These efforts must be closely aligned with the larger, ongoing project of changing the structures that maintain these stereotypes and inhibit genuine justice for Native peoples. As Eric Yamamoto and Ashley Obrey contend, this broader project may involve "scrutiniz[ing] the history of the grievance and decod[ing] stock stories embodying cultural stereotypes that seemingly legitimize the injustice" and "examin[ing] the institutional – the ways that organizational structures can embody discriminatory policies that deny fair access to resources or promote aggression."[72] It may also require governments to recognize the harms done against Native peoples; accept responsibility for the damage and for taking action to repair that damage; work to reconstruct Native governance and new productive relationships between the federal, state, and Native governments; and take reparatory actions that promote reconciliation between the United States and its Native peoples. Although this effort can take many forms, it means the United States must support greater Native political authority, control of lands and resources, and cultural sovereignty to begin repairing the persisting damage of historic injustice.

IV. CONCLUSION

Justin Levinson maintains that "debiasing measures may be highly scientific and sometimes cognitively inaccessible." For this reason, he asserts that reducing or eliminating implicit bias requires both a de-biasing and a "cultural" solution, which "requires recognizing the link between historical and societal discrimination and the continued exhibition of implicit biases." Addressing implicit racial biases thus "requires more than a scientific effort at debiasing through cues and primes. It requires a recognition that their very existence reflects the state of American culture. And this recognition, in turn, calls for steps that will facilitate cultural change" as "part of a larger movement to achieve social equality, healing, and the overcoming of historical injustice."[73]

As such, we contend that attempts to lessen or eliminate implicit bias against Native peoples as sovereigns form an integral element of the larger, ongoing project of repatriating Native lands, resources, and sovereignty to Native peoples. This effort must take into account the deep historical, cultural, social, and psychological roots of the negative stereotypes that serve to legitimize injustices, as well as seek to change the structures (legal, cultural, political, and otherwise) that serve to maintain these stereotypes.

[72] Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States–Native Hawaiian and Japan–Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 33 (2009).

[73] Levinson, *supra* note 4, at 418.

14

Capital Punishment

Choosing Life or Death (Implicitly)

Robert J. Smith and G. Ben Cohen

"Even under the most sophisticated of death penalty statutes, race continues to play a major role in determining who shall live and who shall die."

– Justice Harry Blackmun[1]

A Fulton County, Georgia, jury sentenced Warren McCleskey, a black man, to death for the murder of a white police officer. McCleskey argued on appeal that his sentence should be reversed because race discrimination plagued the administration of the death penalty in Georgia. To make the claim, McCleskey presented a comprehensive statistical study that tracked more than 2,000 Georgia murder cases.[2] The raw numbers established that defendants charged with killing white persons received the death penalty in 11% of cases, whereas defendants charged with killing black persons received the death penalty 1% of the time.[3] The raw numbers also established that black defendants charged with killing white victims (as opposed to those who killed black victims) were twenty-two times more likely to be sentenced to death.[4] Once adjusted to account for more than two-hundred case-related factors, the Baldus study demonstrated that a defendant charged with killing a white victim was 4.3 times more likely to receive a death sentence than a defendant charged with killing a black victim.

In 1987 in *McCleskey v. Kemp*,[5] the U.S. Supreme Court rejected the challenge to Georgia's death penalty system despite the overwhelming statistical evidence suggesting that race (and especially race of the victim) played a significant role in whether a defendant received the death penalty. The Court accepted the race

[1] Callins v. Collins, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting from denial of certiorari).

[2] McCleskey v. Kemp, 481 U.S. 279, 286 (1987).

[3] *Id.* at 287.

[4] *Id.*

[5] 481 U.S. 279, 297–98 (1987).

disparities for the sake of argument, but observed that the studies that McCleskey presented could not prove that race bias affected *his* particular case. In dissent, Justice Brennan labeled the Court's position that such claims "would open the door to widespread challenges to all aspects of criminal sentencing" as "a fear of too much justice."[6]

Fast forward to the present. Although it is more difficult to imagine juries making explicitly race-based decisions, empirical studies continue to document the presence of race discrimination in the administration of the death penalty. For instance, in 2010, Professors Michael Radelet and Glen Pierce compared the race of the victim in roughly 15,000 homicides that occurred in North Carolina between 1980 and 2007 with the race of the victim in the 352 homicide cases that resulted in a death sentence over the same time period.[7] The researchers documented that a defendant is three times more likely to get a death sentence in North Carolina for murdering a white person than for killing a black person.[8]

A 2010 study of homicides in East Baton Rouge, Louisiana, documented the same trend. Professors Radelet and Pierce researched 1,100 potentially capital crimes committed in East Baton Rouge Parish between 1990 and 2008.[9] Their research indicated that prosecutors pursued capital cases 364% more often when the victim was white than when the victim was black. The researchers also found that black citizens represented 82% of homicide victims in East Baton Rouge Parish, yet the victim was white in more than half of the cases in which a death sentence was imposed.

