The North Carolina Racial Justice Act: An Essay on Substantive and Procedural Fairness in Death Penalty Litigation

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INTRODUCTION

Like other states that formed part of the Confederacy, North Carolina has had a history of racial prejudice, including executing African Americans at high rates and excluding African Americans from serving on juries.[1] However in 2009, the North Carolina Legislature passed the North Carolina Racial Justice Act, making it the first state to allow courts to consider statistical evidence bearing on discrimination—the type of evidence that the United States Supreme Court refused to allow in *McCleskey v. Kemp*.[2] David Baldus's important corpus of scholarship, especially his famous research in *McCleskey* and his many subsequent articles bearing on racial fairness, provides an opportunity to reflect on why race matters in the context of the Racial Justice Act.

The North Carolina Racial Justice Act provides: "No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."[3] In contrast to the United States Supreme Court ruling in *McCleskey*, the Act specifically allows an appellate court reviewing a death sentence to consider statistical evidence or other evidence showing:

> (1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.
>
> (2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
>
> (3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.[4]

Under the Act, if a defendant successfully shows that racial considerations played a significant part in the prosecution's decision to seek

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1. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2070–76; *see also* Brief of the North Carolina State Conference of the NAACP as Amicus Curiae in Support of Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act, State v. LeGrande, No. 95 CRS 56 (N.C. Super. Ct. Aug. 25, 2010).

2. McCleskey v. Kemp, 481 U.S. 279 (1987). In 2011, the new Republican-dominated legislature passed a bill essentially nullifying the Act, but on December 14, 2011, Governor Beverly Perdue vetoed the bill. Gary D. Robertson, *Beverly Perdue, North Carolina Governor, Vetoes Repeal of Racial Justice Act*, HUFFINGTON POST (Dec. 14, 2011), http://www.huffingtonpost.com/2011/12/14/racial-justice-act-bev-perdue-death-penalty_north_carolina_n_1148776.html.

3. N.C. GEN. STAT. § 15A-2010 (2011); *see also* Sam Favate, *North Carolina Senate Rewrites Racial Justice Act; Gov Urged To Veto Changes*, WALL ST. J. L. BLOG (Nov. 30, 2011, 3:15 PM), http://blogs.wsj.com/law/2011/11/30/north-carolina-senate-rewrites-racial-justice-act-gov-urged-to-veto-changes/.

4. N.C. GEN. STAT. § 15A-2011(b).

or impose the death sentence, the court is required to vacate the death sentence and to resentence the defendant to life imprisonment without the possibility of parole.[5] The Act permits both white defendants and black defendants to challenge their sentences on this basis.[6] To date, 153 persons on North Carolina's death row have used the Act to appeal their sentence.[7]

Professors Catherine M. Grosso and Barbara O'Brien conducted a study of North Carolina death penalty cases (hereinafter the "MSU Study") that is impressive in its scope and methodological rigor.[8] The results of the study have become the focus of appellants challenging their death sentences under the Act.[9] The MSU research examined all but one of the state's 173 capital cases decided between 1990 and 2010: The findings demonstrate that prosecutors consistently exercised peremptory challenges at a significantly higher rate against prospective black jurors than against members of other racial groups.[10]

The first court hearings under the Act began in January 2012 and are likely to play out over a number of years.[11] However, the MSU research has already borne fruit in the case of Marcus Reymond Robinson.[12] Mr. Robinson was found guilty of murder in 1994 and sentenced to death. Appeals were unsuccessful and his execution by lethal injection was scheduled for January 26, 2007, but a civil action challenging the lethal injection protocol stayed the execution.

In August 2009, Mr. Robinson filed a motion for appropriate relief pursuant to the Racial Justice Act. In an extensive evidentiary hearing involving testimony by Professor Grosso and others, including rebuttal evidence by the State, the presiding judge concluded that "race was a significant factor in jury selection."[13] For instance, African American jurors in Mr. Robinson's trial were peremptorily challenged at rates three times

5. *Id.* § 15A-2012(a)(3).

6. *See, e.g.*, *id.* §§ 15A-2010 to -2012; Robertson, *supra* note 2.

