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Deadly 'Toxins': A National Empirical Study of Racial Bias and Future Dangerousness Determinations

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Cover Page Footnote

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DEADLY "TOXINS": A NATIONAL EMPIRICAL STUDY OF RACIAL BIAS AND FUTURE DANGEROUSNESS DETERMINATIONS

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Since the beginning of the modern Death Penalty Era, one of the most important—and fraught—areas of capital punishment has been the so-called "future dangerousness" determination, a threshold inquiry that literally rests the defendant's life or death on jurors' predictions of the future. An overwhelming majority of capital executions have occurred in jurisdictions that embrace the perceived legitimacy of the future dangerousness inquiry, despite its obvious flaws and potential connection to the age-old racial disparities that continue to plague capital punishment. This Article presents, and empirically tests, the hypothesis that jurors' future dangerousness assessments cannot be separated from their racial and ethnic biases held against Black and Latino defendants. It does so by examining two pathways whereby future dangerousness judgments may function in inappropriately racialized ways: First, it studies the domain of implicit bias and investigates, using Implicit Association Tests (IATs) we designed, whether jurors implicitly and automatically associate future danger with Black and Latino men, and conversely, associate future safety with White men. Second, it considers the domain of explicit bias and measures whether jurors' self-reported racial animus may function as a driving force in future dangerousness judgments. The results of the studies show that, indeed, both implicit and explicit biases

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are inexorably linked with future dangerous determinations. After presenting the studies in detail, the Article situates the findings within death penalty jurisprudence and concludes that future dangerousness can no longer pass constitutional muster as a mandatory or permissible factor in capital cases.

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I. INTRODUCTION

At his capital murder trial, Duane Buck looked on from the defense table as an expert witness testified that Mr. Buck was likely to be a future danger to society simply because he was Black.[1] In the wake of that racialized testimony, a jury sentenced Mr. Buck to death, sending him to Texas's death row, where he waited on appeals for more than two decades.[2] In 2017, the Supreme Court finally recognized the improper use of the future dangerousness testimony and overturned Mr. Buck's death sentence.[3] Chief Justice John Roberts, who authored the Court's majority opinion, explained that, at least in the context of racial bias and the death penalty, "[s]ome toxins can be deadly in small doses."[4] Although Mr. Buck

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[1] *See* Buck v. Davis, 137 S. Ct. 759, 769 (2017) (describing the expert testimony of Dr. Walter Quijano who believed that "the race factor, black, increases the future dangerousness" factor). The testimony was unusual in Mr. Buck's case because his own counsel had elicited it. *See id.* at 767–69 (noting that although the expert, Dr. Quijano, ultimately concluded Mr. Buck was unlikely to be a future danger, he also provided a report that indicated that Mr. "Buck was statistically more likely to act violently because he is black" and that "read, in relevant part: 'Race. Black: Increased probability'"); *id.* at 769 ("After opening cross-examination with a series of general questions, the prosecutor likewise turned to the report. She asked first about the statistical factors of past crimes and age, then questioned Dr. Quijano about the roles of sex and race: 'You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?' . . . Dr. Quijano replied, 'Yes.'" (quoting Joint Appendix at 170a, *Buck*, 137 S. Ct. 759 (2017) (No. 15-8049), 2016 WL 4120631, at *170a)).

[2] *See id.* at 767–73 (describing the facts and procedural history of Buck's case, beginning in 1995, as "wander[ing]" in "a labyrinth of state and federal collateral review" until arriving at the U.S. Supreme Court in 2016).

[3] *See id.* at 777, 780 (noting that the Court could not "accept the District Court's conclusion that 'the introduction of any mention of race' during the penalty phase was '*de minimis*'" and thus reversed the decision of the Fifth Circuit). As the Court noted in *Buck*, similar racialized dangerousness testimony was given in at least five other trials, in cases introduced by the prosecution. *See id.* at 779. The Attorney General of Texas eventually conceded penalty phase error in those cases. *See id.* at 777–79 ("[T]he State has repeatedly attempted to justify its decision to treat Buck differently from the other five defendants identified in the Attorney General's statement, . . . arguing that Buck's was the only one of the six cases in which defense counsel, not the prosecution, first elicited Dr. Quijano's opinion on race.").

[4] *Id.* at 777 ("There were only 'two references to race in Dr. Quijano's testimony'—one during direct examination, the other on cross. . . . But when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death,

received a reprieve from death row,[5] the Court did not address a more pressing question arising from the disproportionate numbers of Black and Latino men who remain on death row: Is future dangerousness testimony, a staple of so many death penalty verdicts, so inexorably tainted with racial bias that its very use violates the Constitution?

For decades, facing study after study that revealed continuing and pervasive racial inequalities in capital punishment,[6] scholars and practitioners have argued that juror judgments of a defendant's future dangerousness may well be tainted by harmful racial stereotypes.[7] Yet despite the clarity of the critique, the role of the

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the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record.").

[5] *See id.* at 780 (concluding Mr. Buck was entitled to relief).

[6] *See generally, e.g.*, STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002) (presenting the evolution of capital punishment, the arguments for and against capital punishment, the changes in crimes considered capital offenses, the methods of execution, and America's experience with capital punishment); FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (discussing America's deep history of racializing the death penalty, specifically through the lynching of African Americans); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) (addressing the history of race within criminal law, how race affects jury composition, the unfair trials and allegations against African Americans, and the role of race in death penalty cases). For a general discussion of race and the death penalty, see DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (analyzing evidence of arbitrariness and racial discrimination in capital sentencing post *Furman v. Georgia* and the unlikelihood of improvement resulting from *McCleskey v. Kemp*); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING xiii (1989) ("The Supreme Court has more or less acknowledged that race continues to play a major role in capital sentencing in America . . . . But the Court has decided to do nothing about this form of discrimination and to refuse to hear future claims based on it."); and William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 175 (2001) ("Since the Civil War, blacks have been executed for lesser crimes, at younger ages, and more often without appeals than whites; and over this period they have been disproportionately executed for crimes against whites." (footnote omitted)).

[7] *See* Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 327–28, 359 (2012) (explaining the influence of racial schemas on "jurors' assessments of [a defendant's] future dangerousness" in capital sentencing and how "implicit racial bias could lead jurors to interpret any ambiguous evidence consistent with greater moral culpability and a higher risk of future dangerousness"); *see also* Michael R. Cavanaugh, Marilyn McShane & Frank P. Williams III, *Confronting the Demons of Future Dangerousness*, 2 J.L. & CRIM. JUST. 47, 56,

future dangerousness determination in capital punishment remains prevalent and powerful in many jurisdictions, including in the federal death penalty, where a majority of capital convictions continue to include a jury finding of future dangerousness.[8] Scholars have taken sharp aim at the role of future dangerousness determinations, noting that jury predictions vastly over-include non-dangerous individuals,[9] and, as Professor Lee Kovarsky

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58–59 (2014) (examining the potential for racial bias due to the influence of media and social networks on jurors' judgments of future dangerousness in capital punishment cases); Bowers et al., *supra* note 6, at 225–26 (explaining how "white jurors were the most likely, and black jurors the least likely, to report that the defendant's future dangerousness made them much more likely to vote for the death penalty" in cases with Black defendants and White victims); *cf.* Matthew S. Crow, *The Complexities of Prior Record, Race, Ethnicity, and Policy: Interactive Effects in Sentencing*, 33 CRIM. JUST. REV. 502, 507 (2008) ("[D]ecision makers incorporate other information about the offense and offender to develop a perceptual shorthand that aids in deciding sentences . . . . Among the characteristics believed to influence this perceptual shorthand is the offender's race. Stereotypical assessments of the dangerousness of racial (and ethnic) minorities are believed to contribute to the determinations made by judges." (citations omitted)).

[8] *See infra* notes 66–73 and accompanying text. Future dangerousness determinations are also relevant to other areas of law, including pre-trial release determinations, sentencing, and parole decisions. *See* Jurek v. Texas, 428 U.S. 262, 275–76 (1976) (plurality opinion). The empirical study presented in this Article is relevant to those areas, but for purposes of clarity, this Article primarily focuses on the role of future dangerousness determinations in the death penalty.

[9] Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 148 (2008); *see also* Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 713 (2015) (arguing that "risk-assessment tools are stuck at sentencing: they assess an individual's likelihood of future dangerousness by examining various characteristics that might change over time," which leads to unnecessary incarceration of non-dangerous individuals); William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1078 (2015) (discussing the inaccuracy of future dangerousness estimates because of how most "criminal offenders have not reached" "complete social and emotional maturity" and that "most criminal offenders cease to be dangerous once [they] reach[] a certain elderly age"); Martin R. Gardner, Commentary, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 786 (reviewing ANDREW VON HIRSCH, DOING JUSTICE (1976)) ("Incarceration because of predicted dangerousness is unsatisfactory because the ability to make accurate predictions does not exist and the tendency to over-predict results in many non-dangerous offenders being deprived of their liberty for longer periods than they would have been if prediction had not influenced the sentence."); *cf.* Russell Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST.

observed in 2019, are "exceptionally unreliable" in a multiplicity of ways.[10] Nonetheless, race-based legal challenges to the death penalty, and future dangerousness in particular, continue to stall,[11] and there remains a striking lack of empirical work examining the role of racial bias in future dangerousness determinations.

In *Buck*, the Court reversed the death sentence because the explicit reference to race introduced a visible poison into the death penalty process.[12] But what if the concept of future dangerousness

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L.Q. 189, 257 (2004) (arguing that future dangerousness predictions "are wrong more often than they are right" and that it is hard "to imagine that the jury will be competent at any time soon to reliably sort dangerous and non-dangerous offenders").

[10] Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1206 (2019); *see also* Carla Edmondson, *Nothing Is Certain but Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK L. REV. 857, 860, 862 (2016) (asserting that "[t]he future dangerousness question impermissibly asks jurors to function as fortune tellers, basing their sentencing determination on the likelihood of some future, unascertained event" and that it "is a fundamentally flawed question that leads to arbitrary and capricious death sentences"); Berry, *supra* note 9, at 1078 ("Many estimates suggest that dangerousness estimates are only 50% accurate at best."); Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 L. & PSYCH. REV. 63, 92, 101–02 (2005) (noting that "jurors have been shown to make highly subjective and severely overestimated assessments of future dangerousness," leading them to "find that only a small percentage of convicted capital offenders do not pose a future threat"); Bowers et al., *supra* note 6, at 219 (explaining the unreliability of imposing a death sentence based on a defendant's future dangerousness because such estimates "incorporate racial stereotypes" and "culturally rooted racial stereotypes may tend to demonize and dehumanize blacks accused of lethal violence by portraying them as especially dangerous"); Brief for Am. Psychiatric Ass'n as Amicus Curiae at 4, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080) ("The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession."); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 749 (1974) ("We have seen that predictions of dangerous behavior are wrong more often than they are right even in those cases in which the subject of the prediction has actually done or threatened something dangerous in the past. And without such evidence of past dangerous behavior, predictions of dangerous behavior are even more inaccurate.").

[11] *See, e.g.*, United States v. Bin Laden, 126 F. Supp. 2d 290, 303 (S.D.N.Y. 2001) ("The Supreme Court has discussed with approbative language the submission of a defendant's future dangerousness as a subject for a penalty jury's consideration. Not surprisingly, lower courts have uniformly upheld future dangerousness as a non-statutory aggravating factor in capital cases . . . ." (citations omitted)).

[12] Buck v. Davis, 137 S. Ct. 759, 778 (2017) ("Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process . . . ." (quoting Davis v. Ayala, 576 U.S. 257, 285 (2015))).

is always tied toxically to race, even when it is not visible and explicit? Juror judgments of future dangerousness play a prominent role in capital punishment cases, especially in separating those who receive prison sentences from those who are executed when the jurisprudence limits application of the death penalty to the "worst of the worst."[13] Although there are various paths that juries can take to arrive at a death verdict, our analysis indicates that a disproportionate number of defendants who have been sentenced to death—and those who have been executed—have been found by juries to be future dangers.[14] Indeed, while the broad death penalty trajectory in the United States has been in decline,[15] the influence of the future dangerousness determination has grown in paramount ways.

This Article presents, and empirically tests, the hypothesis that jurors' future dangerousness assessments cannot be separated from their racial and ethnic biases held against Black and Latino defendants. It does so by examining two pathways whereby dangerousness judgments may function in inappropriately racialized ways: First, it studies the domain of implicit bias and investigates, using Implicit Association Tests (IATs)[16] that we designed, whether jurors implicitly and automatically associate future dangerousness with Black and Latino men, and conversely, associate future safety with White men. Second, it considers the domain of explicit bias and measures whether jurors' self-reported racial views and stereotypes may function as a driving force in

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[13] *See, e.g.*, Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("[T]he death penalty must be reserved for 'the worst of the worst.'" (citing Roper v. Simmons, 543 U.S. 551, 568 (2005))); *Roper*, 543 U.S. at 569 ("[T]he death penalty is reserved for a narrow category of crimes and offenders."); Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("[O]ur jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes."); *see also* Kovarsky, *supra* note 10, at 1165 ("In producing death sentences, U.S. jurisdictions expend considerable resources sorting the 'worst of the worst' from the 'worst of the really bad.'" (footnote omitted)); *id.* at 1186 n.135 ("There are many reasons to believe that most jurisdictions fail to select the worst of the worst for death sentences . . . .").

[14] *See infra* notes 49–55 and accompanying text.

[15] *See, e.g.*, Brandon L. Garrett, Alexander Jakubow & Ankur Desai, *The American Death Penalty Decline*, 107 J. Crim. L. & Criminology 561, 564 (2017) ("The American criminal justice system is imposing fewer death sentences than at any point in the past three decades.").

[16] For a description of the Implicit Association Test and its methods, see *infra* notes 111–114 and accompanying text.

future dangerousness judgments. After presenting the results of the studies in detail, this Article tackles the wide-ranging implications of these examinations and concludes that future dangerousness cannot pass muster as a mandatory or permissible factor in capital cases.

This Article is organized as follows: Part II provides legal background concerning the death penalty and the future dangerousness inquiry. It explains how the future dangerousness determination became one of the most important inquiries in the American death penalty (at both federal and state levels) and highlights the ways in which the law amplifies the importance of this particular jury-led, subjective, and predictive inquiry. Part III situates the literature on race and future dangerousness in the context of empirical scholarship related to implicit and explicit bias, juries, and capital punishment. Part III then recognizes the absence of empirical research on racial bias in future dangerousness determinations and sets the stage for the empirical studies we conducted.

Part IV reports on the national empirical studies we conducted. We surveyed a diverse sample of over 570 jury-eligible citizens, measured their implicit and explicit racial biases, and then asked them to assess the future dangerousness of several defendants. The results of the studies show, first, that the jurors possessed strong anti-Black and anti-Latino implicit future dangerousness biases, and second, that the jurors' anti-Black implicit and explicit racial biases predicted their dangerousness judgments: the more racial bias they held, the more of a future danger they believed defendants to be. Part V discusses these results in a practical and constitutional context and concludes by claiming that future dangerousness can no longer play a role in capital cases.

II. FUTURE DANGEROUSNESS: AN AMORPHOUS PREDICTION TAKES ON INCREASING IMPORTANCE

Future dangerousness has been a central component of death penalty jurisprudence since 1976.[17] Although juries are almost

[17] *See* Jurek v. Texas, 428 U.S. 262, 274–76 (1976) (plurality opinion) (upholding a Texas death penalty statute that included a requirement to consider a convicted person's future

always tasked with making decisions based on discrete events from the past, in the context of capital sentencing they are often asked to predict how a particular defendant may or may not act in the future.[18] Despite the obvious risks of basing a life-and-death decision on jurors' ability to predict the future, over 90% of executions since 1976 have come from jurisdictions that either require or otherwise permit jurors to make such a prediction.[19] As this Part explains, the death penalty has evolved over the past five decades in such a way as to amplify the importance of the future dangerousness determination. Even setting aside the massive historical racial disparities in the American death penalty, capital cases' reliance on future dangerousness would be concerning enough. But considering the historical inexorability of race and the death penalty,[20] the reliance on this forward-looking dangerousness prediction becomes particularly fraught. Indeed, if juror judgments of defendants' future dangerousness are at all influenced by race in a consistent manner, the removal of future dangerousness from the capital equation should be required.

A. CONSTITUTIONAL BACKGROUND AND THE BIRTH OF FUTURE DANGEROUSNESS

In 1972, the Court in *Furman v. Georgia* held that the death penalty, as it was administered at that time, constituted cruel and unusual punishment, a holding that sent death-penalty-seeking states back to the drawing board.[21] In *Furman*, two justices

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dangerousness because "prediction of future criminal conduct is an essential element" in many decisions in criminal cases).