With the appearance of declining explicit racism, the continued presence of race disparities, and a reluctant Supreme Court, explaining and remedying race effects in capital punishment resemble a Gordian knot. Reframing the issue through the lens of implicit bias, however, helps explain the dogged persistence of race disparities and also points us toward the steps that courts, as well as defense lawyers and egalitarian-minded prosecutors, might take to decrease the risk of race effects before a jury issues a death sentence in a particular case. It also gives rise to the view that the post-Gregg[10] death penalty schemes – where a jury's determination that a specific defendant should receive the death penalty is made with unfettered discretion in which "subtle, less consciously held racial attitudes could also influence a juror's decision"[11] – are unable to eliminate the concern that animated the Court in *Furman v. Georgia*[12] to eliminate the death penalty.

6 *Id.* at 339 (Brennan, J., dissenting).
7 Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina 1980–2007*, 89 N.C. L. Rev. (Forthcoming 2011).
8 *Id.*
9 Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 La. L. Rev. 647 (2011).
10 Gregg v. Georgia, 428 U. S. 153 (1976).
11 Turner v. Murray, 476 U.S. 28, 42 (1986).
12 Furman v. Georgia, 408 U.S. 238 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.").

This chapter proceeds in three parts. Part I provides context by describing implicit racial bias and exploring the broad contours of its relationship to death penalty prosecutions. Part II focuses on three discrete locations in a capital trial where the operation of implicit racial bias could have the most damaging effect: (1) during consideration of aggravating evidence, (2) during consideration of mitigating evidence, and (3) during the introduction of victim impact statements. In Part III, we offer concluding thoughts and also consider how the capital trial–related phenomena we discuss throughout the chapter might also apply in the capital plea-bargaining context.

I. IMPLICIT RACE BIAS AND DEATH PENALTY PROSECUTIONS

Implicit social cognition describes the process by which the brain uses "mental associations that are so well-established as to operate without awareness, or without intention, or without control."[13] Professor Jerry Kang gives the following example:

> When we see something with a flat seat, a back, and some legs, we recognize it as a "chair." Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category "chair." Without spending a lot of mental energy, we simply sit.[14]

The mental associations that allow us to recognize an object as a "chair" operate through the mind's use of schemas. Schemas are "templates of knowledge that help us organize specific examples into broad categories."[15] These schemas may represent actual shortcuts in the neural network. "Stereotypes" refer to the schemas that we use to categorize people. The stereotypic beliefs we hold often do not operate explicitly. Although we are increasingly unlikely to admit to harboring (or even to be consciously aware of) negative racial attitudes, a plethora of research studies show that people of all races continue to harbor negative implicit biases against black citizens and members of a variety of other groups. Indeed, implicit social cognition studies often detect bias in people who sincerely believe that they are color-blind or race neutral.

The pernicious effects of implicit racial bias are concentrated around decision points marked by a high degree of discretion. The decision to sentence someone to death is inherently subjective and depends, in part, on how jurors quantify harm: All

13 *FAQ #22*, Project Implicit, https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq2 (last visited September 26, 2011).
14 Jerry Kang, Implicit Bias: A Primer for Courts (2009), http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf.
15 *Id.*

murders are horrible, but is *this* murder among the "worst of the worst"? How much suffering did the murder cause the victim's family? What are the characteristics and attributes of the person who committed the crime? This triangle of factors drives capital sentencing determinations. Each requires emotional and moral processing, which, despite our best efforts, is mediated by race. The argument we make here is that implicit bias could have an impact at multiple points from the initial decision to charge a case capitally, to the decision whether to offer (and accept) a plea to life imprisonment, to the consideration of aggravating and mitigating evidence, to the penalty phase deliberation process. We claim that these instances of bias aggregate throughout the capital case and become visible as we look at statistical disparities over a number of cases.

The bottom line is that black individuals do worse as both defendants and victims in capital trials. We propose that this might be because when decision-makers (e.g., prosecutors, judges, and jurors) think of people who deserve the ultimate punishment, they think of black defendants as more inherently violent, dangerous, and prone to criminality than white defendants. Jurors might also see black defendants as being less fully human and thus might be more likely to believe in the need to resort to physical means of control or retaliation, whereas these same jurors might believe that the possibility of change, rehabilitation, or redemption in white offenders calls for less severe punishment.