7. John Chappell, *DA Questions Racial Justice Act in Court Filings*, PILOT (Southern Pines, N.C.) (Feb. 16, 2012), http://www.thepilot.com/news/2012/feb/17/da-questions-racial-justice-act-court-filings/.

8. *See* Catherine M. Grosso & Barbara A. O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012).

9. *See, e.g.*, Motion for Appropriate Relief Pursuant to the Racial Justice Act at 3–4, State v. Allen, 2010 WL 5864197 (N.C. Super. Ct. Aug. 9, 2010) (Nos. 99 CRS 3818, 3820); Motion for Imposition of Life Sentence Pursuant to the Racial Justice Act at 3, State v. Campbell, 2010 WL 5763853 (N.C. Super. Ct. Aug. 6, 2010) (No. 00 CRS 473–74); Motion for Appropriate Relief Pursuant to the Racial Justice Act at 3, State v. Maness, 2010 WL 5792748 (N.C. Super. Ct. Aug. 5, 2010) (No. 05 CRS 50338).

10. Grosso & O'Brien, *supra* note 8, at 1548.

11. *First Hearing Under NC Racial Justice Act Begins*, GASTON GAZETTE (Jan. 30, 2012), http://gastongazette.com/articles/hearing-66758-justice-racial.html.

12. State v. Robinson, No. CRS 23143 (N.C. Super. Ct. Apr. 20, 2012).

13. *Id.* at 160–67.

greater than white jurors. In consequence, Mr. Robinson's sentence of death was vacated and he was resentenced to life imprisonment without the possibility of parole.

More litigation, involving other appeals under the Racial Justice Act will follow this initial victory.

WHY RACIAL BIAS HARMS THE JUSTICE SYSTEM

In the remainder of this short Essay, I briefly outline three reasons why racial discrimination in death penalty cases—and indeed in all criminal and civil cases—harms the American justice system, regardless of whether the juries are composed exclusively of white persons or composed with only token black jurors. Specifically, the criminal justice system is delegitimized in three distinct—and unacceptable—ways:

(1) Systematic exclusion of death-qualified African American jurors negatively affects a jury's deliberative thoroughness and ultimately the accuracy and fairness of the jury's verdict bearing on life or death;

(2) Systematic exclusion of death-qualified African American jurors from capital trials raises the very realistic specter that both conscious and unconscious racism could have been present in those trials; and

(3) Systematic exclusion of African Americans from capital juries affects the perceived legitimacy of the criminal justice system, especially in the eyes of the large African American community, but also in the eyes of white residents and other minority groups.[14]

A. DELIBERATIVE ACCURACY OF THE JURY

A crucial task of the jury is to have twelve members from different walks of life examine the evidence during trial, evaluate it, and then in subsequent deliberation bring together all of the perspectives of the members in order to reach a verdict. African Americans have unique social and cultural life experiences that can provide insight into the evidence: for example, the social and physical context in which a killing occurred; the reliability of witnesses; the potential motives of the accused; the background of the accused; and other factors, including the weight that should be given to each piece of evidence. In *Peters v. Kiff*, Justice Thurgood Marshall asserted that the group-based exclusion of jurors "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."[15]

Research conducted by legal anthropologist Daniel Swett specifically demonstrates how non-diverse juries may lack multi-cultural perspectives

14. While this Essay's primary focus is on capital trials, the implications of racial exclusion obviously apply to other criminal trials and also to civil trials.

15. Peters v. Kiff, 407 U.S. 493, 503–04 (1972).

and the ability to carefully consider the evidence.[16] One trial that was the focus of Swett's research took place before an all-white jury and white judge. It involved a charge of first-degree murder against an African American man accused of shooting and killing another African American man in a pool-room dispute. The killer, the victim, and the only witnesses to the event were from an inner-city culture.[17] The defendant admitted to the shooting, but claimed the dead man was actually the aggressor and that he had merely been defending himself. The witnesses to the shooting, all from the inner city, unanimously supported the defendant and testified that the deceased man had put the defendant "in the dozens." It was clear from the judge's attempt to clarify the testimony and the puzzlement on the jurors' faces that the jurors were totally confused by the testimony. As Professor Swett documented, the white jurors' unfamiliarity with the witnesses' inner-city vocabulary and subculture, especially with respect to the continuously repeated phrase "in the dozens," led the jury to return a verdict of murder in the second degree based solely on the ground that the defendant admitted that he shot the other man. If even a single African American had been on the jury, it is likely that he or she could have explained to the other jurors that the defendant's and the witnesses' testimony about "in the dozens" was reference to an extreme form of verbal aggression usually directed against the person's mother that frequently leads to violence. In the case before the jury, the aggression was initiated by the deceased man against the defendant. This knowledge could have been critical to the jury in assessing a claim of self-defense. At minimum, it meant the homicide was manslaughter, rather than murder.