[18] *See, e.g.*, *id.* at 272 (describing the Texas statute's requirement that the jury determine how likely the defendant was to commit future violent crimes that would make him a threat to society).

[19] *See Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last visited Dec. 16, 2021) (charting the number of executions by state and region since 1976). For detailed jurisdiction-by-jurisdiction execution and death row statistics underlying this number, see *infra* Table 1.

[20] *See supra* note 6.

[21] *See* 408 U.S. 238, 239–40 (1972) (per curiam) (holding that "the imposition and carrying out of the death penalty" in petitioner's murder and rape convictions "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments").

suggested that evolving standards of decency rendered the death penalty cruel and unusual punishment.[22] Justice Stewart, writing a concurring opinion in support of the Court's per curiam decision, focused on the arbitrariness of the Georgia statute's life-death decision and observed that the wanton freakishness of the death penalty vitiated the validity of the punishment.[23] While *Furman* was fractured in multiple separate opinions,[24] the Court almost uniformly rejected the notion that the Eighth Amendment solely prohibited punishments thought cruel and barbarous at the adoption of the Constitution; a majority of justices agreed that the constitutionality of a punishment required an assessment of the evolving standards of decency.[25]

Four years later, in July 1976, the Court issued a flurry of five opinions addressing separate statutes that had been rapidly adopted by states aiming to reinstate the death penalty and

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[22] *See id.* at 269–70 (Brennan, J., concurring) ("We know 'that the words of the [Clause] are not precise, and that their scope is not static.' We know, therefore, that the Clause 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (alteration in original) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958))); *id.* at 329 (Marshall, J., concurring) ("[T]he cruel and unusual language 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today." (footnote omitted) (quoting *Trop*, 356 U.S. at 101)).

[23] *Id.* at 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

[24] The historical account of the internal deliberations of the Justices was described by Professor Carol Steiker—with reference to Evan Mandery's book about the Justices' decisions titled *A Wild Justice*—in oral testimony in a Vermont case. *See* Transcript of Motions Hearing at 12–13, United States v. Fell, No. 5:01-cr-12-01, 2018 WL 4258111 (D. Vt. Sept. 6, 2018) ("But because the decision was so close, five to four, and so fractured, there were nine opinions in the, in the case, one from each of the nine justices . . . ."); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362 (1995) ("The opinions presented a staggering array of arguments for and against the constitutionality of the death penalty and offered little means, aside from shrewd political prediction, of determining which arguments would dominate in the decision of any future cases.").

[25] *See* Steiker & Steiker, *supra* note 24, at 362 ("Only Justices Brennan and Marshall argued in *Furman* that the death penalty was per se cruel and unusual punishment; Justices Douglas, Stewart, and White expressly left open the question whether a more structured capital sentencing regime might someday pass constitutional muster." (footnote omitted)).

presumably avoid the *Furman* arbitrariness problem.[26] Born from those five opinions was a new understanding of the death penalty that has directly led to today's legal landscape. In two opinions, *Roberts v. Louisiana* and *Woodson v. North Carolina*, the Court set outer limits of the penalty, rejecting mandatory death sentences because the death penalty statutes in those states failed to allow juries to consider the character and background of the defendant before imposing the death penalty.[27] Conversely, three death penalty statutes based more on individualized formulations of the life-death calculus—those of Georgia, Florida, and Texas—were upheld by the Court.[28] The Georgia and Florida statutes, which relied upon a consideration of aggravating and mitigating factors in each case, were upheld because they narrowed the class of defendants and allowed individualized consideration.[29] These state victories spurred the rapid response of some state legislatures passing similar statutes, including Louisiana's and North Carolina's legislatures, whose prior laws had just been ruled unconstitutional.[30]

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[26] *See id.* at 363–64 (describing "*Gregg* and its accompanying quartet" that "selected certain themes of the vast *Furman* morass to represent the Court's central concerns").

[27] *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (holding that capital cases require the "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"); Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (plurality opinion) (finding that the Louisiana death penalty statute "not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate").

[28] *See infra* notes 29, 31 and accompanying text.

[29] *See* Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality opinion) ("The new Georgia sentencing procedures . . . focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant."); Proffitt v. Florida, 428 U.S. 242, 258 (1976) (plurality opinion) ("The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. . . . [Moreover,] the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants.").

[30] *See* LA. STAT. ANN. § 14:30 (2021) (allowing capital punishment only "in accordance with the determination of the jury" rather than automatic application); N.C. GEN. STAT. § 15A-2000 (2021) (allowing the jury to consider evidence showing aggravating or mitigating circumstances in a capital sentencing decision).

The Texas death penalty statute, as considered in *Jurek v. Texas*, was unique.[31] It differed from Georgia and Florida's statutes because it did not rely on an individualized consideration of aggravating and mitigating factors.[32] Rather, it attempted to tackle the individualization of the death penalty by mandating the imposition of the death penalty for individuals convicted of capital murder based upon a jury's finding of future dangerousness.[33] To some observers, by predicating a death sentence upon a jury finding of future dangerousness, the Texas statute appeared to combine all the flaws of the mandatory death penalty scheme with all the problems of the unguided schemes that the petitioners had identified in *Furman*: the Texas death penalty was indeed mandatory,[34] and its usage would predictably be confined to the poor, the powerless, and those perceived as dangerous.[35] However, as part of a strategic decision apparently made to avoid conceding that any death penalty statute was constitutional, Jurek's counsel chose not to challenge the Texas statute based on *Furman*-like arbitrariness grounds.[36] Rather, Jurek's counsel approached the

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[31] *See* Jurek v. Texas, 428 U.S. 262, 270–72 (1976) (noting differences between the Texas statute and the death penalty statutes in Georgia and Florida).

[32] *See id.* at 270–72 (noting that "Texas ha[d] not adopted a list of statutory aggravating circumstances" like Georgia and Florida, nor did the "Texas statute . . . explicitly speak of mitigating circumstances").

[33] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2021) (directing the court to submit the issue of "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" to the jury); *see also Jurek*, 428 U.S. at 272–74 (describing the future dangerousness question and the jury's analysis of mitigating and aggravating factors in that inquiry).

[34] *Cf. Jurek*, 428 U.S. at 276 ("By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance . . . before a death sentence may even be considered.").

[35] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 255 (1972) (Douglas, J., concurring) ("Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority . . . .").

[36] *See* EVAN MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 361 (2013) ("Yet [counsel] never considered conceding the constitutionality of capital punishment . . . . In its submissions to the Court, [counsel's] thrust remained . . . that capital punishment in any form violated the Eighth Amendment.").

legal challenge as a broader-scale Eighth Amendment cruel and unusual punishment challenge to the death penalty.[37]

In writing about the *Jurek* decision, Evan Mandery observed that Justice Powell's notes concerning the petitioner's argument indicated that it was "fairly persuasive" but that the issue was left unresolved, as counsel for Jurek "viewed it as unfair to spare some from the death penalty while others received it."[38] Ultimately, the Court rejected the argument that future dangerousness was an inquiry that was meaningless at best and reasoned that:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task

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[37] *Id.* Evan Mandery noted that the Texas "statute was so unusual and so problematic that Jurek's best strategy almost certainly would have been to ignore the cruel-and-unusual argument and simply expose the Texas law as a mandatory one." *Id.* at 360–61. As Mandery recounted, Petitioners in *Jurek* had argued the Texas statute by attacking the future dangerousness determination:

> "The thing that is most devastating is that you can't even challenge the jury's finding because the question to which it responds is so meaningless. You can say that on this record that the jury in this case found, without sufficient evidence, the defendant was guilty of capital murder. I mean, that is a question that has meaning." But, [counsel] asked, "How can you—even on the absurd basis on which this jury condemned this defendant to die—say that the evidence is or is not sufficient to establish that there is a probability that the defendant may engage in future criminal conduct? The question is devoid of intelligible meaning."

Id. at 376.

[38] *Id.* at 376, 378.

> performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.[39]

Upon his retirement, Justice Stevens, the critical fifth vote in *Jurek*, described it as the one case in which he could have changed his vote: "In my judgment we made a mistake on that case."[40] Nonetheless, *Jurek* stood and thus began the dawn of the future dangerousness era.

B. THE EXPANSION OF THE FUTURE DANGEROUSNESS INQUIRY

After *Jurek*, the use and importance of the future dangerousness inquiry began to grow in multiple ways. First, it grew through judicial expansion.[41] Second, it grew through the passing of new statutes in states beyond Texas.[42] And third, it grew through legislative and judicial inaction, such that when prosecutors began to raise it in jurisdictions that made no mention of it in their laws, courts and legislatures chose not to prohibit it.[43] In each of these

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[39] *Jurek*, 428 U.S. at 274–76 (footnotes omitted).

[40] MANDERY, *supra* note 36, at 439–40.

[41] *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 905 (1983) ("There is no doubt that the psychiatric testimony [about future dangerousness] increased the likelihood that petitioner would be sentenced to death, but this fact does not make that evidence inadmissible . . . ."); Skipper v. South Carolina, 476 U.S. 1, 5 (1986) ("Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing . . . .").

[42] *See, e.g.*, OR. REV. STAT. ANN. § 163.150(1)(b)(B) (West 2017) (amended 2019) (providing that one of the issues submitted to a death penalty jury is "[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); VA. CODE ANN. § 19.2-264.2 (West 1977) (repealed 2021) (providing that the death penalty may be imposed if the jury "find[s] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society").

[43] *See Skipper*, 476 U.S. at 5 (discussing the admissibility of evidence regarding a defendant's potential future dangerousness as an aggravating factor despite the South Carolina death penalty statute not mentioning such a consideration); S.C. CODE ANN. § 16-3-

ways, the importance of the future dangerousness inquiry increased and moved further away from constitutional scrutiny.

Seven years after *Jurek*, judicial expansion began in *Barefoot v. Estelle*, which considered whether experts should be permitted to testify as to a defendant's possible future dangerousness.[44] The Court held that psychiatrist testimony as to a defendant's future dangerousness in the penalty phase of a capital trial was indeed admissible.[45] The Court based its holding on *Jurek,* stating,

> If the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify.[46]

The Court made its holding in *Barefoot* despite the Court's own acknowledgment that "[t]here is no doubt that the psychiatric testimony increased the likelihood that petitioner would be sentenced to death"[47] and an amicus brief presented by the American Psychiatric Association showing that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession."[48]

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20 (2021) (listing aggravating factors the jury may consider, none of which is future dangerousness).

[44] *See Barefoot*, 463 U.S. at 898–99 ("If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors.").

[45] *See id.* at 905–06 (holding that psychiatrist testimony about a defendant's future dangerousness was admissible).

[46] *Id.* at 896–97 (citation omitted).

[47] *Id.* at 905.

[48] *Id.* at 920 (Blackmun, J., dissenting) (alteration in original) (quoting Brief for Am. Psychiatric Ass'n as Amicus Curiae, *supra* note 10, at 4).

And out of Pandora's box, the idea of judicially-blessed future dangerousness spread.[49] Even in jurisdictions such as South Carolina, where statutes made no mention of future dangerousness,[50] prosecutors began using the argument as part of their aggravating factor analysis, and courts moved out of their way.[51] Furthermore, in multiple cases, the U.S. Supreme Court appeared to create an entire exception to the ordinary rule excluding juries from making decisions based upon estimates of what might happen next rather than what had already transpired, permitting their use in the determination of whether death was the appropriate punishment.[52] In 1994, the *Simmons* Court reasoned,

> Arguments relating to a defendant's future dangerousness ordinarily would be inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant's future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt. But where the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase. The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the

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[49] *See Skipper*, 476 U.S. at 5 ("[E]vidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an 'aggravating factor' for purposes of capital sentencing . . . ." (first citing Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion); and then citing *Barefoot*, 463 U.S. 880)).

[50] *See* S.C. Code Ann. § 16-3-20 (2021).

[51] *See Skipper*, 476 U.S. at 5 (permitting consideration of future dangerousness as "an inevitable and not undesirable element of criminal sentencing" and of "evidence that the defendant would not pose a danger" as a mitigating factor).

[52] *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 163 (1994) (plurality opinion) (distinguishing between jury determinations of future dangerousness in the "guilt-innocence determination" and the jury's "sentencing responsibilities in a capital trial" based on prior caselaw (first citing Lockett v. Ohio, 438 U.S. 586 (1978); then citing Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); and then citing Barclay v. Florida, 463 U.S. 939, 948–51 (1983) (plurality opinion))).

> many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment.[53]

As Justice Blackmun explained further in *Simmons*,

> [P]rosecutors in South Carolina, like those in other States that impose the death penalty, frequently emphasize a defendant's future dangerousness in their evidence and argument at the sentencing phase; they urge the jury to sentence the defendant to death so that he will not be a danger to the public if released from prison.[54]

In addition to expansion fueled by courts, various state legislatures got into the act: Oregon and Virginia embraced the future dangerousness approach to the death penalty and enacted laws specifically referencing it, with Oregon's law functioning much like Texas's[55] and with Virginia providing future dangerousness as one of two findings that jurors can make before recommending the death

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[53] *Id.*

[54] *Id.*

[55] Texas's death penalty statute focuses juries' death determinations on "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b)(1) (West 2021). The same was true in Oregon: "Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: . . . Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . . ." OR. REV. STAT. ANN. § 163.150(1)(b) (West 2017) (amended 2019).

penalty.[56] Other states, such as Oklahoma,[57] Idaho,[58] and Wyoming,[59] passed legislation that did not automatically equate future dangerousness with an immediate death sentence but rather created a hybrid approach, whereby future dangerousness became listed as a statutory aggravating factor.[60] In Washington, the statute provided that the jury may decide to be lenient based on "[w]hether there is a likelihood that the defendant will pose a danger to others in the future."[61] In 2018, however, the Washington State Supreme Court held that the statute was unconstitutional because it was applied in a racist manner.[62]

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[56] Virginia's statute reads as follows:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

VA. CODE ANN. § 19.2-264.2 (West 1977) (repealed 2021).

[57] "Aggravating circumstances shall be: . . . The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . . ." OKLA. STAT. ANN. tit. 21, § 701.12 (West 2011).

[58] "The following are statutory aggravating circumstances . . . The defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." IDAHO CODE ANN. § 19-2515(9)(i) (West 2021).

[59] "Aggravating circumstances are limited to the following: . . . The defendant poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence . . . ." WYO. STAT. ANN. § 6-2-102(h)(xi) (West 2021).

[60] *See supra* notes 57–59. Idaho and Oklahoma courts have also considered psychiatric testimony as evidence of a defendant's continuing threat to society or propensity for future violence. *See* State v. Dunlap, 873 P.2d 784, 790 (Idaho 1993) (finding that the psychiatric evidence in the case supported "the district court's finding that [defendant] has the propensity to commit murder which will probably constitute a threat to society"); Thompson v. State, 724 P.2d 780, 785 (Okla. Crim. App. 1986) ("[The expert witness's] testimony was used solely to prove the existence of a probability that the appellant would commit criminal acts of violence that would constitute a continuing threat to society."), *vacated*, 487 U.S. 815 (1988).

[61] WASH. REV. CODE § 10.95.070(8) (2021).

[62] State v. Gregory, 427 P.3d 621, 642 (Wash. 2018) ("[W]e hold that Washington's death penalty is unconstitutional, as administered, because it is imposed in an arbitrary and racially biased manner.").

Fourteen other states and the federal death penalty allow future dangerousness to play a non-statutory aggravator role in death penalty determinations.[63] While consideration of future

[63] *See* Dorland & Krauss, *supra* note 10 at 64–65, 65 n.12 (listing "ways in which states incorporate future dangerousness into" sentencing, including "allow[ing] prosecutors to argue future dangerousness as a non-statutory aggravating factor" and citing caselaw from fourteen states that demonstrates this practice); 18 U.S.C. § 3592 (listing aggravating and mitigating factors to be considered in federal death penalty sentencing). New Hampshire, Kentucky, Missouri, Pennsylvania, Georgia, Alabama, South Carolina, and South Dakota have recognized future dangerousness as a non-statutory aggravator. *See* State v. Addison, 87 A.3d 1, 206 (N.H. 2013) (finding that the defendant's future dangerousness was an acceptable non-statutory aggravating factor); Hodge v. Commonwealth, 17 S.W.3d 824, 853 (Ky. 2000) (finding it acceptable that the jury considered the defendant's future dangerousness as a non-statutory aggravating factor); State v. Deck, 303 S.W.3d 527, 543 (Mo. 2010) (en banc) (finding that one purpose of capital punishment is the prevention of future crimes); Commonwealth v. Poplawski, 130 A.3d 697, 732–33 (Pa. 2015) (finding that the prosecutor properly argued future dangerousness before the jury so that it could be considered as a non-statutory aggravating factor); Brooks v. Kemp, 762 F.2d 1383, 1411–12 (11th Cir. 1985) (finding that the prosecution appropriately argued the defendant's future dangerousness before the jury in Georgia state court), *vacated sub nom.* Kemp v. Brooks, 478 U.S. 1016 (1986); Doster v. State, 72 So. 3d 50, 120–21 (Ala. Crim. App. 2010) (finding future dangerousness "relevant and admissible in Alabama pursuant to § 13A–5–45(d), Ala. Code 1975"); Kelly v. South Carolina, 534 U.S. 246, 252–53 (2002) (finding that the defendant's future dangerousness was at issue in the case and should have been considered); State v. Robert, 820 N.W.2d 136, 143 (S.D. 2012) (finding that the circuit court's conclusion "was based on appropriate considerations including: [the defendant's] future dangerousness").