Consider the following two studies, both of which suggest that something about the capital trial itself produces discriminatory outcomes. First, a study by Professor Jennifer Eberhardt investigated whether a capital defendant's afro-centric features influenced evaluations of his death-worthiness.[16] Eberhardt used pictures of forty-four black capital defendants who had been convicted of killing white victims and whose trials reached the penalty phase. She then asked participants (who were not told that the men in the pictures had committed any crime) to rate each picture in terms of how stereotypically black the person appeared to be (e.g., thick lips, wide nose). After controlling for nonracial factors known to have an impact on capital sentencing, she found that afro-centric features correlated with being sentenced to death. Indeed, black defendants whose afro-centric features situated them among the top half of the stereotypicality distribution were more than twice as likely to receive a death sentence.

In another study, Professor Jack Glaser and his colleagues tested whether a defendant's race has an impact on the likelihood that jurors find him to be guilty of first-degree murder in a case in which the death penalty is a sentencing option.[17] Participants read materials from a fictional triple murder. Half of the participants were told that death was the maximum punishment possible, whereas the other half were told that life without the possibility of parole was the maximum sentence. Half of the defendants were black, and half were white. Participants told that the death penalty was the maximum possible punishment convicted black defendants 25% more often than white defendants, whereas participants told that the maximum sentence was life without the possibility of parole did not convict black defendants significantly more often than white defendants. Because defendant race appears to have a stronger impact on verdict outcomes in cases where death is a possible sentence, Professor Glaser and his colleagues suggested that "capital punishment may be more than another domain of racial disparities; it may actually be a cause."[18]

Taken together, the results of these two studies, each of which show the possibility that something in the capital trial process itself drives discriminatory results at both the guilt and penalty phases of a capital trial, warrants a careful review of the primary avenues by which implicit racial bias enters into capital cases. The remainder of this chapter explores the unique ways in which implicit racial bias can operate in trials where the government seeks the death penalty. Our thesis is that implicit race bias presents an unacceptably high risk that race will infect *all or almost all* interracial capital trials (but especially those with a black defendant and a white victim). Moreover, the comparative lack of bias against white defendants, or the diminished perception of gravity of harm with black victims, completes an ugly privilege. Ultimately, the decision to sentence a person to death is based not on a rational determination, a weighing of the evidence, or the finding that the particular defendant is indeed guilty of the worst of the worst offenses, but rather on a series of unconscious decisions, by prosecutors, judges, jurors, and even defense lawyers in which race affects the processing of the underlying evidence and tilts the scales of justice.

The remainder of the chapter proceeds with a focus on the operation of implicit racial bias at three points in capital cases where discretion is at its peak and thus arbitrary factors such as race are most likely to creep into the process. The next section focuses on how implicit race bias might color consideration of facts that aggravate a crime. We then explore how implicit bias can inhibit full consideration of factors presented by the defendant to mitigate the crime or to humanize him- or herself to the jury. Finally, we consider how the introduction of victim impact evidence might activate implicit biases that are responsible for a significant part of the often documented race-of-the-victim effect.

II. UNDERSTANDING THE ROLE OF IMPLICIT BIAS IN A CAPITAL TRIAL: AGGRAVATING EVIDENCE, MITIGATING EVIDENCE, AND VICTIM IMPACT STATEMENTS

In 1972 the U.S. Supreme Court enacted a sea change in the administration of capital punishment, holding in *Furman v. Georgia* that the Eighth Amendment requires that the death penalty be reserved for the worst offenders who commit the worst

[16] *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 386 (2006).

[17] *See, e.g.*, Jack Glaser et al., *Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants*, GOLDMAN SCHOOL OF PUBLIC POLICY WORKING PAPER NO. GSPP09-002 (2009), *available at* http://ssrn.com/abstract=1428943 (last visited September 26, 2011).

[18] *Id.*

offenses. The elements introduced at trial that determine whether a particular case satisfies that criteria are known as aggravating factors (those that tend to make death the more appropriate punishment) and mitigating factors (those that tend to make life the more appropriate punishment). Balancing these aggravating and mitigating factors, which nearly all states require capital jurors to do, is the epitome of a high-stakes, hopelessly discretionary determination. Justice Kennedy described this effort as "still in search of a unifying principle" and "not all together satisfactory."[19] It requires jurors to reach a decision that "reflect[s] a reasoned moral response to the defendant's background, character, and crime."[20] It leaves plenty of room for implicit bias to operate.