The recent 2010 exoneration of Shawn Massey after twelve years in a North Carolina prison, although not a death penalty case, helps to show that Professor Swett's examples are not a relic of history or an anomaly.[18] Mr. Massey, a young black man was convicted of robbery and kidnapping by an all-white jury after a white victim described her assailant as having hair "pulled back from the front with 4 or 5 braids hanging down the back." After Massey was arrested the victim, although expressing some doubts, said Massey "most" looked like her assailant even though Massey did not have braids. Moreover, Massey and his family insisted he had never had braids. Yet, because of the victim's description, police and prosecutors incorrectly assumed the victim's attacker had braids only on the back of his head. They did not understand her trial testimony that the braids went over his head

16. For a detailed explanation of this study see Daniel H. Swett, *Cultural Bias in the American Legal System*, 4 LAW & SOC'Y REV. 79 (1969).

17. *Id.* at 97–98.

18. This case is unreported; Mr. Massey's story is recounted more fully in the files of Duke Law School's Center for Criminal Justice and Professional Responsibility and an August 25, 2010 letter to Governor Beverly E. Perdue from Prosecutor Eric H. Cottrell in support of Shawn Giovanni Massey's Application for a Pardon of Innocence.

from front to back, the hairstyle known as having "cornrows." Prosecutors, defense counsel, and presumably the jurors, assumed that the seven pictures of Mr. Massey without cornrows, some as recent as eleven weeks before the assault, had little significance because the pictures did not show the back of Mr. Massey's head; and they assumed he could have cut off the braids following the assault and robbery. Only recently were investigators from the Duke University School of Law's Wrongful Conviction Clinic able to show that it would have been impossible for Mr. Massey to have grown hair long enough to have it braided into cornrows—something the white police and prosecutors never considered.

Empirical research has consistently confirmed the wisdom of a truly representative jury. In one such study, Samuel Sommers created an experiment comparing six-person juries composed exclusively of white persons with juries composed of four white and two black members.[19] The racially mixed juries engaged in longer deliberations, discussed a wider range of information, and were more accurate in their statements about the case. Interestingly, this was not simply the result of distinctive behavior on the part of black jurors in the mixed juries. White jurors acted quite differently depending on whether they were members of all-white or mixed juries. Compared to whites in the homogeneous juries, whites in mixed juries appeared to be more careful and systematic in their decision-making: they made fewer factual mistakes and raised more pieces of evidence and issues in their deliberations. A substantial body of research on jury decision-making is generally supportive of Sommers' findings.[20] After an exhaustive review of research devoted to the study of racial effects on jury decision-making, researchers Sommers and Ellsworth concluded "that the racial composition of the jury influenced the content and scope of the discussions. Compared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial . . . ."[21]

Research also shows that the incidence of superficial deliberations by all-white juries involving black defendants often cannot be cured simply by placing a single token black person on the jury. As far back as the 1950s, social psychologists began to document a finding that in circumstances where a single member of a group holds opinions that are different from the

19. For an in-depth explanation of this study, see Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

20. *See, e.g.*, Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, LAW & CONTEMP. PROBS., Autumn 1989, at 205. In a compelling essay, Richard Lempert also identified multiple ways that diversity could enhance fact-finding. *See* Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 670–71 (1975).

21. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1028 (2003).

majority opinions, that person is highly likely to withhold dissent and just go along with the majority.[22] However, if that person has an ally, he or she is likely to express that opinion and defend it. Over the intervening decades, hundreds of studies have confirmed this finding, labeled the "Asch effect" after the psychologist who identified it.[23] Put in the context of the current discussion, the absence of a critical mass of black jurors may often have the same detrimental effect on deliberations as the complete absence of black jurors. In other words, even when there is a lone black person on the jury, there is still a significant chance that cultural perspectives bearing on guilt or sentencing may not be heard.