Pennsylvania and Georgia courts allow expert psychiatric testimony on defendants' future dangerousness following the Supreme Court's holding in *Barefoot v. Estelle*. *See* United States v. Williams, No. 4:08-cr-00070, 2013 WL 1335599, at *33 (M.D. Pa. Mar. 29, 2013) (refusing to strike the future dangerousness factor on the basis that expert testimony is inaccurate); Pitts v. State, 386 S.E.2d 351, 357 (Ga. 1989) ("Expert testimony concerning a defendant's future dangerousness is not, as the defendant contends, constitutionally barred." (citing Barefoot v. Estelle, 463 U.S. 880 (1983))). California allows prosecutorial argument regarding a capital defendant's future dangerousness if it is based on evidence of a defendant's conduct rather than expert opinion. *See* People v. Thomas, 256 P.3d 603, 622 (Cal. 2011) ("Prosecutorial argument regarding a capital defendant's future dangerousness is permissible if, as here, it is based on evidence of the defendant's conduct rather than expert opinion.").

The Arkansas Supreme Court has interpreted the aggravating factor of a previous violent felony as incorporating a defendant's propensity for a violent future. *See* ARK. CODE ANN. § 5-4-604(3) (2021) ("The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person . . . ."); Williams v. State, 991 S.W.2d 565, 576 (Ark. 1999) ("[I]t is evident that the purpose of this aggravating circumstance is not simply to show the defendant's violent history, as appellant contends, but it is also intended to show the defendant's propensity for a violent future."). Utah and North Carolina have allowed for

dangerousness is thus only required or permitted in twenty states and the federal courts, it plays the majority role in the administration of the death penalty. As Dorland and Krauss explained, "Only six states explicitly list future dangerousness as a primary statutory criteri[on]. Yet, these states represent over half of all executions that have occurred since the *Furman* decision."[64]

C. FUTURE DANGEROUSNESS BY THE NUMBERS

Stark statistics reflect the outsized national importance of future dangerousness inquiries in death penalty proceedings.[65] Of the 1,535 total executions carried out since 1976, all but 141 have been carried out in jurisdictions where juries were permitted to consider future dangerousness as part of their sentencing determinations.[66] And in more than half of those executions, there were specific legislative provisions for considering future dangerousness or a requirement that it be considered.[67] Notably, zooming in on Texas,

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the imposition of death to be based on a defendant's future dangerousness. *See* UTAH CODE ANN. § 76-3-207(2)(b) (2021) ("Any evidence the court considers to have probative force may be received regardless of its admissibility . . . ."); State v. Young, 853 P.2d 327, 353 (Utah 1993) ("A jury may legitimately consider a defendant's character, future dangerousness, lack of remorse, and retribution in the penalty phase hearing."); N.C. GEN. STAT. § 15A-2000(a)(3) (2021) (stating that evidence "may include matters relating to any of the aggravating or mitigating circumstances" otherwise listed in the statute); State v. Smith, 607 S.E.2d 607, 621 (N.C. 2005) (stating that "a prosecutor may urge the jury to reach a death sentence based on a fear of the defendant's future dangerousness" (citing State v. Cummings, 536 S.E.2d 36, 55 (N.C. 2000))).

[64] Dorland & Krauss, *supra* note 10, at 66 (footnote omitted).

[65] *See* Mark D. Cunningham, Jon R. Sorensen & Thomas J. Reidy, *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 PSYCH. PUB. POL. & L. 223, 225 (2009) (stating that "[j]ury anticipation of future violence by a capital defendant played a role in a substantial proportion of the 1158 executions carried out in the United States between 1976 and April 2009" and "in seventy-seven per cent of the federal capital prosecutions from 1995 to 2006").

[66] *Executions by State and Region Since 1976*, *supra* note 19. The total number of such executions in the twenty states listed in Table 1, *infra*, is 1,394. *Execution Database*, DEATH PENALTY INFO. CTR. [hereinafter DPIC Execution Database], https://deathpenaltyinfo.org/executions/execution-database (last visited Dec. 16, 2021).

[67] There were 806 executions in the following six states, all of which have statutory provisions allowing future dangerousness to be considered: Texas, Virginia, Oklahoma, Wyoming, Idaho, and Oregon. DPIC Execution Database (selecting the aforementioned six states); *see supra* notes 55–60.

the state where it all started, "[f]uture dangerousness findings have played a dispositive role *in each of the more than 550 executions in Texas* . . . since *Furman*."[68]

The massive importance of future dangerousness extends to the current death row as well. As of October 2020, of the 2,557 people on death row in both the state and federal systems, 2,353 (or 92%) are from jurisdictions where juries were permitted to consider future dangerousness as part of their sentencing determinations.[69] Focusing in on the federal death penalty in isolation provides similar clarity as to the importance of future dangerousness: of the 538 cases in which the United States Attorney General has authorized federal capital prosecutions,[70] 374 have featured defendants who faced an allegation of future dangerousness as a non-statutory aggravating circumstance.[71]

Table 1 lists the jurisdictions that either statutorily require consideration of future dangerousness (such as Texas[72]), provide by statute that future dangerousness is an aggravating factor, or permit future dangerousness testimony in a range of circumstances.

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[68] Marah Stith McLeod, *The Death Penalty as Incapacitation*, 104 VA. L. REV. 1123, 1140 (2018) (emphasis added).

[69] *Death Row Database*, DEATH PENALTY INFO. CTR. [hereinafter DPIC Death Row Database], https://deathpenaltyinfo.org/death-row/overview (last visited Feb. 18, 2021) (providing death row information as of October 1, 2020). *See infra* Table 1 (listing which states consider future dangerousness). And there were, as of October 1, 2020, 290 people on death row from jurisdictions with specific statutory provisions for considering future dangerousness or a requirement that it be considered: these states are Texas, Virginia, Oklahoma, Wyoming, Idaho, and Oregon. DPIC Death Row Database, *supra*.

[70] Declaration of G. Ben Cohen Regarding Federal Death Penalty Cases Involving Allegations of Future Dangerousness ¶ 5 (Jan. 28, 2021) [hereinafter Declaration of G. Ben Cohen], https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/project_declarations/future_dangerousness/future_danger_alleged_as_aggravator_in_notice_of_intent_january_2021.pdf. These statistics are from cases for which information regarding whether future danger was alleged could be located. According to the author of the declaration setting forth these statistics, information could not be located for twenty-five defendants. *Id.*

[71] *Id.*

[72] *See supra* note 55 and accompanying text.

Table 1[73]

Jurisdiction	**Use of Future Dangerousness**	**# On Death Row**	**# Executions**
Texas	Statutory Requirement	210	576
Oregon	Statutory Requirement	24	2
Virginia	Statutory Permitted	2	114
Idaho	Statutory Aggravating Factor	8	3
Oklahoma	Statutory Aggravating Factor	45	113
Wyoming	Statutory Aggravating Factor	1	1
Alabama	Permit Future Dangerousness Evidence or Argument	170	67
California	Permit Future Dangerousness Evidence or Argument	711	13
Georgia	Permit Future Dangerousness Evidence or Argument	45	77
Louisiana	Permit Future Dangerousness Evidence or Argument	68	28
Missouri	Permit Future Dangerousness	22	93

[73] These numbers were drawn from DPIC Death Row Database, *supra* note 69, and DPIC Execution Database, *supra* note 66, on February 18, 2021, reflecting statistics last updated on October 1, 2020.

	Evidence or Argument		
Montana	Permit Future Dangerousness Evidence or Argument	2	3
Nevada	Permit Future Dangerousness Evidence or Argument	70	12
North Carolina	Permit Future Dangerousness Evidence or Argument	141	43
Ohio	Permit Future Dangerousness Evidence or Argument	141	56
Pennsylvania	Permit Future Dangerousness Evidence or Argument	142	3
South Carolina	Permit Future Dangerousness Evidence or Argument	39	43
Utah	Permit Future Dangerousness Evidence or Argument	7	7
Arizona	Rebuttal	119	38
Florida	Rebuttal	347	99
Federal	Non-Statutory Aggravating Factor	55	16

D. FUTURE DANGEROUSNESS IN THE HANDS OF THE JURY

Future dangerousness not only plays a prominent role as a major engine of the American death penalty when considering large-scale

execution, charging, and death row statistics in the aggregate but also functions as a powerful factor when considering the fairness of each trial in which it is alleged. In such a context where the life or death of a particular defendant depends upon a jury's predictive accuracy, future dangerousness testimony is perhaps so powerful that it risks obfuscating the very constitutional purpose that the Court has used to uphold it.[74]

As Professor William Berry III has explained,

> While the rationales of retribution and general deterrence tend to permeate the public's understanding of the justification for the state's use of the death penalty against its citizens, a closer examination of the various capital schemes employed by death penalty jurisdictions quickly reveals that dangerousness is in fact the primary determinant in the sentencing process.[75]

As other commentators have noted, jurors' assessments of future dangerousness are "highly subjective" at best.[76] Jurors overestimate risks of future violence, recidivism, and release.[77] As William Bowers and Benjamin Steiner summarized, "Judging a person's likely future dangerousness is far from foolproof; indeed, those who have examined such assessments find that they are often unreliable

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[74] *See* Ana M. Otero, *The Death of Fairness: Texas's Future Dangerousness Revisited*, 4 U. DENV. CRIM. L. REV. 1, 2 (2014) (explaining that even though future dangerousness has been criticized for being based on "unreliable and faulty scientific evidence," it is the "touchstone of the death sentence" in Texas). Commentators also have noted that the rise of life without parole sentencing—which cabins the jury's consideration of future dangerousness—has been one of the key state-law changes that explains the dramatic decline in death sentencing. *See* Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty*, 94 NOTRE DAME L. REV. 1255, 1259 (2019) ("[A] possible explanation for the decline in death sentencing may be the rise of an alternative sentence: life without parole.").

[75] William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 893 (2010).

[76] Jonathan R. Sorenson & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1254 (2000).

[77] *See id.* at 1254–55 ("Several factors in the decision-making process encourage jurors to overestimate the threat of violence posed by capital murderers. . . . [J]urors seldom realize research has consistently found the true incidence of recidivism among murderers released from prison to be much lower than for other types of parolees.").

because they are subject especially to 'false positives' or predictions of dangerousness that do not materialize."[78] Not only are future dangerousness assessments often unreliable; they also often result in the sentencing to death—and execution—of the least culpable defendants.[79]

To this end, the Capital Jury Project's interviews with hundreds of capital jurors found that in the eyes of the jurors who sit on death penalty cases, future dangerousness allegations play a remarkably weighty role in jury decision making.[80] "A theme present in a number of early pro-death jurors' accounts is the perception of likely future dangerousness of the defendant—the likelihood that 'he could do something like that again' . . . ."[81]

If future dangerousness allegations reliably trigger the fear of a jury—and nearly always result in a jury finding of future dangerousness—it could be an indicator that the supposed individualized life and death determination prized by the Court in *Jurek* may actually be more reminiscent of a *Furman*-like arbitrary system of justice that comes down to whether a particular prosecutor chooses to allege future dangerousness. Supporting this concern is a review of Texas cases that found that juries considered defendants to be a future danger in 110 of the 115 reviewed cases.[82]

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[78] William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 667 (1999).

[79] *See* Shapiro, *supra* note 9, at 168 ("[F]uture dangerousness manages to simultaneously undermine the retributive rationale for the executions it supports and trap many of the least-culpable capital defendants.").

[80] The Capital Jury Project was initiated by William J. Bowers and is one of the largest empirical assessments of jurors' decision-making in death penalty determinations. *See Capital Jury Project, 1941–2011*, M.E. GRENANDER DEP'T OF SPECIAL COLLECTIONS & ARCHIVES, https://archives.albany.edu/description/catalog/apap196#summary (last visited Dec. 17, 2021). The research involved "over 1,200 interviews from jurors in 353 capital trials in 14 states." *Id.*; *see also* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1088 (1995) (discussing survey results in which "[j]urors were evidently concerned with the defendant's future dangerousness" and "deliberations focused on" the future dangerousness "topic[] a 'great deal' or a 'fair amount'").

[81] William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1500 (1998).

[82] *See* Scott Phillips & Trent Steidley, *A Systematic Lottery: The Texas Death Penalty, 1976 to 2016*, 51 COLUM. HUM. RTS. L. REV. 1041, 1055 n.55 (2020) ("Phillips examined the cases of 504 defendants who were indicted for capital murder in Houston from 1992 to 1999. The

Similarly, a study of Virginia death sentences found jurors to be "preoccupied" with the defendant's future dangerousness when they deliberated about the defendant's fate.[83] Capital Jury Project research in South Carolina found that "[f]uture dangerousness appears to be one of the primary determinants of capital-sentencing outcomes, and it also appears to be one of the few ways in which white jurors and black jurors think differently about aggravation and mitigation."[84]

E. RACE, ETHNICITY, AND FUTURE DANGEROUSNESS

Adding to the concern of the arbitrariness and lack of individuation is data indicating that future dangerousness determinations may be systematically tied to race and ethnicity.[85] Black and Latino defendants stand out. According to our research on race in the federal death penalty, of the 538 cases authorized by the Attorney General, only 28% of the defendants have been White. Two hundred sixty-two (49%) of the defendants have been Black, ninety-nine (18%) have been Latino, and twenty-nine (5%) have been other minorities. We found that over the course of the federal death penalty's operation, future dangerousness has been alleged

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District Attorney sought death in 129 cases and 117 cases advanced to a penalty trial. Phillips had data on whether the jury concluded that the defendant was a future danger in 115 of the 117 cases in question. The jury decided the defendant was indeed a future danger in 96% of the cases (110/115) . . . ." (citing Paul Colomy & Scott Phillips, *Irremedial Work and Act-Person Merger: Constructing Irredeemable Selves in Death Penalty Trials*, 33 SOCIO. F. 783, 798–99 (2018))).

[83] Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 WM. & MARY L. REV. 2063, 2067 (2003) ("South Carolina jurors are preoccupied with the defendant's future dangerousness when they deliberate about his fate, but Virginia jurors are, if anything, even more preoccupied.").

[84] Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559–60 (1998) ("When the question of the defendant's future dangerousness was put more directly—the 'defendant might be a danger to society in the future'—57.9% reported that they would be more likely to vote for death. Moreover, 78.7% believed the defendant actually presented such a risk. These results comport with prior studies that emphasize the pervasive role future dangerousness plays in and on the minds of capital sentencing jurors." (footnotes omitted)).

[85] One of this Article's authors, G. Ben Cohen, reviewed and compiled this data in the normal course of business while serving as Resource Counsel with the Federal Death Penalty Resource Counsel Project.

against Latino defendants at a disproportionate rate—higher than against Black, White, and other minority defendants. For example, prosecutors alleged future dangerousness against eighty of the ninety-nine (81%) Latino defendants authorized for the federal death penalty.[86] More specifically, 95% of the Latino defendants authorized for death penalty sentences faced an allegation of future dangerousness in the decade and a half since the departure of Attorney General Gonzalez in September 2007.[87]

If future dangerousness allegations are made disproportionately against non-White defendants, and these same future dangerousness allegations drive death sentences as we have described, this connection between race and future dangerousness leads to an intolerable injustice. In Part III, we explore research on some of the psychological and cognitive levers that may be underlying prosecutor, judge, and juror associations between future dangerousness and Black and Latino defendants.