Jurors are asked to distinguish among defendants who have done horrible things and to make a reasoned moral response as to which of these people who have committed murder deserve to be executed and which deserve to be sentenced to life imprisonment. Implicit racial bias colors the way that the jurors evaluate the evidence, and thus in identical cases jurors assessing the evidence against black defendants might find them to be more dangerous (or to have committed a more brutal crime) or less deserving of empathy (or mercy) than if they had been white. Research by Professor Justin Levinson and Dr. Danielle Young supports the argument that jurors need not hold explicit negative attitudes toward black defendants for implicit beliefs to have an impact on how the juror assigns weight to evidence.[21] In their study, after reading about a fictional robbery at a Mini Mart, each participant was then asked to view five pictures from the crime scene in sequence for four seconds each. The first, second, fourth, and fifth pictures were irrelevant. The third picture depicted a masked assailant reaching over the counter with a gun in his left hand. Half of the participants saw a picture with the visible forearm of a dark-skinned suspect; the others saw the visible forearm of a light-skinned suspect. The participants were told the police had apprehended a suspect and were asked to evaluate several pieces of ambiguous evidence and determine the probative value of each piece.

Participants shown the photo of the dark-skinned suspect found the ambiguous pieces of evidence to be more probative of guilt and determined the suspect to be guilty far more often than those shown the light-skinned suspect. These findings correlated with the implicit biases of participants (as measured by performance on the IAT) but not with their explicit racial attitudes. This study demonstrates that the implicit attitudes and stereotypes that a juror holds can influence how that juror evaluates otherwise neutral pieces of evidence. When the evidence being evaluated

[19] Kennedy v. Louisiana, 128 S. Ct. 2641, 2659 (2008).
[20] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 n.14 (1994) (quoting Penry v. Lynaugh, 492 U.S. 302, 319 (1989).
[21] *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010).

is relevant to the evaluation of how aggravated a murder (or murderer) is, and the preconceived implicit stereotype is that black persons are violent and prone to criminality, then it is reasonable to conclude that implicit race bias introduces an arbitrary factor into the capital sentencing determination.

A. *Aggravating Evidence*

Every death penalty jurisdiction has a list of statutory aggravating factors, at least one of which the prosecution must prove to a jury beyond a reasonable doubt before a convicted murderer can be "death-eligible." Two aggravating factors in particular require subjective moral evaluations of the crime and the offender and thus are particularly subject to the influence of implicit racial bias. One of the most common aggravators is known as the Heinous, Atrocious, or Cruel (HAC) aggravator.[22] States define HAC differently. For instance, in *Maynard v. Cartwright*, the Court implicitly approved of a definition of the Oklahoma HAC aggravator as being applicable to murders with "some kind of torture or physical abuse."[23] Similarly, in *Walton v. Arizona*, the Court noted its approval of the Arizona Supreme Court's construction of the Arizona HAC aggravator as applying to a murder in which "the perpetrator inflicts mental anguish or physical abuse before the victim's death" and the "[m]ental anguish includes a victim's uncertainty as to his ultimate fate."[24] To determine whether HAC applies, jurors must make "reference to community-based standards, standards that incorporate values,"[25] and thus the decision that a murder was heinous, atrocious, or cruel is not the same as finding that an objective fact (for instance, that the defendant pulled the trigger on a gun that killed a convenience store clerk) exists.

Jurors asked to determine whether a crime was heinous, atrocious, or cruel necessarily must answer whether the defendant intended to commit a murder with the degree of depravity required to find the HAC aggravator applicable. As jurors look over to the defendant, what they see might have an impact on that finding. If they see a black person, then that visual cue might activate stereotypes about black citizens, such as the stereotypes of black persons as violent, dangerous, and prone to criminality. Recall the Eberhardt study (discussed in Chapter 3 on criminal law and procedure[26]), in which participants were able to identify an object as a "knife" or a "gun" more quickly when primed with a consciously imperceptible image of a black face. The study suggests that simply looking at a black defendant could trigger

[22] *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348, 361 (2004) (Breyer, J., dissenting) (noting that "[t]he leading single aggravator charged in Arizona . . . requires the fact-finder to decide whether the crime was committed in an "especially heinous, cruel, or depraved manner").
[23] Maynard v. Cartwright, 486 U.S. 356, 365 (1988).
[24] Walton v. Arizona, 497 U.S. 639, 654 (1990).
[25] Schriro, 542 U.S. at 361 (Breyer, J., dissenting).
[26] *See* Chapter 3 at 48.

negative associations that color the perception that a murder is particularly heinous, atrocious, or cruel.