In the context of such findings as summarized above, there is a very reasonable likelihood that some, if not all, of the North Carolina juries composed exclusively of white persons (or those including just one black person) that rendered death verdicts failed to engage in robust deliberations and, moreover, failed to understand and weigh pieces of evidence bearing on guilt and on factors bearing on mitigation.

Vidmar and Hans summarized the representativeness issue this way:

> The idea of a representative jury is a compelling one. A jury of people with a wide range of backgrounds, life experiences, and world knowledge will promote accurate fact-finding for several reasons. . . . [A] diverse group is likely to hold varying perspectives on the evidence, encouraging more thorough debate over what the evidence proves. . . . [T]he inclusion of minorities and women in a representative jury adds their life experiences and insights to the collective pool of knowledge. Research on heterogeneous decision-making groups supports the claim that diverse juries are better fact-finders. Minority jurors contribute their unique knowledge to the general discussion. Furthermore, when whites anticipate participating in a diverse jury, they tend to give more careful assessment of the evidence.[24]

B. CONFRONTING EXPLICIT AND IMPLICIT RACIAL BIAS

The case involving African American defendant, Robert Bacon, helps to illustrate the problems of explicit and implicit racial prejudice. Mr. Bacon, a black man, was sentenced to death twice by all-white juries in a North Carolina county whose population was made up of approximately twenty

22. *See, e.g.*, Michael A. Hogg, *Influence and Leadership*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1179–89 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010)

23. For a general review of this literature, see *id.*

24. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 74 (2007) (footnotes omitted).

percent African Americans.[25] In his first trial in 1987, the jury convicted and sentenced Bacon to death for murdering the white husband of his white girlfriend in a plot that his girlfriend masterminded.[26] In a separate trial, Bacon's white girlfriend was also convicted of first-degree murder. However, unlike Bacon, she was sentenced to life in prison.[27] Because of legal irregularities in the first trial, Bacon received a second trial on his sentence; but like the first trial, the verdict was death even though the jury found that Bacon had no prior history of violent behavior and had acted under the domination of his girlfriend.[28]

Later, a female juror, Pamela Bloom Smith, who served on Bacon's resentencing jury, stated in a sworn declaration that some jurors felt that it was wrong for a black man to date a white woman.[29] Moreover, she also said that some jurors expressed the view that black people commit more crime and that it is typical of blacks to be involved in crime. Smith also stated that some jurors were adamant in their feeling that Bacon was a black man and deserved what he got. According to this juror, the majority of jurors were impatient with those jurors who initially wanted to sentence Bacon to life without parole—they complained that it should have been an easy decision and that the jury was taking too long.[30]

While Bacon's case appears to have involved explicit racial bias, United States Supreme Court case law commentary concludes, and social science research demonstrates, that all-white juries—even those comprised of citizens who honestly consider themselves race-neutral and fair-minded—may tend to exhibit implicit as well as explicit racial biases in their decisions. The presence of black citizens on juries has been shown to alleviate the risks that both conscious and subconscious racial bias may impact criminal justice decisions.[31] In *Georgia v. McCollum*, Justice Sandra Day O'Connor observed 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."[32]

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25. *See* Press Release, Death Penalty Info. Ctr., Racial Discrimination, Inept Defense, and Basic Unfairness Make Pending North Carolina Execution Closer to the Norm (May 11, 2001), *available at* http://www.deathpenaltyinfo.org/node/22.

26. Bacon v. Lee, 225 F.3d 470, 473 (4th Cir. 2000).

27. Press Release, Death Penalty Info. Ctr., *supra* note 25.

28. *Bacon*, 225 F.3d at 475.

29. *See* Declaration of Pamela Bloom Smith (May 10, 2010), for Ms. Smith's full statement.

30. In 2001, Governor Michael F. Easley commuted Bacon's death sentence to life imprisonment without parole. Press Release, N.C. Dep't of Pub. Safety, Governor Consigns Bacon to Life in Prison Without Parole (Oct. 2, 2001), *available at* http://www.doc.state.nc.us/dop/deathpenalty/bacon_commuted.htm.