III. INVESTIGATING IMPLICIT AND EXPLICIT BIAS IN THE CRIMINAL JUSTICE SYSTEM

The law's surprisingly heavy reliance on future dangerousness determinations in capital cases, contextualized within historically unrelenting racial disparities in the death penalty—including the disproportionate use of future dangerousness allegations against non-White defendants facing the federal death penalty—necessitates a targeted empirical examination of whether future dangerousness standards act as a predictable and biasing racial toxin in capital cases. Fortunately, the development of implicit and explicit bias-focused study methodologies in the social and cognitive sciences allows for unique and targeted study designs to be developed. This Part presents modern research connecting race and ethnicity to automatic stereotypes of dangerousness and examines the ways in which empirical studies have begun to investigate

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[86] An allegation of future dangerousness has only been made in 294 of the other 439 cases (67%).

[87] *See* Richard B. Schmitt, *Alberto Gonzales Resigns as AG*, L.A. TIMES (Aug. 28, 2007, 12:00 AM), https://www.latimes.com/nation/la-na-gonzales28aug28-story.html (discussing Gonzales's resignation, effective September 17, 2007).

racializing toxins in the criminal legal system generally, as well as in the capital context more specifically. Connecting these discourses, this review sets the stage for our national empirical study on racial bias and future dangerousness.

A. EMPIRICAL STUDIES OF RACE, BIAS, AND CAPITAL PUNISHMENT

Racial bias has plagued the administration of America's experiment with capital punishment since its inception.[88] Even before David Baldus's landmark empirical study demonstrating the influence of race on the administration of Georgia's death penalty (Baldus study),[89] the interconnection between race and American capital punishment was inexorably linked.[90] Yet, the groundbreaking Baldus study illuminated the undeniability of a racialized system of punishment.[91] Nonetheless, the Baldus study was met with judicial indifference.[92] Ultimately, when confronted

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[88] *See* BANNER, *supra* note 6, at 8 (describing "the swelling number of capital statutes applicable only to blacks" in American colonies in the early eighteenth century); FROM LYNCH MOBS TO THE KILLING STATE, *supra* note 6, at 1 (describing "the connection between race and the killings of African-Americans, in particular through lynchings and the death penalty" as "widely recognized among scholars, activists, and legal officials"); KENNEDY, *supra* note 6, at xii (noting the debate over "evidence suggesting that, in a substantial number of instances, age-old racial habits assert themselves in the process of condemning certain criminals to death").

[89] *See generally* David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim L. & Criminology 661 (1983) [hereinafter Baldus et al., *An Empirical Study of the Georgia Experience*].

[90] *See* BANNER, *supra* note 6, at 8 (demonstrating that the link between race and capital punishment in America dates back to the early eighteenth century); *see also* GROSS & MAURO, *supra* note 6, at 8–9 (discussing empirical studies of racial discrimination in capital sentencing).

[91] *See* Baldus et al., *An Empirical Study of the Georgia Experience*, *supra* note 89, at 709–10 ("[O]ur data strongly suggests that Georgia is operating a dual system, based upon the race of the victim, for processing homicide cases. Georgia juries appear to tolerate greater levels of aggravation without imposing the death penalty in black victim cases; and, as compared to white victim cases, the level of aggravation in black victim cases must be substantially greater before the prosecutor will even seek a death sentence." (footnote omitted)).

[92] *See* McCleskey v. Kemp, 481 U.S. 279, 294–95 (1987) (rejecting the use of statistics to prove race discrimination because "[e]ach jury is unique in its composition, and the Constitution requires . . . consideration of innumerable factors"; "[t]hus, the application of an

with evidence that "blacks who kill whites are sentenced to death at nearly *22 times* the rate of blacks who kill blacks, and more than *7 times* the rate of whites who kill blacks,"[93] the Supreme Court expressed an "unwillingness to regard petitioner's evidence as sufficient . . . based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing."[94] Justice Brennan described this as "a fear of too much justice."[95]

After *McCleskey*, a series of empirical studies demonstrated results in myriad jurisdictions consistent with the landmark Baldus study[96]—none of which achieved any support in the courts.[97] Part of

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inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case").

[93] *Id.* at 327 (Brennan, J., dissenting).

[94] *Id.* at 339.

[95] *Id.*

[96] *See* BALDUS ET AL., *supra* note 6, at 1 (describing the findings of "a study of equal justice in death sentencing during the fifteen-year period" between *Furman* and *McCleskey*); GROSS & MAURO, *supra* note 6, at 69 ("Multiple logistic regression . . . analysis reveals large and statistically significant race-of-victim effects on capital sentencing in Georgia, Florida, and Illinois."); *see also* David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1413 (2004) (explaining that empirical evidence from research proved "that race-of-victim discrimination" "appears to characterize many, but not all" capital punishment systems after *Furman*); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 208–09 (2003) (discussing sentencing disparities influenced by race); Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976–1991*, 20 AM. J. CRIM. JUST. 17, 25, 27 (1995) (finding that in Kentucky from 1976–1991, "Blacks who killed Whites" were more likely to face capital charges and were "more likely to be sentenced to die by the jury"); U.S. GEN. ACCT. OFF., GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (finding "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision").

[97] *See, e.g.*, United States v. Bass, 536 U.S. 862, 864 (per curiam) (2002) (holding that a defendant was not entitled to discovery regarding the state's capital punishment practices because "raw statistics regarding overall charges" were not relevant to the decision); Sheri Lynn Johnson, *Litigating for Racial Fairness After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 180 (2007) (noting that after *McCleskey*, courts have almost universally rejected narrowly tailored and focused statistical challenges to race prosecution). Even in cases where statistics reflect overwhelming race discrimination at the county (as opposed to state) level, claims have been unsuccessful unless race is specifically identified (and proven) as a reason

the challenge is that many of these studies found results that could not overcome what Justice Scalia predicted and acknowledged in the memoranda he circulated at the time of the *McCleskey* case: "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof."[98]

Justice Scalia's then-observation now seems impressive in its ability to predict the impact of "unconscious" bias on case outcomes despite the lack of evidence at that time, when modern empirical methods of testing implicit bias were in early development.[99] In

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for prosecution. *Id.* at 181–84. Ultimately, the focus of the Court has been on intentionality rather than statistics, but even in the most outrageous of cases, the Court has held its nose and permitted executions. *See* Wellons v. Hall, 558 U.S. 220, 221, 226 (2010) (per curiam) (remanding for further hearings but ultimately permitting execution regardless of allegations that some jurors gave chocolate shaped as male genitalia to the trial judge and chocolate shaped as female breasts to the bailiff); *see also* Tharpe v. Ford, 139 S. Ct. 911, 911 (2019) (Sotomayor, J., statement respecting denial of certiorari) (denying certiorari even where "Tharpe, who is black, has asked state and federal courts to consider his claim that a white member of the jury that sentenced him to death was biased against him because of his race"); *id.* ("Tharpe has presented a signed affidavit from the juror in question, who stated, among other things, that 'there are two types of black people: 1. Black folks and 2. Niggers,' and that Tharpe, 'who wasn't in the "good" black folks category in [his] book, should get the electric chair for what he did.' . . . Nevertheless, Tharpe has never received a hearing on the merits of his racial-bias claim." (alteration in original) (quoting Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018) (per curiam))).

[98] David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 371 n.46 (1994) [hereinafter Baldus et al., *Reflections*] (quoting Memorandum from Antonin Scalia, J., U.S. Sup. Ct., to the Conf. of the Js., U.S. Sup. Ct. 1 (Jan. 6, 1987) (on file with the *Washington and Lee Law Review*)).

[99] These methods included priming and the development of the Implicit Association Test. *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5, 8–9 (1989) (explaining the studies that examined "automatic stereotype priming effects"); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 6 (1995) [hereinafter Greenwald & Banaji, *Implicit Social Cognition*] (discussing how "priming" and "context" affect empirical studies); Anthony G. Greenwald, Debbie E. McGhee & Jordan L.K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464 (1998) [hereinafter Greenwald et al., *Measuring Individual Differences*] (defining Implicit Association Tests).

today's world of social science methodology, it is now possible to observe that the empirical studies demonstrating overarching racial bias in the administration of America's capital punishment (which, at the time, were indeed groundbreaking and continue to provide valuable and striking confirmation of the modern continuation of a historical problem) were not methodologically able to identify the precise locations where racial bias taints the system.[100] Today, these methods can potentially uncover specific and identifiably problematic legal inquiries and processes that, if addressed, would hardly be considered what Justice Scalia deemed "ineradicable."[101]

B. STUDIES OF IMPLICIT BIAS IN THE LEGAL CONTEXT

Research, including our own prior scholarship, not only has sought to examine racial bias and case outcomes generally but also has attempted to focus on particularly troubling spots within the administration of the criminal justice system, including specific processes in death penalty cases.[102] In particular, and as we will summarize in more detail, our colleagues and members of our research team have empirically tested the role of racial bias in death

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[100] Former federal prosecutor, now Professor, Rory Little, considered the compelling statistics presented by Kevin McNally that race played a role in the administration of the federal death penalty and suggested that "unconscious empathic bias cannot be identified and corrected by the unconscious individual actors." Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1592, 1602 (2004) (citing Kevin McNally, *Race and Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004)). Professor Little concluded that "[i]nstitutional responses are necessary to eliminate, or correct for, such unconscious influences." *Id.* at 1602. He suggested that "the unconscious ethnic biases that all persons, of all races, may hold" and "unconscious race empathy . . . might well explain why close potential capital cases—cases that I might colloquially call 'leaners' and Professor Baldus describes as 'mid-range' cases in terms of culpability—might go more often against minority defendants." *Id.* at 1599–1600 (footnote omitted). Little's identification of "leaners," perhaps considered within the role of prosecutorial discretion, may help to illuminate the various pathways whereby precise legal rules, standards, or processes are tested.

[101] *See* Baldus et al., *Reflections*, *supra* note 98, at 371 n.46 (quoting Memorandum from Antonin Scalia, J., U.S. Sup. Ct., to the Conf. of the Js., U.S. Sup. Ct. 1 (Jan. 6, 1987) (on file with the *Washington and Lee Law Review*)).

[102] *See infra* notes 103–108.

qualification,[103] the presumption of innocence,[104] the evaluation of ambiguous evidence,[105] the way jurors and judges remember (and misremember) case facts,[106] the way judges sentence,[107] and capital punishment's retributive norms.[108] Taken together, the results of these studies support broader arguments, such as Levinson and Smith's claim of "systemic implicit bias"—the idea that "a comprehensive understanding of implicit bias in the criminal justice system requires acknowledging that the theoretical underpinnings of the entire system may now be culturally and cognitively inseparable from implicit bias."[109]

These studies also help to focus more on the specific ways bias can operate and can potentially explain some of the "how and why" behind general results like the Baldus studies. At the same time, they help motivate the empirical examination of specific inquiries, such as the future dangerousness prediction in capital cases. Although not every process or procedure may lead to identifiably intolerable racialized harms within a system, such as the system of capital punishment, it is nonetheless not particularly hard to identify and test specific hypotheses whereby certain elements of the criminal justice system may lead to predictably racialized

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[103] *See generally* Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019) [hereinafter Levinson et al., *Race and Retribution*]; Justin D. Levinson, Robert J. Smith & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014) [hereinafter Levinson et al., *Devaluing Death*].

[104] *See generally* Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010) [hereinafter Levinson et al., *Guilty by Implicit Racial Bias*].

[105] *See generally* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010).

[106] *See generally* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) [hereinafter Levinson, *Forgotten Racial Equality*].

[107] *See generally* Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017) [hereinafter Levinson et al., *Judging Implicit Bias*]; Mark W. Bennett, Justin D. Levison & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939 (2017).

[108] *See generally* Levinson et al., *Race and Retribution*, *supra* note 103.

[109] Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J.F. 406, 407 (2017).

harms. Much as we set forth this Article's study of racial bias and future dangerousness in Part IV, the studies described here demonstrate how focusing in on certain elements of the legal process may help illuminate legally-sanctioned "toxins" and pave the way toward just solutions.

Of the various ways that researchers have been able to examine specific hypotheses related to race and criminal justice, some of the most revealing have included the creation of specifically tailored Implicit Association Tests or priming mechanisms.[110] These measures are designed to investigate particular hypotheses within the criminal justice system. Perhaps the most well-known method of measuring automatic associations is the Implicit Association Test (IAT). The IAT is a game-like measure that pairs an "attitude object" (such as a particular group, e.g., women or Muslim Americans) with an "evaluative dimension" (positive or negative) and tests how the speed (measured in milliseconds) and accuracy of participants' responses indicate automatic associations between concepts.[111] Study participants sit at a keyboard (frequently at their own computer) and are instructed to match an attitude object (e.g., Muslim or Christian, woman or man) with either an evaluative dimension (e.g., positive or negative) or an attribute dimension (e.g., moral or immoral, valuable or worthless) by pressing a designated response key as quickly as possible.[112] For example, in one task, participants are instructed to press a key (e.g., "E") when a Muslim

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[110] "Priming is a term imported from cognitive psychology that describes a stimulus that has an effect on an unrelated task. . . . Simply put, priming studies show how causing someone to think about a particular domain can trigger asscociative networks related to that domain." Justin D. Levinson, Danielle M. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 9, 10 (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter Levinson et al., *A Social Science Overview*] (first citing Levinson, *Forgotten Racial Equality*, *supra* note 106; and then citing Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009)); *see also* Levinson, *Forgotten Racial Equality*, *supra* note 106, at 356–58 (describing priming studies that demonstrated "shooter bias" in which the participants were more likely to "shoot Black perpetrators more quickly and more frequently than White perpetrators" in a video game instructing participants "to shoot perpetrators . . . as fast as they can").

[111] This description of the IAT in this paragraph and the next is derived heavily from our prior description of it. *See* Levinson et al., *A Social Science Overview*, *supra* note 110, at 10–15.

[112] *See* Greenwald et al., *Measuring Individual Differences*, *supra* note 99, at 1466 (discussing the IAT keyboard procedure).

name or a positive word appears on the screen. In a second task, participants are instructed to press a key (e.g., "I") when a Christian name or negative word appears. The strength of the attitude is understood as the variance in the speed at which people can respond to the two tasks.[113] For example, if participants pair the words in the first task faster than those in the second task, then they are demonstrating implicitly positive attitudes toward Muslims. If they, however, are faster to respond to tasks that require categorizing Muslims with negative words than tasks that require categorizing Muslims with positive words, then they are demonstrating implicit religion-based stereotyping.[114]

Levinson's scholarship has relied upon both IATs and other priming methodologies. Using a priming methodology, Levinson and psychologist Danielle Young tested whether "priming mock jurors with the image of a dark-skinned perpetrator might alter judgments about the probative value of evidence."[115] Although the study did not measure dangerousness explicitly, its context was an armed robbery case.[116] Participants read the basic story of the robbery and viewed five crime scene photos for four seconds each.[117] All participants viewed identical photos, excluding one dimension: half saw a photo of a darker-skinned perpetrator, and the other half

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[113] Levinson et al., *A Social Science Overview*, *supra* note 110, at 17 (explaining "strength of attitude").

[114] Social scientists Nilanjana Dasgupta and Anthony Greenwald have accurately summarized the logic underlying the IAT: "When highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty." Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCH. 800, 803 (2001). Social psychologists Laurie Rudman and Richard Ashmore concur: "The ingeniously simple concept underlying the IAT is that tasks are performed well when they rely on well-practiced associations between objects and attributes." Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GRP. PROCESSES & INTERGROUP RELS. 359, 359 (2007).

[115] Levinson et al., *A Social Science Overview*, *supra* note 110, at 22 (discussing Levinson & Young, *supra* note 105); *see also* Levinson & Young, *supra* note 105, at 310–11 (describing a study that provided "identical photos except in one key respect," the color of the perpetrator's skin, and found discrepancies based on differing skin tones).

[116] Levinson & Young, *supra* note 105, at 332.

[117] *Id.*

saw a photo of a lighter-skinned perpetrator.[118] Mock jurors then learned about various pieces of evidence from trial and were asked to rate the probative value of each piece of evidence.[119] The study results found that jurors who saw a darker skinned perpetrator evaluated evidence as tending to indicate guilt, a result that demonstrated how simply priming skin tone or race can potentially affect the way jurors evaluate key case facts and defendants.[120]

In a different study, Levinson used racialized names and a memory test to evaluate whether jurors automatically misremember case facts (of a violent assault case) in racially biased ways.[121] When case facts are consistent with jurors' explicit or implicit racial stereotypes—for example, the stereotype that Black people are aggressive—it was hypothesized that study participants would more accurately remember facts that are consistent with these stereotypes.[122] Levinson thus conducted a study designed to examine whether people misremember stereotype-consistent case facts in racially biased ways.[123] Results of the study indicated that participants who read about a Black actor remembered that actor's aggressive actions more frequently than participants who read about a White actor, even though the White actor had committed the same aggressions.[124] Though a memory study is perhaps the converse of a predictive study, the study provides an insightful link into how racialized cognitive processes can affect the ways jurors understand cases and defendants.