A second aggravating factor – statutorily defined in some states and implicitly referenced in catchall aggravators in other states – is whether a defendant is a "future danger." Like the HAC aggravator, the future dangerousness aggravator does not require that jurors simply determine that an objective fact has been proved. Instead, it requires jurors to answer subjective questions about how scary a defendant (and his or her past actions) seems to be and then to make a probabilistic determination about future conduct. Thus, the future dangerousness finding requires the type of moral processing that triggers associations between black persons and criminality and violence. As the Court wrote in *Turner v. Murray*, "a juror who believes that blacks are violence prone . . . might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under [the] law."[27]

The stereotype of black persons as violence prone also appears to elicit fear, which in turn amplifies the perception that a defendant is dangerous. This stereotype that black persons are fearsome appears to be so powerful as to activate a discriminatory response at the neurological level. Professor Matthew Lieberman and colleagues used functional magnetic resonance imaging (fMRI) scans to record brain activity in participants who had just been exposed to either a black face or a white face.[28] The study found that, when participants were shown black faces, brain activity spiked (for both white and black participants) in the region of the brain responsible for responding to possible threats and other hostile activity. The presence of a stereotypic belief that a black defendant is more violence prone combined with a fear-based response toward the black defendant creates an unacceptable risk that the dangerousness evaluation is influenced by the race of the defendant.

B. *Mitigating Evidence*

To be eligible for a possible death sentence a capital defendant must be convicted of murder plus an aggravating factor. However, the jury is not authorized to return a death sentence against a death-eligible offender until it has considered any mitigating evidence that the defendant proffers. In *Woodson v. North Carolina*, the Supreme Court held that the Eighth Amendment requires that the jury consider the "relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," to determine whether any "compassionate or mitigating factors stemming from the diverse frailties of humankind" warrant a sentence less than death.[29] The most common types of mitigation evidence offered

[27] Turner v. Murray, 476 US 28, 35 (1986).
[28] Matthew D. Lieberman et al., *An fMRI Investigation of Race-Related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCIENCE 720 (2005).
[29] Woodson v. North Carolina, 428 US 280, 304 (1976).

by the defense include evidence of diminished intellectual functioning, of childhood abuse, and of severe mental illness. This section argues that the persuasiveness of mitigating evidence could be mediated by implicit racial bias, or as the Court wrote in *Turner*, once negative stereotypes about black persons are activated, jurors "might also be less favorably inclined towards the defendant's evidence of mitigating circumstance."[30]

There are at least three ways that implicit bias could seep into this process. First, negative stereotypes about black defendants could create active hostility, which could block an empathic response. This factor is the flip side of the dynamics discussed in the previous section. Second, the defendant might become dehumanized, which also could block an empathic response. For example, in *Darden v. Wainwright*,[31] the Court discussed a case where the prosecution referred to the defendant during closing arguments as an "animal" that "shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." In a recent Louisiana case, the prosecution referred to the black capital defendant as "[a]nimals like that (indicating)" and implored the jury to "be a voice for the people of this Parish" and to "send a message to that jungle."[32] The use of animal imagery in reference to the accused stirs up the exact type of emotional response that allows jurors to stop pondering the accused as an individual human being.[33]

Compelling empirical research suggests that referring to the accused in non-human terms dehumanizes the defendant in the eyes of the jurors and results in harsher punishment. Professor Philip Goff and colleagues asked participants to view a degraded image of an ape that came into focus over a number of frames.[34] When primed with a consciously undetectable image of a black face, participants were able to identify the ape in fewer frames; conversely, when primed with a consciously undetectable white face, participants required more frames to detect the ape than when they received no prime at all. These studies indicate that citizens implicitly associate blacks with apes, a finding that heightens the concern surrounding the use of animal imagery during prosecution.

Building on this theme, Professor Goff next explored the black-ape association in the context of capital decision-making by comparing the frequency of animalistic references to black capital defendants with that of similar references to white defendants in a dataset of 600 capital cases prosecuted in Philadelphia between 1979 and

[30] Turner, 476 U.S. at 35.
[31] Darden v. Wainwright, 477 U.S. 168 (1986).
[32] Louisiana v. Harris, 820 So. 2d 471 (La. 2002). *See also* Philip A. Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 292 (2008) (noting that "[o]ne of the officers who participated in the Rodney King beating of 1991 had just come from another incident in which he referred to a domestic dispute involving a Black couple as 'something right out of *Gorillas in the Mist*'").
[33] *See id.* (quoting Caldwell v. Mississippi, 472 U. S. 320, 340 n.7 (1985) (discussing the "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves").
[34] *See* Goff et al., *supra* note 32, at 294–97.

