error, prejudice, and innocence standards to jury discrimination claims are deepening.[254] By carefully evaluating the validity of some these disputes, I hope to have made remedial choices more informed and more attainable.

This effort has produced several suggestions for future doctrinal development. First, courts should reconsider their reasons for refusing to review claims of jury discrimination with outcome-dependent standards. Jury studies belie declarations that the effects of jury dis-

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Court to cut back the scope of habeas review for claims of grand jury discrimination. *See* Jefferson v. Morgan, 962 F.2d 1185 (6th Cir.), *cert. denied,* 113 S. Ct. 297 (1992); *see also* Meltzer, *supra* note 13, at 265-66.

252. 428 U.S. 465 (1976).

253. *See Williams,* 113 S. Ct. at 1767 (O'Connor, J., dissenting) ("[T]his Court continuously has recognized that the ultimate equity on the prisoner's side — a sufficient showing of actual innocence — is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim."); *see also* Herrera v. Collins, 113 S. Ct. 853, 869 (1993) (assuming, arguendo, "that in a capital case a truly persuasive demonstration of 'actual innocence' . . . would warrant federal habeas relief").

254. The review of intentional or systematic exclusion of women from juries creates similar problems. *See generally* WALTER F. ABBOTT ET AL., JURY RESEARCH: A REVIEW AND BIBLIOGRAPHY 20-21 (1993); Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection,* 2 UCLA WOMEN'S L.J. 35 (1992).

crimination on jury decisions are insignificant or unknowable. Equally unconvincing are predictions that recognizing the influence of jury discrimination will lead to racial quotas on juries or will compound constitutional injury.[255] Stripped of these convenient but hollow claims, courts must face the controversial task of weighing the deterrent, symbolic, and compensatory benefits of each standard of review against its costs to defendants and society.

Second, close analysis shows that the one remedial tool that the Court has found most attractive — relief based on factual innocence — is least useful in diagnosing or repairing the harm that jury discrimination causes. Unless the Court is prepared to conclude that a juror's ability to determine "truth" varies with her race, it should not require judges to allocate remedies by quantifying the effect of discrimination on verdict accuracy or reliability.

A third recommendation concerns not which review standards to choose, but how to apply the ones we already have. Whatever the eventual scope of harmless error or prejudice review of jury discrimination claims, judges who apply such standards should pay attention to the inescapable conclusions of researchers that juror race can and does affect verdicts. Taking these findings seriously means that judges should welcome evidence that may explain why potential jurors who have been excluded because of their race or ethnicity would have decided cases differently, rather than summarily rejecting such proof as improbable, insulting, or illegal.

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255. *Cf.* United States v. Greer, 968 F.2d 433 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 1390 (1993):

> Courts are understandably reluctant to create the impression that the outcome of the judicial process turns on the race of the participants in that process. . . . On the other hand, so long as racial and ethnic prejudices are part of the human condition, we cannot will them away by refusing to probe both for their presence and their reach in a given case. Stoic pretense will not do.

968 F.2d at 442 (Higginbotham, J., dissenting).