In another study focusing on jury decision-making and implicit racial bias, Levinson, Huajian Cai, and Young designed an IAT specifically to test whether implicit racial bias is associated with the

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[118] *Id.* at 310–11.

[119] *Id.* at 332–34.

[120] *Id.* at 310–11, 337 ("Participants who saw the photo of the perpetrator with a dark skin tone judged ambiguous evidence to be significantly more indicative of guilt than participants who saw the photo of a perpetrator with a lighter skin tone." (footnote omitted)).

[121] *See* Levinson, *Forgotten Racial Equality*, *supra* note 106, at 347, 353 (providing the hypothetical used and arguing "that implicit racial bias automatically causes jurors (and perhaps even judges) to misremember case facts in racially biased ways" (footnote omitted)).

[122] *Id.* at 397.

[123] *Id.* at 352–53, 380–81 (showing a study that draws on "cognitive science studies that show the fragility of the human memory and connect memory failures to racial biases").

[124] *Id.* at 398–99.

presumption of innocence.[125] The researchers devised an IAT that measured whether people associate White or Black with the legal concepts of Guilty and Not Guilty.[126] The results of the study demonstrated that participants held a significant implicit association between Black individuals and Guilty compared to White individuals and Guilty, indicating that the presumption of innocence may not cognitively function to protect Black men.[127] The study thus provided a model of the way IATs can be specifically developed to test racialized associations in the criminal justice context.[128]

Building upon these studies, researchers began using implicit and explicit bias methodologies to examine racial bias in capital punishment.[129] For example, Levinson, Smith, and Young studied the implicit and explicit biases of jury-eligible citizens in six leading death penalty states.[130] The study focused first on whether jurors harbor implicit racial biases related to the value of human life, such that jurors automatically associate White with concepts of value and Black with lack of worth.[131] The study results supported that prediction; indeed, jurors implicitly associated White with worth and Black with worthless.[132] In addition, the research project also focused in on the role of implicit and explicit bias in the process of capital punishment's "death qualification" process whereby jurors in the venire are screened for their willingness to potentially impose

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[125] *See* Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 104, at 204 ("The results of the Guilty/Not Guilty IAT confirmed our hypothesis that there is an implicit racial bias in the presumption of innocence.").

[126] *See id.* at 201–03 (discussing the study's IAT method).

[127] *See id.* at 204 ("These results suggest that participants held an implicit association between Black and Guilty.").

[128] *Id.* at 189.

[129] *See infra* notes 130, 135.

[130] *See* Levinson et al., *Devaluing Death*, *supra* note 103, at 553–56 (describing how the authors measured the jurors' implicit and explicit racial biases). For additional discussion of implicit bias in the death penalty, see also Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly), in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 110, at 229.

[131] Levinson et al., *Devaluing Death*, *supra* note 103, at 537–38, 565.

[132] *See id.* at 565 (explaining "that death-qualified participants more rapidly associate[d] White subjects with the concepts of 'worth' or 'value' and Black subjects with the concepts of 'worthless' or 'expendable'").

the death penalty.[133] In that context, the study findings demonstrated that death qualified jurors—the only jurors who would be allowed to sit on a capital jury—actually possessed *higher* levels of racial biases (both implicit and explicit) than jurors who would be excluded from capital juries because they either would not be able to convict or would never be able to vote for a death sentence.[134]

Levinson, Smith, and Hioki continued the inquiry into bias and the death penalty by measuring whether Americans' automatic conceptions of retributive punishment have become cognitively inseparable from race.[135] The experimenters recruited a diverse

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[133] As the authors explained, death qualification is a process that applies to capital cases. *See id.* at 542 ("One particular form of regulation that applies solely to capital cases is the death-qualification process."); *see also id.* ("To be eligible [(death-qualified)] to sit on a capital jury, a prospective juror must be willing to consider sentencing a defendant to both life without the possibility of parole and the death penalty. . . . [N]o juror who would automatically vote to reject (or to impose) the death penalty is eligible to sit on a capital jury.").

[134] *Id.* at 521, 521 n.19 ("[W]e found—as predicted—that death-qualified jurors harbored stronger racial biases than excluded jurors. These differences in racial bias levels were revealed on both implicit and self-reported (explicit) measures." (footnote omitted)). Young, Levinson, and Scott Sinnett employed a priming methodology to follow up on this study by examining the presumption of innocence and race. Danielle M. Young, Justin D. Levinson & Scott Sinnett, *Innocent Until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence*, 9 PLOS ONE 1, 1–2 (2014). In this study, mock jurors were seated in groups of up to six in a moot courtroom. *Id.* at 2. The jurors were shown a video in which a White United States District Court judge "read[] a series of jury instructions that either included the presumption of innocence" instructions or unrelated instructions of similar length. *Id.* Immediately after listening to the instructions, the mock jurors completed a study method known as a "dot-probe task." *Id.* at 2–3. This task involves quickly viewing four faces, two Black and two White, which flash rapidly and then disappear from a screen. *Id.* Immediately after the faces disappear, a gray dot appears in equal frequency behind one of the two faces. *Id.* at 3. While still seated in the jury box, the mock jurors were instructed to indicate, as quickly as possible, the side of the screen in which the dot appeared. *Id.* The researchers found that the "[p]resumption of innocence instructions induced attentional bias. Specifically, individuals presented with presumption of innocence instructions had faster responses to Black, compared to White, faces in a dot-probe task." *Id.* The results, considered in connection with prior studies, could indicate that the presumption of innocence triggers guilty stereotypes about Black men. *See id.* at 4 (recognizing that "the very instructions designed to protect defendants from bias" might produce an implicitly biased response).

[135] *See* Levinson et al., *Race and Retribution*, *supra* note 103, at 844, 854, 874–75 (proposing that "the historical use of punishment in racialized ways has led to the cognitive inseparability of race and retribution" and discussing the development and use of the "Retribution IAT").

sample of over 500 American adults and created an IAT to test whether people implicitly associate retributive concepts with Blacks and leniency and mercy with Whites.[136] The results of the study demonstrated that jury-eligible citizens indeed automatically associated Black faces with the words "punish," "payback," and "revenge" and associated White faces with the words "forgive," "compassion," and "redemption."[137] Furthermore, the researchers added to their earlier study by examining whether the process of death qualification was potentially a fraught one.[138] Results of this study corroborated earlier results and demonstrated that death qualified jurors were indeed more likely to hold implicit and explicit biases than those who would be excluded because of an unwillingness to convict or sentence a defendant to death.[139]

C. STEREOTYPES OF DANGER: RACE, ETHNICITY, AND THE MEASUREMENT OF BIAS

Contextualized within this research on implicit bias and the criminal justice system, research from the fields of implicit social cognition and social psychology supports the prediction that implicit and explicit biases may plague future dangerousness determinations in capital cases and beyond.[140] Here, we briefly review the ways in which social scientists have examined racial cues and the notion of danger in studies mostly outside of the legal system. Even though such studies are not situated within the courtroom context—and, notably, do not require jurors to make judgments of a particular capital defendant's future dangerousness—they provide important theoretical support for the hypothesis that asking jurors to determine a defendant's future dangerousness may lead to biased results. Taken together, they support the hypothesis that when people think about Black and Latino men, they automatically think about danger and hostility.

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[136] *Id.* at 844.

[137] *Id.* at 844, 874–75, 879.

[138] *See id.* at 844–45 (summarizing findings that the process of death qualification actually increases the likelihood that racial biases will be triggered).

[139] *See id.* at 879–81 (finding that "the death qualification process actually excludes the least biased citizens").

[140] *See infra* Sections III.C.*1–2*.

1. Black Men and Stereotypes of Danger. There is no shortage of compelling studies investigating the connection between Black men and stereotypes of danger and hostility.[141] In a classic study by Patricia Devine that demonstrated how easily racial stereotypes can be activated, participants watched a series of flashing words—including racialized category words, such as "Blacks," and words that were stereotypically associated with Black Americans, such as "athletic" and "poor."[142] Shortly thereafter, participants read about a man engaging in various ambiguous behaviors—such as withholding rent until the landlord made repairs—and were asked to make judgments about the man.[143] Participants who were primed with more Black-stereotyped words judged the actor's ambiguous behavior as more hostile than participants who were primed with fewer Black-stereotyped words.[144] Devine concluded, "[T]he automatic activation of the racial stereotype affects the . . . interpretation of ambiguously hostile behaviors for both high- and low-prejudice subjects."[145] Although traits such as "poor" and "athletic" are unrelated to the trait of "hostility," the stereotype

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[141] *See* Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 889 (2004) (discussing study results finding that "Black faces looked more criminal to police officers; the more Black, the more criminal"); *see also* Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314, 1325 (2002) (discussing study participants' decisions to either shoot or not shoot targets and finding that "the decision to fire on an armed target was facilitated when that target was African American, whereas the decision not to shoot an unarmed target was facilitated when that target was White"); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181, 190 (2001) (finding "that the race of faces paired with objects does influence the perceptual identification of weapons," that the results of the study "showed that when time was unlimited, Black primes facilitated the identification of guns, relative to White primes," and that "when response time was constrained, Black primes caused race-specific errors"); Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 773 (2018) ("The stereotyping of Blacks' predisposition to crime and dangerousness is rooted in the beliefs formed during slavery by Whites that Blacks were more animalistic than human."). Studies on Latino men are not as numerous.

[142] Devine, *supra* note 99, at 9–11.

[143] *Id.* at 10.

[144] *Id.* at 11.

[145] *Id.*

congruence between the primed social category (Blacks) and the trait of hostility actually made participants more likely to judge a behavior as hostile.[146] If simply flashing words like "Black" and "basketball" can automatically elicit racial stereotypes of hostility unbeknownst to a person, then certainly looking at a Black or Latino defendant in a murder trial could be expected to do the same.

Later studies of priming and race have shown that stereotypes connecting Black Americans to dangerousness are essentially ready to be activated and can be triggered even by normal occurrences, such as listening to music[147] or, perhaps, sitting on a jury. Participants in a study by Rudman and Lee, for example, listened to either rap or pop music for thirteen minutes and were later asked to make judgments about a person's ambiguously hostile and sexist actions.[148] The researchers found that simply listening to rap music for only a few minutes activated participants' negative racial stereotypes of Black Americans and specifically triggered racialized conceptions of violence and danger.[149] Furthermore, the researchers found that rap music even led to elevated judgments of a fictional person's hostility when he had a Black-sounding name (but not when he had a White-sounding name).[150] This study further demonstrates that racial stereotypes of danger can be easily and automatically activated, with concerning results.[151]

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[146] *See id.* at 9, 12 (discussing why words seemingly unrelated to hostility could cause the priming effect).

[147] *See* Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GRP. PROCESSES & INTERGROUP RELS. 133, 138–39 (2002) (finding that "exposure to violent and misogynistic rap music had the generalized effect of strengthening the association between Black men and negative attributes").

[148] *See id.* at 135–36, 140 (describing the study's methodology). Participants' self-reported (explicit) prejudice levels did not predict participants' racialized judgments, indicating that automatic biases can leak into people's decision-making processes without their endorsement or awareness. *See id.* at 145–46 (discussing the fact that "self-reported stereotyping" only "weakly predicted" a participant's racialized judgments).

[149] *See id.* at 144–46 (finding that the results of the study showed direct evidence that "rap music automatically activates negative Black stereotypes").

[150] *See id.* at 145 (finding that "primed subjects rated Kareem as more sexist, as well as more hostile and less intelligent than Donald, and they did so irrespective of their prejudice level").

[151] *See id.* at 138 ("In sum, these results are consistent with our expectation that rap music would strengthen automatic associations between Blacks and negative attributes . . . .").

A similar study by researchers James Johnson, Sophie Trawalter, and John Dovidio primed participants by playing segments of either a violent or non-violent rap song, indicating that the content of what one hears can actually have important effects on later racialized decision-making.[152] After listening to the music, participants read stories of violent behavior (e.g., breaking car windows) and were asked to make judgments about the cause of those actions.[153] Those who heard the violent rap music, compared to other participants, judged a Black male's, but not a White male's, aggressive behavior as caused by dispositional factors (e.g., a violent personality) rather than situational factors (e.g., alcohol or stress related to a break-up).[154] When people make dispositional attributions for criminal behavior, such as believing that a person acted because of a violent character rather than a bad situation, there are clear implications for capital-case sentencing and future dangerousness determinations.

Research on racial stereotypes and danger has even implicated the role of mass media in the context of the death penalty.[155] Phillip Goff and his colleagues conducted a Pennsylvania-focused study that linked the number of animal references in media sources (in particular, references related to "ape," such as "brute," "barbaric," "claw," and "crawl," among others) used to describe a crime and the number of Black defendants who were sentenced to death.[156] Although it was not a particularized focus of the study, it is notable that Pennsylvania, which has 142 people on death row, indeed

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[152] James D. Johnson, Sophie Trawalter & John F. Dovidio, *Converging Interracial Consequences of Exposure to Violent Rap Music on Stereotypical Attributions of Blacks*, 36 J. EXPERIMENTAL SOC. PSYCH. 233, 239–40, 245–49 (2000) (outlining the study's methodology and discussing its results).

[153] *Id.* at 240–41.

[154] *Id.* at 245 ("When compared to control participants and those exposed to nonviolent Black artists, participants exposed to the violent rap music made more negative dispositional attributions of violence to a Black, but not to White, target person.").

[155] Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCH. 292, 304 (2008) ("[W]e demonstrated that subtle media representations of Blacks as apelike are associated with jury decisions to execute black defendants.").

[156] *Id.* at 292, 303–04, 304 n.5 (describing the archival study of twenty years of capital cases in Pennsylvania).

allows for future dangerousness testimony.[157] In the study, the researchers reviewed newspaper coverage of murder cases in the Philadelphia area from 1979 to 1999.[158] Employing a coding methodology, they compared the number of times "bestial or subhuman" references were made in *Philadelphia Inquirer* articles related to death-penalty cases and compared references for Black defendants versus White defendants.[159] As they hypothesized, the number of "ape-relevant" words used in cases with Black defendants (approximately 8.5 mentions per article) was significantly higher than in cases with White defendants (approximately 2.2 mentions per article).[160] Interestingly, the researchers also found a direct relationship between the articles' "bestial or subhuman" content and the trial outcome: Black defendants who were sentenced to death were portrayed with a greater number of ape-like representations in articles than Black defendants who received sentences of less than death.[161] This study powerfully demonstrates that even supposedly race-neutral portrayals of capital crimes incorporate harmful racial stereotypes of Black defendants and that these racialized portrayals may actually influence trial outcomes.[162]

2. Latino Men and Stereotypes of Danger. Although research projects investigating stereotypes of the Latinx community have been somewhat less abundant, there have indeed been empirical examinations that link Latinx stereotypes with conceptions of

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[157] *See supra* Table 1.

[158] Goff et al., *supra* note 155, at 303 ("[W]e examined death-eligible cases between 1979 and 1999 in Philadelphia, Pennsylvania . . . [and] extracted 153 cases for which we had both mug shots of the defendant and press coverage of the case in the *Philadelphia Inquirer*.").

[159] *Id.* at 303–04.

[160] *Id.* at 304.

[161] *Id.* The researchers did not investigate how many of the death sentences included future dangerousness testimony. S*ee also* Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 383–84 (2006) (finding that in capital cases with White victims in Philadelphia, Black defendants who looked stereotypically Black were more likely to receive the death penalty than Black defendants who looked less stereotypically Black).

[162] *Cf.* Goff et al., *supra* note 155, at 304 ("[D]espite 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.").

hostility and aggression.[163] A 2017 study by Melody Sadler, Joshua Correll, Bernadette Park, and Charles Judd (Sadler and colleagues) employed the classic "shooter bias" paradigm and measured automatic responses in a way that illuminates the automaticity of stereotypes of Latino danger.[164] As demonstrated in a 2015 study, in the video-game-style shooter bias paradigm, someone arrives on "screen holding either a cell phone or a gun. Participants are instructed to 'shoot' as rapidly as possible if the person is holding a gun or to hit the safety (i.e. 'not shoot') as rapidly as possible if the person is holding a cell phone."[165] In the classic shooter-bias studies, researchers have found that people shoot more rapidly when they see a Black person holding a gun compared to a White person holding a gun.[166] Similarly, participants are more likely to "shoot" unarmed Black men than unarmed White men.[167] When expanding the "shooter bias" paradigm to include images of Latino men in a study of actual police officers, Sadler and colleagues found that study participants indeed "shot" Black and Latino men significantly faster than White and Asian men.[168] Furthermore, they found that the quicker reaction times to shoot Latino men were associated with police officers' danger- and aggression-related stereotypes of

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[163] *See infra* notes 164, 171–173.