31. *See, e.g.*, Sommers, *supra* note 19, at 597.

32. Georgia v. McCollum, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting).

In 1993, Professor Nancy King reviewed the then-existing body of research on race and juries.[33] She concluded that, overall, the research indicated that "whenever a connection [between verdicts and juror race] exists . . . white jurors are harsher with black defendants and more lenient with those charged with crimes against black victims than black jurors."[34] Consistent with Justice O'Connor's observation, racial effects do not always result from conscious racism. Social psychologists use the term "implicit bias" as a term to describe the psychological phenomenon, demonstrated in a substantial body of research, whereby even persons who see themselves as liberals on race issues nevertheless often make implicit assumptions about African Americans based on subtle stereotypes.[35] A series of studies have found that whites who professed an egalitarian philosophy were nevertheless quick to attribute negative personality traits to African Americans and positive personality traits to whites.[36] Many other studies unquestionably lead to a conclusion that people who sincerely believe themselves to be non-prejudiced often harbor anti-African American assumptions that influence their behavior and decision-making.[37] The following findings from experimental studies demonstrate the presence of implicit racial bias in juror decision-making.

An experiment by Johnson et al. involved a simulated trial in which white persons serving as jurors learned about circumstantial evidence that incriminated the defendant, but the circumstantial evidence was ruled inadmissible.[38] The defendant was described as either white or black. The results showed that the jurors ignored the incriminating circumstantial evidence when the defendant was described as white, but, despite its judicial proscription, used it in their decisions when he was described as black. In another experiment, Sommers & Ellsworth asked 156 white persons to give their opinions about the guilt of a defendant accused of assaulting his

33. Sommers & Ellsworth, *supra* note 21, at 1003.

34. *Id.* (quoting Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 85 (1993)).

35. *See generally* John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 22, at 1084; Vincent Yzerbyt & Stéphanie Demoulin, *Intergroup Relations*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 22, at 1024.

36. *See generally* Sommers & Ellsworth, *supra* note 21.

37. *See, e.g.*, Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064 (2006) ("[E]vidence from hundreds of thousands of individuals across the globe shows that (1) the magnitude of implicit bias toward members of out groups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, [and] (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias . . . ." (footnotes omitted)).

38. For the details regarding this experiment, see James D. Johnson et al., *Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893, 893–96 (1995).

girlfriend in a bar.[39] In a race-salient version of the event, the defendant allegedly yelled: "You know better than to talk that way about a White (or Black) man in front of his friends."[40] In another version, the defendant was quoted merely as saying "to talk that way about a *man* in front of his friends."[41] When race was made salient, as in the first scenario, the ratings of guilt were about equal for both black and white defendants. However, when race was not made salient, as in the second version, "[w]hites gave higher guilt ratings . . . to the [b]lack defendant than the [w]hite defendant" and rated him as more aggressive and violent than the white defendant and more likely to commit a crime in the future.[42] In summarizing a similar study, Sommers and Ellsworth reported that "[r]acially mixed juries were . . . more likely to discuss racial issues such as racial profiling during deliberations, and more often than not, Whites on these heterogeneous juries were the jurors who raised these issues."[43] Those authors further concluded: "[S]imply knowing that they would be discussing the case with a racially heterogeneous group was sufficient to influence jurors' private judgments."[44] And as the findings showed, those private judgments were unfavorable to African Americans.

The Sommers and Ellsworth review concluded that the findings concerning racial issues involved complex interactions with the type of evidence.[45] For example, when race was made explicitly salient the simulating jurors were on guard against making racially based assumptions, but when the case was described without an explicit mention of race the subtle stereotypes came into play.[46] Furthermore, these findings are consistent with a large body of research demonstrating the subtle, but often invidious, effects of perceptions of African Americans and judgments about criminal behaviors.

These experimental results need to be considered along with the findings of David Baldus and his co-authors, who, by examining actual case files, demonstrated that the killing of a white person compared to a black person increased the likelihood of a defendant being sentenced to death, and, moreover, that black defendants who killed white victims were more

39. *See* Sommers & Ellsworth, *supra* note 21, at 1014–15.