1999.[35] The study found that coverage from the *Inquirer*, Philadelphia's major daily newspaper, of black capital defendants included, on average, nearly four times the number of dehumanizing references *per article* than articles covering white capital defendants. Furthermore, the study found a strong correlation between the number of times an animalistic reference was made and the likelihood that the defendant was sentenced to death.[36]

The government – in capital cases – is seeking nothing less than an agreement of twelve jurors to kill another human being. As cognitive scientist David Livingstone Smith recently wrote, "thinking of humans as less than human" is essential to exterminate a human being in "cold blood."[37] Implicit racial bias research teaches us that transforming defendants into a less-than-human species is easier when the defendant is black.

The third way in which implicit bias could affect evaluations of mitigating evidence relates not to a disfavoring of black defendants, but to a favoring of white defendants. The aim of mitigation evidence is to trigger an empathic response in jurors by creating a narrative that humanizes a person who has been convicted of committing what most imagine to be an unfathomable act. To be receptive to mitigation evidence jurors must be able to place themselves in the defendant's position. This is a difficult task. Neuroimaging studies reveal that members of extremely marginalized groups (e.g., the homeless) – a category in which convicted murderers likely fall – "are so dehumanized that they may not even be encoded as social beings."[38] Professor Goff explained that individuals from outgroups "who elicit disgust" and those "who are the least valued in the culture" appear not to be "deemed worthy of social consideration on a neurological level."[39] If all defendants who enter the penalty phase begin at this disadvantage of being dehumanized by virtue of their conduct, then it takes powerful mitigation evidence presented in a compelling narrative to humanize a capital client.

The task is often more difficult still when the defendant is black. Most jurors in capital cases are white. When white jurors connect the mitigation evidence presented by the defendant to their own life experiences (or to those of family or friends), the process is adulterated by the phenomenon of ingroup bias. Or, as Justice Scalia put the point in his dissent in *Powers v. Ohio*, there exists an "undeniable

[35] *Id.*

[36] *See id.* at 305 ("despite the fact that we controlled for a substantial number of factors that are known to influence criminal sentencing, these apelike representations were associated with the most profound outcome of intergroup dehumanization: death").

[37] David Livingstone Smith, Why We Demean, Enslave, and Exterminate Others (2011). Smith traces, for instance, the manner in which Nazis explicitly referred to Jews as "subhumans" in order to render it more permissible to exterminate them.

[38] *See* Goff et al., *supra* note 32, at 294.

[39] *Id.*

reality . . . that all groups tend to have particular sympathies and hostilities – most notably, sympathies toward their own group members."[40]

The result is that white citizens receive the benefit of an enhanced ingroup empathic response. A recent study used transcranial magnetic stimulation (TMS) to measure corticospinal activity level in participants who were shown short video clips of a needle entering into the hand of either a light-skinned or dark-skinned target.[41] Consistent with the ingroup empathic bias explanation, researchers here found that region-specific brain activity levels are higher when a light-skinned participant views the clip of a light-skinned participant experiencing pain than when a light-skinned participant sees a clip of a dark-skinned target being subjected to pain.

According to Professor Jerry Kang this "[i]ngroup bias is so strong that people explicitly report liking 'ingroups' even when they are randomly assigned to them, and even when the groups are made up. For example, being arbitrarily placed in the category 'Quan' or 'Xanthie' – groups that do not exist, and thus should be considered equivalent – generated implicit biases within participants in favor of their assigned group."[42] Kang highlighted that the most disturbing element of ingroup bias is that the more socially privileged a group is perceived to be – for example, white over black – the stronger the biases held in favor of the group.

Of course, in the capital sentencing context, we are not talking about "Quans" or "Xanthies" but people – and when white jurors view the world through ingroup bias, then those jurors can imagine themselves in the shoes of the white defendant; for example, that defendant could remind one juror of her brother who suffers from schizophrenia, or another juror of his borderline mentally retarded cousin, or a third juror of her friend who was sexually and physically abused as a child. When jurors can imagine that defendant's experiences as something that someone they know could experience, that empathic response triggers a favorable implicit bias toward the white defendant. In contrast, if white jurors are not able to connect with the mitigation evidence because they see a black defendant, and the negative stereotypes of black people have been automatically triggered, then that lack of empathic response biases the black defendant, even though jurors might not hold any explicit racial prejudices against black persons.