[164] Melody S. Sadler, Joshua Correll, Bernadette Park & Charles M. Judd, *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286, 289–92 (2012) ("The current research examined implicit racial bias in the decision to shoot White, Black, Latino, and Asian male targets in a FPS task in two studies.").

[165] Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 883 (2015) (footnote omitted).

[166] *See, e.g.*, Correll et al., *supra* note 141, at 1325 (finding that "[b]oth in speed and accuracy, the decision to fire on an armed target was facilitated when that target was African American"); *see also* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1013 (2007) (finding that participants reacted more quickly in the decision to shoot when the shooting targets "were Black, rather than White"); Charles M. Judd, Irene V. Blair & Kristine M. Chapleau, *Automatic Stereotypes vs. Automatic Prejudice: Sorting out the Possibilities in the Payne (2001) Weapon Paradigm*, 40 J. EXPERIMENTAL SOC. PSYCH. 75, 78–79 (2004) (finding that responses to categorize an object in a photograph as a gun were faster when the participants had seen Black face primes than White face primes).

[167] *See* Correll et al., *supra* note 141, at 1325 ("[T]he decision to fire on an armed target was facilitated when that target was African American, whereas the decision not to shoot an unarmed target was facilitated when that target was White.").

[168] *See* Sadler et al., *supra* note 164, at 301 ("Officers showed racial bias in the decision to shoot Latinos relative to Whites and Asians.").

Latinos.[169] The researchers summarized, "The more aggressive their personal stereotype of Latinos, the less able officers were to accurately distinguish objects."[170]

The shooter bias results associating Latinos with hostility and threat can be contextualized within other studies showing anti-Latino implicit bias. For example, using a stereotype IAT designed to measure ethnic stereotypes related to intelligence, James Weyant found that participants implicitly associated the category of Hispanic with unintelligent stereotypes and the category of White with intelligent stereotypes.[171] In an earlier study, Galen Bodenhausen and Maryl Lichtenstein investigated stereotypes of Hispanic aggression in the criminal justice system and found that study participants judged defendants to be more aggressive (and more guilty) when they were depicted as Hispanic as compared to when they were not.[172] In yet another study, this time using methods from psychology's field of attention and perception, Steffanie Guillermo and Correll studied attentional biases and compared how people visually paid attention to Latino, Black, and White faces.[173] The researchers found that Latino faces captured study participants' attention faster, and kept their attention longer, than Black or White faces.[174] The researchers surmised that "[s]ince Latinos are stereotypically associated with threat, it is plausible

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[169] *See id.* at 305 (noting that "[t]he more officers endorsed stereotypes of Latinos as violent and dangerous, the faster they tended to respond to armed than unarmed Latino targets").

[170] *Id.* at 306.

[171] James M. Weyant, *Implicit Stereotyping of Hispanics: Development and Validity of a Hispanic Version of the Implicit Association Test*, 27 HISP. J. BEHAV. SCIS. 355, 357, 360 (2005).

[172] Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCH. 871, 875 (1987) ("[S]ubjects saw the Hispanic defendant as more aggressive, more likely to be aggressive in the future, more likely to be guilty, and more likely to commit criminal assault in the future than a nondescript defendant . . . ."). The comparison group was described by the authors as being "ethnically nondescript." *Id.* at 872.

[173] *See* Steffanie Guillermo & Joshua Correll, *Attentional Biases Toward Latinos*, 38 HISP. J. BEHAV. SCIS. 264, 265 (2016) ("The goal of the present research was to examine preferential attention, or attentional bias, toward Latinos.").

[174] *Id.* at 274 ("The current research provides the first evidence that Latino faces capture attention faster and hold attention longer than White faces when participants are White. We demonstrated this effect across two studies, and [found the same] even when the racial context included Black faces . . . .").

that threat stereotypes are related to attention toward Latino faces."[175]

As Latinx defendants now face disproportionate treatment in the death penalty,[176] it is important not just to investigate anti-Black bias in capital punishment but also to investigate any potential connection between anti-Latinx bias and capital punishment decision-making and outcomes. Our study attempts to do so at what may be a historical moment in the wake of recent presidential campaigns launched under the stereotype-stoking threat of Mexico sending us "rapists" and "bringing drugs" and "crime,"[177] along with allegations that people seeking asylum in the United States were "animals" and that "monsters" from the MS-13 gang are coming to the United States to murder children.[178]

In light of the voluminous research connecting both Black and Latino Americans to stereotypes of danger and hostility, as well as the development of empirical methods that facilitate the testing of implicit stereotypes in specific legal contexts, we set out to examine whether implicit and explicit biases affect death penalty future dangerousness determinations.

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[175] *Id.*

[176] *See supra* notes 85–88 and accompanying text.

[177] Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016, 11:35 AM), https://time.com/4473972/donald-trump-mexico-meeting-insult/ ("Donald Trump kicked off his presidential bid more than a year ago with harsh words for Mexico. 'They are not our friend, believe me,' he said, before disparaging Mexican immigrants: 'They're bringing drugs. They're bringing crime. They're rapists. . . .'").

[178] Robert E. Kessler & Nicole Fuller, *Trump, Barr: Feds to Seek Death Penalty in Slaying of Two Brentwood Teens, Other Killings*, NEWSDAY (July 15, 2020, 10:48 PM), https://www.newsday.com/long-island/ms13-murders-long-island-trump-barr-1.46901741 ("'We believe the monsters who murder children should be put to death,' Trump said during a briefing with reporters inside the Oval Office Wednesday morning. 'We seem to have quite a good agreement on that. These people murder children and they do it as slowly and viciously as possible. We will not allow these animals to terrorize our communities. And my administration will not rest until every member of MS-13 is brought to justice.'"); Julie Hirschfeld Davis & Niraj Chokshi, *Trump Defends 'Animals' Remark, Saying It Referred to MS-13 Gang Members*, N.Y. TIMES (May 17, 2018), https://www.nytimes.com/2018/05/17/us/trump-animals-ms-13-gangs.html ("President Trump on Thursday defended his use of the word 'animals' to describe dangerous criminals trying to cross into the United States illegally . . . . His comments this week come after he has complained bitterly about a wave of migrants from Central America . . . arriving at the United States border asking for asylum . . . .").

IV. THE EMPIRICAL STUDIES

Considering the importance of future dangerousness determinations in capital punishment, as well as prior research on implicit and explicit bias, this Part describes the empirical studies designed to measure the role—if any—of implicit and explicit racial anti-Black and anti-Latino bias in future dangerousness determinations in capital cases and beyond. Two national studies were conducted on a diverse group of jury-eligible participants.

A. METHODS AND MATERIALS

1. Mock Juror Participants. Study participants came from a diverse national sample of 547 jury-eligible participants across the two studies described below.[179] In Study 1, 271 participants from a national sample participated. Participants were diverse in terms of age,[180] gender,[181] race and ethnicity,[182] and political preferences.[183] In Study 2, 276 participants from a separate national sample

[179] Participants in both studies were recruited via MTurk and were compensated for their participation. Participants who were non-citizens or convicted felons were excluded from the study results because they would likely be excluded from jury service.

[180] 36.16% of participants were between ages 21–30. The second most common age range was 31–40, with 35.79% falling in this range. The third most common age range was 41–50, with 15.13% falling in this range.

[181] 38.01% of the participants in Study 1 identified as female, and 61.99% identified as male.

[182] In Study 1, 74.91% of participants identified themselves as White, 13.65% identified themselves as Black or African American, 7.38% identified themselves as Asian American, 6.27% identified themselves as Hispanic or Latino, and 2.58% identified themselves as more than one race.

[183] In Study 1, participants were asked political preferences by inquiring how strongly they typically agreed with liberals and conservatives on a range of issues: 39.48% reported affiliating strongly or moderately with liberal positions, 14.76% reported affiliating strongly or very strongly with conservative positions, and the remainder reported agreeing slightly more often with liberal positions (16.24%) or slightly more often with conservative positions (18.08%). The remainder of participants identified as being ideologically neutral (11.44%).

participated. These participants also displayed diversity in terms of age,[184] gender,[185] race and ethnicity,[186] and political preferences.[187]

2. The Future Dangerousness IAT and the Race Stereotype IAT. Building on the existing body of work on implicit racial bias, we used both a well-established IAT and one we specifically designed to measure implicit racial biases related to future dangerousness. In Study 1, we employed a classic Black–White stereotype IAT that has been used in hundreds of studies.[188] Participants in our study were therefore asked to categorize photos of Black and White men and women[189] with words associated with "Positive" (the stimuli words being Ambitious, Industrious, Successful, Calm, Trustworthy, Ethical, and Lawful) and words associated with "Negative" (the stimuli words being Lazy, Unmotivated, Unemployed, Hostile, Dangerous, Threaten, and Violent). In the first task,[190] participants were instructed to press a key (e.g., the "E" key) for Black faces and Positive words, as well as press a key (e.g.,

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[184] 38.8% of participants in Study 2 fell within the ages of 31–40. The second most common age range was 21–30, with 26.1% falling within this range. The third most common age range was 41–50, with 17.0% falling in this range.

[185] 46.4% of the participants in Study 2 identified as female, and 53.6% identified as male.

[186] In Study 2, 78.3% of participants identified themselves as White, 10.5% identified themselves as Black or African American, 6.9% identified themselves as Asian American, 8.7% identified themselves as Hispanic or Latino, and 2.5% identified themselves as more than one race.

[187] In Study 2, 45.3% reported affiliating strongly or moderately with liberal positions, 16.7% reported affiliating strongly or very strongly with conservative positions, and the remainder reported agreeing slightly more often with liberal positions (15.2%) or slightly more often with conservative positions (12.3%). The remainder of participants identified as being ideologically neutral (10.5%).

[188] *See, e.g.*, Greenwald & Banaji, *Implicit Social Cognition*, *supra* note 99, at 15 (listing multiple implicit racial stereotyping studies from the 1980s and 1990s); Greenwald et al., *Measuring Individual Differences*, *supra* note 99, at 1464–65 (describing the IAT procedure and its use in measuring Black–White stereotypes); *see also* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 36, 43–44, 52 (2007) (describing the IATs used in the study and findings on race-related attitudes).

[189] The photographs we used for the study have been used in many previous studies. *See, e.g.*, Nosek et al., *supra* note 188, at 87 app. B (describing the twelve photos used in the study).

[190] This task order is presented here simply to give an example of the study. In the study itself, the order of the two tasks was counterbalanced to minimize possible order effects. Therefore, approximately half of the participants received tasks in the opposite order as presented in the text: they first paired together Black with Negative and White with Positive.

the "I" key) for White faces and Negative words. In the second task, participants were instructed to press a key for Black faces and Negative words, as well as for White faces and Positive words. If participants more quickly responded to Black faces with Negative words and White faces with Positive words, as compared to Black faces with Positive words and White faces with Negative words, we could thus conclude that an implicit stereotype racial bias exists.

In Study 2, we set out to design an IAT that was not simply a measure of general implicit stereotypes but rather one that could hone in on specific implicit anti-Black biases regarding future dangerousness. Furthermore, due to the increasing composition of Latino men on death row and in future dangerousness cases generally,[191] we wished to expand beyond the traditional "Black–White paradigm" that limits racial bias discussions in a way not reflective of a diverse America and criminal justice system. Thus, we created two distinct versions of what we call the "Future Dangerousness IAT." With this structure, we set out to measure whether people hold automatic dangerousness-related stereotypes of Black Americans as compared to White Americans, as well as Latino Americans as compared to White Americans. In designing the Future Dangerousness IATs that we employed, we selected the following stimuli to represent future danger: "Danger, Threaten, Vicious, Hostile, Wild, Menacing, and Violent." We selected the following stimuli to represent future safety: "Safe, Generous, Helpful, Friendly, Calm, Gentle, and Kind."[192] Participants in Study 2 thus completed two IATs: a Black–White Future Dangerousness IAT and a Latinx–White Future Dangerousness IAT.[193]

3. Explicit Bias. Because we were interested not only in measuring mock jurors' implicit biases but also whether they harbored explicit biases that they would be willing to self-report, we

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[191] *See* Sheri Lynn Johnson, *The Influence of Latino Ethnicity on the Imposition of the Death Penalty*, 16 ANN. REV. L. & SOC. SCI. 421, 425 (2020) ("Taken together, the archival studies, although limited in number, strongly suggest that sometimes (or perhaps, in some places) the likelihood of a death sentence is increased when the defendant is Latino . . . ."); *see also supra* notes 85–88 and accompanying text.

[192] For the racial category stimuli, we selected men's names that are highly associated with White American, Black American, and Latinx American groups. *See infra* notes 202–204 and accompanying text.

[193] The order of IATs was counterbalanced in order to lessen order effects.

also employed the Symbolic Racism 2000 Scale.[194] This measure has been used and validated by prior studies and is well-known as a measure of explicit racial (anti-Black) bias.[195] The Scale, for example, asks participants to state their level of agreement or disagreement with statements such as the following: "How much of the racial tension that exists in the United States today do you think blacks are responsible for creating?" and "It's really a matter of some people not trying hard enough; if blacks would only try harder they could be just as well off as whites," as well as several other questions.[196]

4. Crime Vignettes. In addition to measuring participants' implicit and explicit racial biases in Studies 1 and 2, we measured judgments of future dangerousness for specific crimes. To do this, participants in both studies were presented with hypothetical crimes (in randomized order) prior to completing the IATs and were asked to rate the future dangerousness of the defendant for each crime. In Study 1, two of the four crimes were homicides, and the other two were drug-related crimes (one a drug sale and the other a robbery). The two homicides, which were largely based upon real crimes, were as follows[197]:

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[194] *See* P.J. Henry & David O. Sears, *The Symbolic Racism 2000 Scale*, 23 POL. PSYCH. 253, 259–62 (2002) (developing, explaining, and employing the scale for the first time).

[195] *See, e.g.*, Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 Wash. L. Rev. 1473, 1496 (2017) (using questions from the Symbolic Racism 2000 Scale to "measure contemporary racial attitudes").

[196] Henry & Sears, *supra* note 194, at 260. Due to space constraints, we did not employ a measure of anti-Latinx Explicit bias.

[197] The two drug-related crimes were as follows:

> *(1) The defendant is a street level drug dealer with two previous convictions for drug possession. He always carries a gun but has never used it. He was arrested after he tried to sell twenty dollars' worth of marijuana to an undercover police officer.*
>
> *(2) Defendant snuck up behind the victim on a dark and mostly empty street. He grabbed the victim from behind, pressed a sharp object against the victim's back, and demanded that the victim hand over an expensive looking watch. Evidence came out at trial which suggested that the defendant was carrying a screwdriver (but no other weapon), was high on drugs at the time of the crime, and that he suffered from a chronic addiction. At trial, the defendant apologized to the victim.*

> *(1) The defendant robbed a gas station. He carried a gun during the robbery but had told his friends beforehand that he did not plan to fire it. In the middle of the robbery, the store clerk was shot and killed. The prosecution argues that the killing was cold-blooded and intentional. The defense claims that the gun went off accidentally as he was pointing it at the clerk; and*
>
> *(2) The defendant broke into his neighbor's home, expecting that the home was empty. However, the neighbor was home, and when he threatened to call the police, the defendant picked up a baseball bat that was lying on the floor and struck the homeowner in the head. The homeowner died. The defendant, who was 14 years-old at the time, was charged in adult court.*[198]

No defendant names or racial identifications were provided about the defendants in Study 1. In Study 2, participants read about, and were asked to evaluate, six different crime vignettes, all of which were homicides. Two examples of the crime vignettes, which were loosely based on real cases, were as follows[199]:

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[198] These crime vignettes were also used in our previous study on implicit racial bias and retribution. *See* Levinson et al., *Race and Retribution*, *supra* note 103, at 876.

[199] The other four vignettes were as follows:

> *(1) The defendant was found with a high-powered rifle and stolen belongings in his vehicle. The rifle type matched the bullets used in the killing of a married couple, and some of the belongings were identified as having come from the defendant's car. The medical examiner had testified that the victims had been shot from a distance, and likely never saw the shooter before they were killed. The defendant presented evidence of organic brain damage, mood disorders which resulted in poor judgment, and that his childhood was marked by bizarre discipline.*

In the results section statistics, this vignette is labelled "Scenario 2." *See infra* notes 215–216.