40. *Id.* at 1015 (internal quotation marks omitted).

41. *Id.* (emphasis added) (internal quotation marks omitted).

42. *Id.*

43. *Id.* at 1028.

44. *Id.*

45. *See id.* at 1014–16.

46. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1375–76 (2000).

likely than white persons to receive death sentences.[47] Subsequently, Jennifer Eberhardt and her colleagues used the Baldus et al. database to ask an important question about subtle effects of race of the defendant.[48] Using photographs of actual African American defendants, Eberhardt and her co-authors had the photographs independently rated according to the degree to which the defendants had features that were stereotypically African American.[49] They found that defendants with such stereotypical African American features were more likely to receive a death sentence when they were convicted of murdering white victims.[50] The best explanation for this finding is that the subtle effects of race influenced the decisions of judges and/or juries in a direction that favored death.

In his award-winning book, Craig Haney expanded upon those basic research insights about conscious and unconscious racial bias.[51] He concluded:

> Attributing deeper and more negative traits and motives to minority group members in our society—traits and motives that are represented and perceived as natural, intrinsic, and immutable—makes it even more difficult for whites to appreciate the role of social history and present circumstances in shaping the life course of African Americans.[52]

Professor Haney described experiments that confirmed the effects of race issues among white jurors. In a review of fourteen different studies conducted by various researchers, he concluded that jurors sentenced differently as a result of the racial characteristics of the case. Haney and a collaborator followed up this finding with their own research using samples of death-qualified, jury-eligible adults.[53] The study varied the race of the defendants and the race of the victims. Haney summarized the findings as follows:

> [W]e found that . . . white participants interpreted aggravating and mitigating circumstances differently as a function of the racial characteristics of the case. In particular, they tended to weigh

47. David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

48. *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

49. *Id.* at 383–84.

50. *Id.* at 385. Notably, the researchers "found that the perceived stereotypicality of Black defendants convicted of murdering Black victims did not predict death sentencing." *Id.*

51. CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM (2005).

52. *Id.* at 204.

53. *Id.* at 205. Haney also used samples of students and obtained essentially the same results. *Id.* at 204–05.

> aggravating circumstances more heavily when the defendant was African American. Similarly, they were reluctant to attach much significance at all to mitigating circumstances when they were offered on behalf of an African American defendant. The participants also mentioned "stereotype-consistent" reasons for their sentencing verdicts (i.e., negative qualities of the African American defendants), and they appeared less able or willing to empathize with or enter the world of African American defendants.[54]

Haney also reported that his research showed that

> white jurors sentenced African American defendants to death more often than they did whites. There was about a 10-percentage-point overall difference that was determined by race—white defendants were given death sentences a little more than 40% of the time, African American defendants a little more than 50%. The harshest sentencing occurred in the black defendant/white victim condition, where death sentences were rendered by 54% of the participants.[55]

Although the effects of implicit bias in jury deliberations, verdicts, and sentencing is well documented, research findings indicate that the presence of African Americans on the jury is likely to reduce the outright expression of racial bias. Even if jury members have strong biases, diversity ensures a range of biases, which can cause the jurors to examine the assumptions behind their individual perspectives during deliberations and thereby explore the testimony and other evidence more thoroughly.

In summary, research indicates that juries that exclude African Americans are more likely to exhibit racial biases, even if they believe they are fair-minded and not racially biased. Conversely, the presence of African Americans on juries helps to prevent such biases from tainting the deliberations.

C. SERIOUS HARM TO THE PERCEIVED LEGITIMACY OF THE CRIMINAL JUSTICE SYSTEM

The United States Supreme Court's 1970 opinion in *In re Winship* held for the first time that the Due Process Clause requires proof beyond a reasonable doubt.[56] In describing the societal interests in the reliability of jury verdicts, the Court said:

> The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The

54. *Id.* at 205.

55. *Id.*

56. *In re* Winship, 397 U.S. 358, 364 (1970).

> accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . .
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.[57]

In short, the United States' constitutionally required procedures have two functions: one is fairness to the individual; the second is ensuring the confidence of the community. Both are critical to the moral force of the law, its acceptance, and consequent compliance with laws.