Black jurors likely are more able to empathize with mitigation evidence presented by black defendants. It is very possible, however, that this ability to empathize with a black defendant's struggles and defects results in the disqualification of a disproportionate number of black jurors from jury service in the first place. Capital juries – unlike any other – are asked whether they could impose a death sentence

[40] Powers v. Ohio, 499 U.S. 400, 424 (1991).

[41] Alessio Avenanti, *Racial Bias Reduces Empathic Sensorimotor Resonance with Other Race Pain*, 20 Current Biology 1018, 1018–22 (2010).

[42] Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 475 n.37 (2010).

on the defendant sitting in front of them. As such, death-qualification jury selection tests whether a juror, looking over at a defendant, can imagine imposing a death sentence. Considering imposition of a death sentence at the outset of voir dire – before the presentation of evidence that generates moral outrage – requires some ability to set aside the human condition. By this, we mean that considering a death sentence – not in the abstract but for the person sitting fifty feet away – requires potential jurors to contemplate whether they are willing to be responsible for deciding to end a particular person's life (should the facts so warrant) before they know anything about the person. If white jurors view a black defendant as inherently dangerous or as someone less human than themselves, then they might find it easier to agree to being able to consider a death sentence. In what he deemed "the death penalty priming hypothesis," Professor Justin Levinson contemplated that the process of questioning jurors about their ability to return a possible death sentence ("death-qualification") activates stereotypes about black persons, which in turn, make jurors more punitive against black defendants.[43] It might be that as these stereotypes become activated black potential jurors are eliminated from consideration because they express hesitation about the prospect of returning a death sentence and white jurors are seated because they are able to picture sentencing the dangerous, less-than-human defendant to death. If so, the operation of implicit bias interrupts consideration of mitigation evidence before the trial even begins.

C. *Victim Impact Statements*

The previous subsection on implicit racial bias and the evaluation of mitigating evidence demonstrated that, all things being equal, white jurors are more likely to magnify the humanity of white victims and marginalize the humanity of black perpetrators. This dynamic also negatively affects defendants who murder white victims, because the favorable implicit biases that flow toward white victims enhance the perceived harm of the crime when the victim is white. This process occurs most clearly through the introduction of victim impact evidence in capital cases. The family members of victims in capital trials are allowed to introduce evidence about how the death of their loved one has affected their own lives. Such evidence describes the physical, emotional, and financial impact and is often highly emotional. Justice Stevens described one example of extremely powerful victim impact evidence in a recent California death penalty case:

> The prosecution played a 20-minute video consisting of a montage of still photographs and video footage documenting [nineteen year-old] Weir's life from her infancy until shortly before she was killed. The video was narrated by the victim's mother with soft music playing in the background, and it showed scenes of her swimming, horseback riding, and attending school and social functions with her family and friends. The video ended with a view of her grave marker and footage of people riding horseback in Alberta, Canada – the "kind of heaven" in which her mother said she belonged.[44]

[43] Justin Levinson, *Race, Death and the Complicitous Mind*, 58 DePaul L. Rev. 599, 631 (2009).

This type of heart-wrenching testimony easily can overcome the presentation of mitigating evidence regardless of the race of the victim or the defendant. The level of emotion induced by the presentation of victim impact statements encourages jurors to decide whether capital punishment is appropriate on the basis of empathy for the victim (and not on the relative severity of the crime or culpability of the offender). Intricately tied to the display of empathy toward the victim are feelings of anger and frustration toward the perpetrator. In white victim/black defendant cases, white jurors likely display both enhanced ingroup empathy toward the white victim and outgroup anger, fear, and frustration toward the black defendant.

Research suggests that jurors quantify harm to families of murdered victims by predicting the impact that the murder-death of a person will have on their friends and family members. This type of evaluation requires empathy, and white jurors – especially those who live in vastly different socioeconomic circles from many victims' family members – are likely able to empathize more with the family members of white victims. Experimental evidence indicates that the level of emotion displayed by the testifying victim moderates verdict outcomes. The point here is that jurors assess the level of emotion displayed – and the perception of a corresponding ability to cope with the loss – as predicting overall harm. As Professor Jeremy Blumenthal explained,