> *(2) The defendant, who was involved in a conspiracy to smuggle undocumented immigrants into the country, was part of a group "guarding" the immigrants (against their will) while waiting for the immigrants' family members to pay "smuggling fees." When two of the immigrants attempted to escape, the defendant or one of his group struck them multiple times. Both immigrants died*

(1) The defendant had been responsible for multiple burglaries from the victim's house. One day, the defendant, along with two other men, entered the victim's house while the victim was home. The defendant looked for money while the victim was held at gunpoint. The victim was taken away from his home in a van, where he scuffled with one of the men and was shot during the altercation. The victim died later that day from his wounds. The defendant claims that the situation got out of hand and that one of the other men was responsible for the killing;[200] *and*

(2) A former employee of a Chili's restaurant decided to rob the restaurant location. During the robbery, two restaurant employees were killed. The defendant claims that the killings were unplanned and that all he wanted to do was get the cash and escape, but the employees tried to be heroic and stop the robbery.[201]

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from blunt force wounds. The defendant claims that he did not use deadly force but that one of his group did.

In the results section statistics, this vignette is labeled "Scenario 3." *See infra* note 215.

(3) A US postal worker was found dead after being accused by the defendant of delivering the defendant's mail to his estranged wife. The defendant was found with materials that were used in disposing of the body. Evidence was presented that the defendant had a severe mental illness that rendered him paranoid, and that the mental illness was exacerbated by drug use and alcohol.

In the results section statistics, this vignette is labeled "Scenario 5."

(4) The defendant robbed a gas station. The defendant carried a gun during the robbery, but had told the defendant's friends beforehand that he did not plan to fire it. In the middle of the robbery, the store clerk was shot and killed. The prosecution argues that the killing was cold-blooded and intentional. The defense claims that the gun went off accidentally as the defendant was pointing it at the clerk.

In the results section statistics, this vignette is labeled "Scenario 6".

[200] In the Results section, *infra* note 215 and accompanying text, this scenario is called "Scenario 1".

[201] In the Results section, *infra* note 215 and accompanying text, this scenario is called "Scenario 4".

The defendants' race and ethnicity were not disclosed in Study 2, but the defendants were given names that resembled popular names of Black Americans,[202] White Americans,[203] and Latino Americans.[204] Each participant read six short cases in a randomly determined order: two cases with a defendant who possessed a White American sounding name, two cases with a defendant who possessed a Black American sounding name, and two cases with a defendant who possessed a Latino American sounding name. The vignette–name pair was randomly determined between participants. After reading each crime vignette, participants were asked to evaluate how dangerous the defendant was likely to be[205] and were also asked whether they preferred that the defendant receive a life sentence or a death penalty sentence.[206]

B. HYPOTHESES

Prior to conducting the studies, we hypothesized as follows:

1) *Jury-eligible citizens will harbor well-known implicit racial biases whereby they automatically associate Black with negative stereotypes and White with positive stereotypes.*
2) *Using a Black–White Future Dangerousness IAT that we designed for this study, jury-eligible citizens will harbor implicit biases whereby they automatically associate Black men with future danger and White men with future safety.*

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[202] The Black American sounding names were Jamal Brown and Reginald Washington.

[203] The White American sounding names were Nathaniel Kinnear and Chris Jensen.

[204] The Latino American sounding names were Hector Sanchez and Roberto Garcia.

[205] There were three future dangerousness measures asked, as follows:

> How much do you agree or disagree with the following statements: (1) The defendant is likely to pose a significant risk of danger in the future, (2) If given an opportunity for release after 20 years, the defendant will be likely to pose a significant risk to others in the free world, and (3) If sentenced to life in prison without parole, the defendant is likely to pose a significant risk of future danger by committing acts of violence against others in prison.

[206] The item was as follows: "The defendant will now be sentenced to life in prison or the death penalty. Which sentence do you prefer[?]" The possible responses ranged from "strongly prefer life in prison (1)" to "strongly prefer death penalty (4)."

3) *Using a Latinx–White Future Dangerousness IAT, jury-eligible citizens will harbor implicit biases whereby they automatically associate Latinx men with future danger and White men with future safety.*
4) *Jurors' implicit bias levels (on the IATs) and explicit bias levels (on the Symbolic Racism Scale) will predict their assessments of defendants' future dangerousness and sentencing recommendations, such that higher levels of racial bias will lead to harsher dangerousness judgments and sentences.*
5) *Jurors will rank future dangerousness levels higher, and recommend more support for the death penalty, when defendants have Black-sounding or Latino-sounding names than when they have White-sounding names.*
6) *"Death Qualified" jurors will possess higher levels of implicit and explicit racial biases than "nullifier" or "excludable" jurors.*

C. STATISTICS

To test our hypotheses, we conducted several statistical analyses. With regard to Hypotheses 1–3 (implicit bias measurement), we calculated 'd' scores by following the suggested statistical processes established by implicit social cognition researchers and used t-tests to evaluate those 'd' scores for statistical significance.[207] For Hypothesis 4, we evaluated predictive models of decision-making by regressing juror judgments of future dangerousness and life or death recommendations upon implicit bias scores of IATs and Symbolic Racism Scale judgments, plus baseline beliefs regarding danger in Study 2. To test Hypothesis 5, we conducted a series of ANOVAs[208] (analysis of variance) to compare dangerousness and

[207] We followed the IAT scoring algorithms recommended in Anthony Greenwald, Brian A. Nosek & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCH. 197, 201 (2003).

[208] ANOVA is a series of techniques that segment the observed variance in a dataset into the various sources of that variance, which allows for the comparison of the means between multiple groups. For example, is the variance in a sample (such as measured happiness)

death penalty scores based upon the race/ethnicity-sounding name of the defendant (White, Latino, or Black). For Hypothesis 6, we conducted a series of t-tests[209] to compare death qualified and excludable jurors. All statistics are presented in footnotes corresponding to the findings described in the text below.

D. RESULTS

The results of the studies confirm several, but not all, of the hypotheses. Generally, the results of the studies indicate first that future dangerousness and implicit racial bias against Black and Latino men are inexorably intertwined, and second, that implicit and explicit racial bias levels predict case-based future dangerousness predictions. We present the study results below, organized by the hypotheses set forth above.

1. Strong Negative Stereotypes About Black Americans. The results of Study 1's analysis of implicit racial stereotypes (on the stereotype Black–White IAT) confirmed that jury-eligible participants associated White with positive and Black with negative. Participants were significantly more likely to quickly group together Black faces with negative stereotypes, such as lazy, violent, and unmotivated, and White faces with positive stereotypes, such as ambitious and ethical.[210] These results are consistent with two decades of research on implicit racial biases and

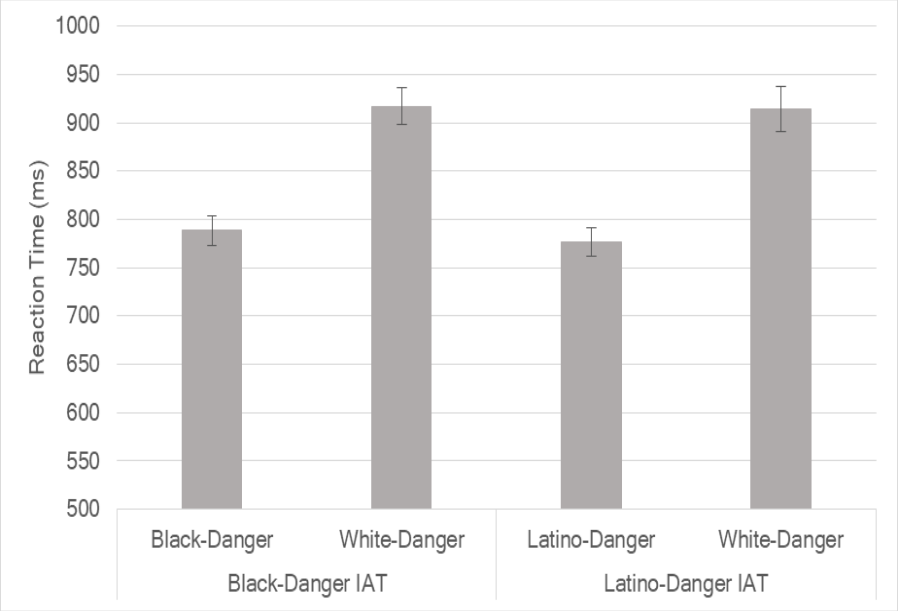
attributable to differences between two groups (such as northerners and southerners), or is it due to other, unmeasured or unexplained variation within the group (such as how much candy they had this morning)? *See* BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS 37–38 (3d ed. 1996) (explaining ANOVA techniques).

[209] One-sample t-tests test whether single populations differ from hypothesized values. *See* RONALD CHRISTENSEN, ANALYSIS OF VARIANCE, DESIGN, AND REGRESSION: APPLIED STATISTICAL METHODS 37–42 (1996) (describing one-sample t-tests). The IAT's hypothesized value is zero, meaning no bias. When an IAT score is significantly different from zero, that IAT score indicates bias in a population. Thus, this one-sample t-test tested whether the population's IAT score differed significantly from zero. *See also* Levinson et al., *Judging Implicit Bias*, *supra* note 107, at 103 n.214.

[210] IAT d M = 0.34, SD = 0.39, T-test comparing with 0 revealed that the score was significantly higher than 0 ($t(270) = 14.00$, $p<.001$).

demonstrate that the participants implicitly associate White with positive stereotypes and Black with negative stereotypes.[211]

Graph 1: Future Dangerousness Reaction Times (in Milliseconds)



Reaction times on IAT blocks. Error bars represent standard error.

2. Black Men: Implicit Future Dangers. The results of the first future dangerousness IAT (Black–White) confirmed our hypothesis: jury-eligible participants significantly (and quite strongly) associated Black with danger and White with safety.[212] These findings are particularly interesting because no empirical studies have examined whether jurors hold automatic associations between race and estimations of future dangerousness.

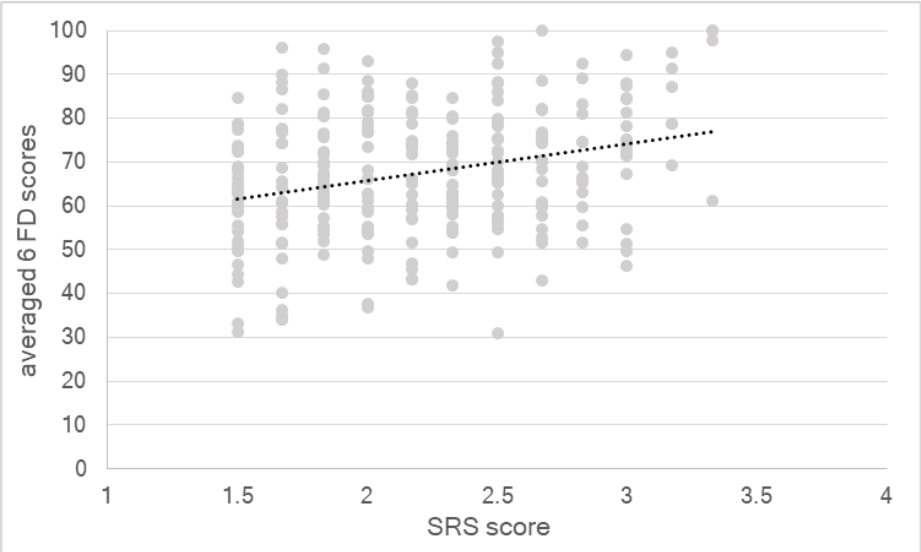
3. Latino Men: Implicit Future Dangers. The results of the second future dangerousness IAT (Latino–White) also confirmed our hypothesis: we found that jury-eligible participants (also quite

[211] *See, e.g.*, Nosek et al., *supra* note 188, at 53 (describing significant White–Black IAT results).

[212] IAT d M = 0.46, SD = 0.41, T-test comparing with 0 revealed that the score was significantly higher than 0 ($t(275) = 18.54$, $p<.001$).

strongly) associated Latino with danger and White with safety.[213] This finding is notable because only a handful of empirical studies have looked at Latino stereotypes in the criminal justice system or death penalty context.[214] Here, we found that, in the context of future dangerousness, jury-eligible citizens hold similar dangerousness stereotypes for Latino men as they do for Black men.

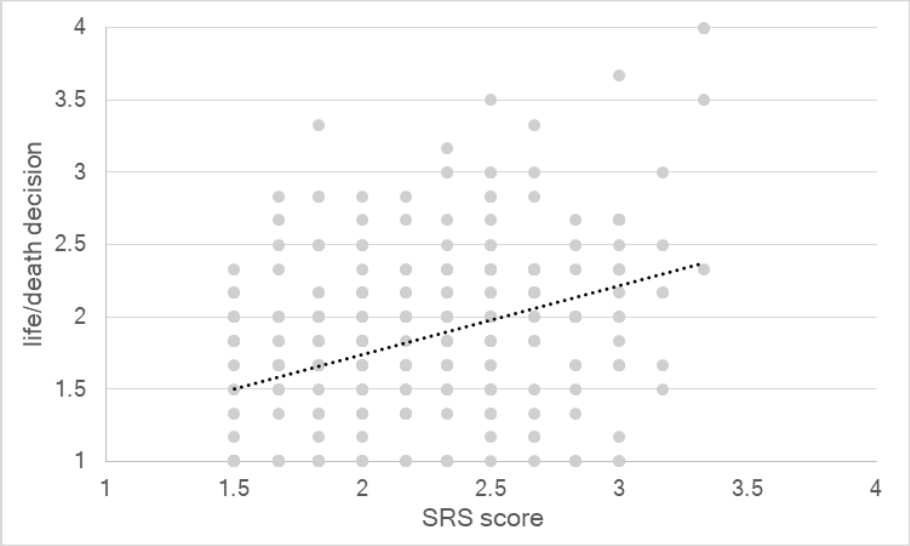
Graph 2: Scatterplot of Future Dangerousness and Explicit Bias (SRS) Score



[213] IAT d M = 0.44, SD = 0.40, T-test comparing with 0 revealed that the score was significantly higher than 0 (t(275) = 18.17, p<.001).

[214] *See, e.g.*, Johnson, *supra* note 191, at 424–25 (describing five county-wide studies that sought to determine whether the ethnicity of the victim or the defendant was a "significant factor[] in deciding whether to seek the death penalty against a defendant").

Graph 3: Scatterplot of Life/Death Decision and Explicit Bias (SRS) Score



4. Implicit and Explicit Biases Predict Future Dangerousness and Life/Death. Both implicit and explicit bias levels predicted judgments of future dangerousness and sentence recommendations. In Study 1, anti-Black implicit bias predicted assessments of future dangerousness in the two homicide cases,[215] and explicit bias scores predicted participants' assessments of future dangerousness in the two non-homicide cases.[216] In Study 2, explicit racial biases

[215] In order to investigate the relation between future dangerousness and predictors, we ran the following regression(stepwise): Future Dangerousness (FD) = beta1 x IAT d + beta2 x SRS + c as full model. On scenario 1 data (the first homicide case, gas station), only IAT d predicted FD (adjusted R2 = .01, F(1, 269) = 3.58, p = .06, beta1 = 0.12, t = 1.90, p = .06, beta2, ns.). On scenario 2 data (the second homicide case, neighbor's home), both IAT d and SRS predicted FD (adjusted R2 = .02, F(1, 269) = 3.97, p = .02, beta1 = .12, t = 1.96, p = .05, beta2 = .10, t = 1.67, p = .10). On scenario 3 data (drug dealer case), only SRS predicted FD (adjusted R2 = .06, F(1, 269) = 17.82, p<.001, beta2 = .25, t = 4.22, p<.001, beta1, ns.). On scenario 4 data (robbery case), both IAT d and SRS predicted FD (adjusted R2 = .02, F(1, 269) = 7.48, p = .01, beta2 = .17, t = 2.74, p = .01, beta1, ns.).

[216] In order to investigate the relation between life/death decision and predictors, we ran the following regression (stepwise): life/death decision = beta1 x Black–Danger IAT d + beta2 x LatinX IAT d + beta3 x SRS + c as full model. On all six models, only the SRS score was a significant predictor of life/death decision (adjusted R2 of all models > .03(max = .11), Fs >

predicted future dangerousness determinations and death penalty decision-making.[217] Regression analyses for Study 2 showed that regardless of the defendant's name, mock jurors' explicit racial bias predicted life-death decisions (in each of the six cases and overall on averaged measures). And these explicit racial biases predict defendants' future dangerousness decisions. Essentially, the greater anti-Black racial bias jurors had, the more dangerous they assessed all defendants to be.