Almost four decades ago, social psychologist John Thibaut and law professor Laurens Walker published their seminal studies on what makes people evaluate the legal system as fair or unfair.[58] Following their path-breaking research, literally hundreds of studies have investigated factors that people use to evaluate whether legal procedures are fair, an issue that has a direct bearing on whether citizens view a justice system as fair and impartial and thus should be accorded legitimacy.[59] One central implication of these studies' findings is that the opportunity to participate in the legal system is critically important in evaluations of a system's legitimacy.[60]

From a normative perspective, the United States Supreme Court has recognized the need for legitimacy of the legal system in many cases, especially in the context of race. For example, in 1991, the Court in *Edmonson v. Leesville Concrete Co.* asserted:

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. In the many times we have addressed the problem of racial bias in our system of justice, we have not "questioned the premise that racial discrimination in the qualification or selection of jurors offends the

57. *Id.* at 363–64.

58. *See* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

59. See, for example, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006), for a review of some of this literature. *See also* Valerie P. Hans & Jonathan D. Casper, *Trial by Jury, the Legitimacy of the Courts, and Crime Control*, *in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 93 (Lawrence M. Friedman & George Fisher eds., 1997); Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65 (2008).

60. TYLER, *supra* note 59; Hans & Casper, *supra* note 59; Sommers, *supra* note 59.

> dignity of persons and the integrity of the courts." To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.[61]

The Court made a similar statement in *Powers v. Ohio*:

> [The process of excluding racial minorities] 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.[62]

While excluding African Americans from serving on capital juries harms accurate fact-finding and removes obstacles to the expression of conscious and subconscious racial bias, it also, as the Court in *Edmonson* observed, harms the legitimacy of verdicts. This is likely to be especially true for Americans who also happen to be African Americans.

CONCLUSION

Much more could be said about racial issues and their relevance to North Carolina's Racial Justice Act. For present purposes, however, it is sufficient to observe that David Baldus's seminal work on racial unfairness in *McCleskey* and his subsequent corpus of research formed the intellectual groundwork for the development of the Act. The research by Grosso and O'Brien is a direct descendant of Baldus's work and of a quality and rigor that is consistent with his extremely high standards. Dozens of North Carolina death row inmates are now challenging their sentences based on racial disparities. That litigation is still in its early stages and even though Marcus Reymond Robinson has had his death sentence overturned, it is yet unclear how other North Carolina courts will ultimately respond to the clear evidence of racial bias, especially in the light of a very recent development.

On June 21, 2012, the North Carolina General Assembly modified the Racial Justice Act, overriding a veto by the Governor. Republicans gained control of the Assembly in the 2010 elections and almost immediately set out to change the relevance of statistical evidence. The revised Act states that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor" in jury selection and that "[t]he State may offer evidence in rebuttal of the claims or evidence of the defendant, including, but not

61. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (citations omitted) (quoting Powers v. Ohio, 499 U.S. 400, 402 (1991)).

62. *Powers*, 499 U.S. at 412.

limited to, statistical evidence."[63] Despite this setback, litigation on behalf of death row inmates is continuing and will likely be before North Carolina courts for many years.

In this brief Essay, I have sketched three important reasons, backed by empirical research, that indicate why David Baldus's work is so important. Racial disparities in jury selection undermine the legitimacy of the legal system. On the other hand, racial inclusion increases jury accuracy, it mitigates implicit racism, and it fosters legitimacy of legal decisions. Our colleague Baldus never lost hope about eventually achieving racial fairness, and his intellectual heirs will continue the fight—in North Carolina and other states.

63. Act To Amend Death Penalty Procedures, ch. 15A, 2012 N.C. Sess. Laws 136; *see also* Allen Reed, *NC Hearing Held on Reworked Racial Justice Act*, S.F. CHRONICLE (July 6, 2012), http://www.sfgate.com/news/article/NC-hearing-held-on-reworked-Racial-Justice-Act-3689053.php; Wade Rawlins, *North Carolina Lawmakers Override Race-Bias Death-Row Veto*, HUFFINGTON POST (July 2, 2012), http://www.huffingtonpost.com/2012/07/03deathpenalty-north-carolina_n_1644919.html/.