> When a juror observes a witness who plausibly predicts future pain and suffering above that which a juror might expect her to reasonably experience, that juror's assessment of the amount of harm caused may increase. On the other hand, seeing a witness who is apparently "coping" well with the aftermath of a crime – perhaps even more than the juror might think "appropriate" – may, conversely, lead to assessing the harm as lower than the juror may otherwise judge.[45]

When we consider the impact of predicting continued feelings of loss in the future and implicit social cognition together, especially in the context of a cross-racial homicide case, it is not difficult to see how differences in cultural displays of emotion, language use in conveying a sense of loss, or even dress can intermix with stereotypes about the offender and about the victim to result in a race-influenced assessment of victim impact evidence. For example, when a video is introduced as victim impact evidence that depicts a young girl with fair skin, blonde hair, and blue eyes running around a yard in a suburban neighborhood with other white children, white jurors are able to imagine that victim as a close relative or friend and predict how they

[44] Kelly v. California, 129 S.Ct. 564 (2008) (Stevens, J., dissenting from denial of certiorari).

[45] Jeremy A. Blumenthal, *Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements*, 46 Am. Crim. L. Rev. 107 (2009).

would feel if that victim had been their friend or relative. Again, this empathic response triggers an inaccurate prediction about how one is going to feel after time has passed, so the juror overstates the harm. Conversely, if white jurors see a video of a little black girl, with braided rows of hair, playing in an urban neighborhood with other black children, they are less likely to be able to picture their family member or relative as the girl in the picture. The empathic reaction is dampened or nonexistent.

III. CONCLUSION

It is important to consider that aggravating, mitigating, and victim impact evidence might influence a capital case far before the trial begins. Often the best outcome in a capital case is a plea deal that avoids a death sentence, and indeed the vast majority of death penalty cases are resolved by plea agreements. Yet implicit race bias could influence these pretrial plea negotiations.

Research by Professors Sheri Lynn Johnson and Theodore Eisenberg on implicit bias by defense attorneys in capital cases demonstrates that white male capital trial and habeas attorneys display the same level of implicit racial bias (including associating white people with "good") that exists in the public at large.[46] Imagine that two defendants are charged with murder in the course of a robbery. The robberies are unrelated to each other. Both occurred in the same county. In both instances, the evidence of participation in the robbery, if not the actual murder, is beyond dispute; this leaves both defendants at the bare minimum susceptible to a life sentence. Both defendants are young and male. One is black and one is white. They have the same attorney – a committed public defender who wants what is best for his clients. The prosecution seeks the death penalty against both defendants.

With Client A, who is black, the public defender informs him of the charge and that a plea might be possible. Client A, who adamantly denies shooting anyone, becomes frustrated at the suggestion of a plea to life without the possibility of parole. Therefore no plea offer is taken to the prosecutor. The public defender takes the case to trial, presenting a defense that the client participated in the robbery but did not shoot the victim (making the defendant a principal to first-degree murder and at least susceptible to a life sentence). The attorney contacts family members in preparation for the penalty phase. They tell him that the defendant suffered from fetal alcohol syndrome. He is convicted of first-degree murder. The jury hears of the defendant's bad conduct in jail as a juvenile and sentences the defendant to death despite evidence of fetal alcohol syndrome.

Client B is white. The public defender informs him of the charge and explains that a plea deal might be possible. Client B also adamantly denies shooting anyone and becomes frustrated at the suggestion of a plea to life without the possibility of

[46] *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539 (2004).

parole. The public defender sees something of his own son – troubled but essentially good – in Client B. He meets with him more to discuss the charges, he relates to Client B's family, and he brings family members into the jail to meet with Client B. They explain to Client B the legal theory of principals and how Client B's statement and proposed defense make him guilty of first-degree murder as a principal. After family members detail how difficult it has always been to communicate with Client B, expert assistance in communicating with him is secured. The public defender speaks to the district attorney on Client B's behalf, explaining that Client B's oxygen intake at birth was reduced, likely leading to intermittent anger disorder that is now being managed with medication. The State agrees to a life plea.

Client A was not sentenced to death because he is black, nor did Client B avoid the death penalty simply because he was white. Yet race played an integral role in the disparity in sentence. This is what implicit bias does to the administration of capital punishment. It seeps into areas where discretion is at its peak. It has the ability to tip the scales in close calls – sometimes leading to the finding of an aggravating factor or the failure to find a mitigating factor. If we could add up all the instances in the life of a capital case where it has an impact, the disparities that it drives could be detected across multiple cases. The lesson here is that, no matter how many procedural rules we invent, we will never have a death penalty reserved for the worst of the worst until we take substantive steps to deal with the role that implicit racial bias plays in capital trials.