5. Limited to No Effects Based on Defendant Name. Of the six short fact patterns we presented, only the "Chili's case" showed marginally significant differences based on whether the defendant had a White-sounding name, Black-sounding name, or Latino-sounding name. The "Chili's case" was the case in which the defendant killed victims while robbing a Chili's restaurant. Jury eligible citizens were more likely to rate a defendant as posing a future danger if they read about a Latino-sounding named defendant or a Black-sounding named defendant, compared to if the jury-eligible citizens read about a defendant with a White-sounding name, with marginal statistical significance.[218] The other vignettes,

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10.58, ps<.001, beta3s > .19(max = .34), ts> 3.25, ps< .001). As for future dangerousness evaluation, we ran the following regression (stepwise): FD = beta1 x Black–Danger IAT d + beta2 x LatinX IAT d + beta3 x SRS + c as full model. Except for one (the model on scenario 2, the immigrant smuggling homicide scenario), on five models only the SRS score was a significant predictor of FD (adjusted R2 of all models > .03(max = .09), Fs > 8.6, ps < .004, beta3s > .18(max = .30), ts > 2.94, ps < .004). Even in the weakest model (scenario 2, the immigrant smuggling homicide scenario), a marginally significant SRS effect was revealed, but no IAT d effects were (adjusted R2 = .01, F(1, 174) = 3.41, p = .07, beta3 = .11, t = 1.85, p = .07).

[217] To investigate the effects of predictors on future dangerousness, we ran the following regression (stepwise): averaged 6 FD scores = beta1 x Black-Danger IAT d + beta2 x LatinX IAT d + beta3 x SRS + c as full model. The result showed that only SRS was a significant predictor of future dangerousness but neither IAT score is (adjusted R2 = .08, F(1, 274) = 25.26, p<.001, beta3 = .29, t = 5.03, p<.001). Also, for investigating life/death decision model, we ran the following regression (stepwise): averaged 6 life/death decision = beta1 x Black–Danger IAT d + beta2 x LatinX IAT d + beta3 x SRS + c as full model. On this model, the results showed that also only SRS was a significant predictor of life/death decision (adjusted R2 = .14, F(1, 274) = 44.56, p<.001, beta3 = .37, t = 6.68, p<.001).

[218] In the "Chili's case," there were marginally significant race effects on future dangerousness questionnaire item 1 and 2 (Fs(2, 273)>2.36, p<.10). On item 1, the follow-up analysis comparing three races (multiple comparison with Bonferroni correction) showed that there was a marginally significant difference between the White-sounding names and the Latino-sounding names (t = 2.15, p<.10, M_{Black} = 74.68, SD_{Black} = 20.71, M_{Latino} = 76.97, SD_{Latino}

however, did not show significant differences based upon the name of the defendant.

6. Death Qualified Jurors and Explicit Racial Bias. Death qualified jurors displayed higher levels of explicit racial bias (on the Symbolic Racism 2000 Scale) than those who would not be eligible for death penalty jury service due to the fact that they could not vote guilty knowing that the death penalty was an option (known as "nullifiers"), or due to the fact that they would not consider a death sentence in any circumstance (known as "excludables").[219] Interestingly, although our research has previously shown that death qualified jurors possess lower implicit bias levels on three different race IATs—the Value of Life IAT,[220] the Stereotype IAT,[221] and the Retribution IAT[222]—these jurors did not display significantly different bias levels on the two Future Dangerousness IATs we tested here.[223] In addition to the higher levels of explicit racial bias they reported, death qualified jurors were generally more likely to believe that murderers overall are more likely to be a future danger.[224] This finding is consistent with the *Witherspoon* and post-*Witherspoon* line of studies, which demonstrates the guilt-proneness of death qualified jurors.[225] These

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= 18.93, M_{White} = 70.82, SD_{White} = 20.24). Also, on item 2, the follow-up test showed that there was a marginally significant difference between the White-sounding names and the Black-sounding names (t = 2.29, p<.10, M_{Black} = 68.57, SD_{Black} = 23.77, M_{Latino} = 65.58, SD_{White} = 22.65, M_{White} = 60.52, SD_{White} = 23.43).

[219] $M_{Death\_qualified}$ = 2.30, $SD_{Death\_qualified}$ = 0.48, $M_{Nullifiers\&Excludables}$ = 2.02, $SD_{Nullifiers\&Excludables}$ = 0.47, t(274) = 4.27, p < .001.

[220] *See* Levinson et al., *Devaluing Death*, *supra* note 103, at 559 (presenting results from the Value of Life IAT in a 2014 study).

[221] *See id.* (presenting results from the Stereotype IAT in the same study).

[222] *See* Levinson et al., *Race and Retribution*, *supra* note 103, at 879–83 (presenting results from the Retribution IAT in a 2019 study).

[223] Black–Danger IAT d: $M_{Death\_qualified}$ = 0.46, $SD_{Death\_qualified}$ = 0.40, $M_{Nullifiers\&Excludables}$ = 0.46, $SD_{Nullifiers\&Excludables}$ = 0.43, t(264) = 0.03, ns.

LatinX–Danger IAT d: $M_{Death\_qualified}$ = 0.43, $SD_{Death\_qualified}$ = 0.40, $M_{Nullifiers\&Excludables}$ = 0.44, $SD_{Nullifiers\&Excludables}$ = 0.38, t(264) = 0.04, ns.

[224] This result is based on a general measure of how dangerous murderers are likely to be in the future, rather than on the individual cases. In this analysis, we used the following regression model (stepwise): general question about murderer's future dangerousness = beta1 x Black–Danger IAT d + beta2 x LatinX IAT d + beta3 x SRS + c as full model. The result revealed that only SRS was a significant predictor of FD(Adjusted R2 = .03, F(1, 194) = 6.08, p = .01, beta3 = .18, t = 2.61, p = .01).

[225] *See infra* notes 242–244 and accompanying text.

results were also true in juror judgments of the six vignettes. In all six of those cases, nullifiers and excludables scored defendants as possessing lower individual dangerousness judgments and were less likely to vote for death.[226]

V. THE FUTURE OF FUTURE DANGEROUSNESS

The results of the studies detailed in Part IV demonstrate that harmful racial and ethnic stereotypes are automatically and inextricably associated with the future dangerousness determination. In this Part, we consider the implications of the empirical study and discuss a path forward. We thus consider topics including the constitutionality of the future dangerousness inquiry, the future of death qualification, and the expansion of legal discourse on capital punishment to include a discussion of Latino men. This Part also acknowledges that the study results are not

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[226] Future dangerousness scores:
Senario1: $M_{Death\_qualified}$ = 65.43, $SD_{Death\_qualified}$ = 19.49, $M_{Nullifiers\&Excludables}$ = 58.29, $SD_{Nullifiers\&Excludables}$ = 20.07, t(274) = 2.74, p < .01.
Senario2: $M_{Death\_qualified}$ = 79.68, $SD_{Death\_qualified}$ = 15.84, $M_{Nullifiers\&Excludables}$ = 72.38, $SD_{Nullifiers\&Excludables}$ = 14.86, t(274) = 3.54, p < .001.
Senario3: $M_{Death\_qualified}$ = 68.80, $SD_{Death\_qualified}$ = 19.25, $M_{Nullifiers\&Excludables}$= 62.91, $SD_{Nullifiers\&Excludables}$= 17.29, t(274) = 2.37, p = .02.
Senario4: $M_{Death\_qualified}$ = 66.47, $SD_{Death\_qualified}$ = 19.19, $M_{Nullifiers\&Excludables}$= 59.23, $SD_{Nullifiers\&Excludables}$= 19.78, t(274) = 2.82, p < .01.
Senario5: $M_{Death\_qualified}$ = 76.05, $SD_{Death\_qualified}$ = 16.84, $M_{Nullifiers\&Excludables}$= 67.77, $SD_{Nullifiers\&Excludables}$= 19.51, t(274) = 3.54, p < .001.
Senario6: $M_{Death\_qualified}$ = 62.81, $SD_{Death\_qualified}$ = 20.25, $M_{Nullifiers\&Excludables}$= 51.30, $SD_{Nullifiers\&Excludables}$= 20.81, t(274) = 4.25, p < .001.
Life/death decision:
Senario1: $M_{Death\_qualified}$ = 1.84, $SD_{Death\_qualified}$ = 0.83, $M_{Nullifiers\&Excludables}$= 1.28, $SD_{Nullifiers\&Excludables}$= 0.57, t(274) = 5.53, p < .001.
Senario2: $M_{Death\_qualified}$ = 2.30, $SD_{Death\_qualified}$ = 0.99, $M_{Nullifiers\&Excludables}$= 1.48, $SD_{Nullifiers\&Excludables}$= 0.81, t(274) = 6.64, p < .001.
Senario3: $M_{Death\_qualified}$ = 1.99, $SD_{Death\_qualified}$ = 0.87, $M_{Nullifiers\&Excludables}$= 1.41, $SD_{Nullifiers\&Excludables}$= 0.69, t(274) = 5.32, p < .001.
Senario4: $M_{Death\_qualified}$ = 2.15, $SD_{Death\_qualified}$ = 0.95, $M_{Nullifiers\&Excludables}$= 1.40, $SD_{Nullifiers\&Excludables}$= 0.67, t(274) = 6.47, p < .001.
Senario5: $M_{Death\_qualified}$ = 1.98, $SD_{Death\_qualified}$ = 0.92, $M_{Nullifiers\&Excludables}$= 1.40, $SD_{Nullifiers\&Excludables}$= 0.62, t(274) = 5.15, p < .001.
Senario6: $M_{Death\_qualified}$ = 1.92, $SD_{Death\_qualified}$ = 0.87, $M_{Nullifiers\&Excludables}$= 1.36, $SD_{Nullifiers\&Excludables}$= 0.66, t(274) = 5.18, p < .001.

limited to the capital punishment context; it outlines how the study results may impact other areas of criminal justice where future dangerousness plays a legally sanctioned role.

A. CONSTITUTIONALITY OF THE FUTURE DANGEROUSNESS INQUIRY

Given the massive importance of the future dangerousness determination to capital punishment,[227] the documentation of the racialized connection between racial bias and future dangerousness should serve to invalidate the constitutionality of death penalty determinations based upon future dangerousness.

Some scholars have justified the consideration of future dangerousness as distinct from that of retribution and deterrence with a separate inquiry relevant to incapacitation instead.[228] Others have noted that incapacitation is not one of the permissible purposes justifying capital punishment—the Court's "own judgment"[229] is shaped by considering two, and only two, recognized purposes of capital punishment: retribution and deterrence.[230] As Carol Steiker and Jordan Steiker have described, "[t]he crucial exclusion of incapacitation from this list permits a plausible finding that the death penalty is inappropriate even for categories of offenders that include those who appear to pose a substantial risk of future danger."[231]

Courts, legislatures, and the academy have spent years attempting to "define and implement [the] principle" that the

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[227] *See supra* Part II.

[228] *See, e.g.*, McLeod, *supra* note 68, at 1124–25 ("The Court has barred the death penalty when it has found the penalty to exceed the goals of retribution and deterrence, without considering the aim of incapacitation. . . . The risk of future violence[, however,] is often a dispositive reason for a death sentence.").

[229] Kennedy v. Louisiana, 554 U.S. 407, 434 (2008) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)).

[230] *See* G. Ben Cohen, McCleskey*'s Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM L. 65, 91 (2012) ("[T]he Court noted only two constitutionally acceptable bases for imposition of the death penalty—'deterrence, and retribution.'" (quoting *Kennedy*, 554 U.S. at 441)).

[231] Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 184 (2008).

"[e]volving standards of decency . . . presume[] respect for the individual and thus moderation or restraint in the application of capital punishment."[232] This effort has generally taken two different approaches—the first adopting "general rules that ensure consistency"[233] and the second insisting on rules that permit "individualized consideration."[234] It has led to broad-scale questioning of the constitutionality of capital punishment by a number of Justices.[235]

State supreme courts have taken different but responsive steps to address the evidence of racial bias. In Washington, the state supreme court held, "The death penalty is invalid because it is imposed in an arbitrary and racially biased manner."[236] In

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[232] *Kennedy*, 554 U.S. at 435–36.

[233] *See id.* at 436 ("The tension between general rules and case-specific circumstances has produced results not altogether satisfactory.").

[234] *See* Lockett v. Ohio, 438 U.S. 586, 606 (1978) (plurality opinion) ("The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases.").

[235] Many Justices have raised questions concerning the death penalty. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 229 (1976) (Brennan J., dissenting) ("[T]he punishment of death, for whatever crime and under all circumstances, is 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution."); *id.* at 231 (Marshall, J., dissenting) ("The death penalty . . . is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."); Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[D]espite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) ("Powell was asked whether he would change his vote in any case . . . . I have come to think that capital punishment should be abolished[, he replied]."); Baze v. Rees, 553 U.S. 35, 85 (2008) (Stevens, J., concurring) ("[A] significant concern is the risk of discriminatory application of the death penalty."); Tuilaepa v. California, 512 U.S. 967, 991–92 (1994) (Blackmun, J., dissenting) ("One of the greatest evils of leaving jurors with largely unguided discretion is the risk that this discretion will be exercised on the basis of constitutionally impermissible considerations—primary among them, race. . . . For far too many jurors, the most important 'circumstances of the crime' are the race of the victim or the defendant."); Glossip v. Gross, 576 U.S. 863, 909 (2015) (Breyer J., dissenting) ("The circumstances and the evidence of the death penalty's application have changed radically . . . . Given those changes, I believe that it is now time to reopen the question."). Notably, Justice Ginsburg joined Justice Breyer in this opinion. *Id.* at 908.

[236] State v. Gregory, 427 P.3d 621, 627, 635 (Wash. 2018) ("Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance.").

Connecticut, the state supreme court held the death penalty unconstitutional, in part because "[t]o the extent that the ultimate punishment is imposed on an offender on the basis of impermissible considerations such as his, or his victim's, race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order."[237]

In *McCleskey v. Kemp*, the U.S. Supreme Court assumed that statistics could show that race plays a role in capital sentencing but declined to invalidate the death penalty scheme because the statistical proof did not meet the Court's expectations as to how a capital defendant might demonstrate actual bias.[238] Our research explains the statistical evidence that race plays a role in capital sentencing (i.e., that Black and Latino defendants are more likely to get the death penalty) by proving that race is inexorably connected to future dangerousness assessments on both an automatic (implicit) and controlled (explicit) cognitive level.

The *McCleskey* Court, in considering statistical racialized impacts,[239] never anticipated that social science and statistics would be able to isolate a particular factor within a death penalty scheme and show that a distinct legal inquiry, for example, is itself a delivery mechanism of bias. This is what our study results have done; they have shown that one particular death penalty scheme, that of future dangerousness, is corrupted by implicit and explicit bias.

Our research results thus detail how the mere existence of the future dangerousness determination acts as a racially biased trigger for jurors considering capital punishment. Just as Phillip Goff identified how the use of animal imagery in capital cases activates

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[237] State v. Santiago, 122 A.3d 1, 66, 84–85 (Conn. 2015) ("In short, the legislature could not have come any closer to fully abolishing capital punishment without actually doing so. We perceive no ringing legislative endorsement of the death penalty in Connecticut. . . . [W]e hold that capital punishment, as currently applied, violates the constitution of Connecticut.").

[238] *See* McCleskey v. Kemp, 481 U.S. 279, 308 (1987) ("Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions." (footnote omitted)).

[239] *See id.* at 309 (acknowledging Baldus's study but declining to accept it "as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions").

racial bias,[240] the invocation of consideration of future dangerousness aligns with racial hierarchies in death qualified jurors. To paraphrase Justice Roberts's language in *Buck v. Davis*, the concept of future dangerousness is indeed itself a racially deadly toxin.[241]

B. BIASED JURIES: THE PROCESS OF DEATH QUALIFICATION

For decades, and especially in the era between *Witherspoon*[242] and *Lockhart*,[243] social scientists assembled an impressive library of studies that linked the process of death qualifying jurors to "stacking the deck" for a death sentence.[244] Although the *Lockhart*

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[240] *See* Goff et al., *supra* note 155, at 304 ("[E]ven controlling for implicit anti-Black prejudice, the implicit association between Blacks and apes can lead to greater endorsement of violence against a Black suspect than against a White suspect. . . . [Moreover,] subtle media representations of Blacks as apelike are associated with jury decisions to execute Black defendants.").

[241] *See* Buck v. Davis, 137 S. Ct. 759, 777 (2017) ("But when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.").

[242] *See* Witherspoon v. Illinois, 391 U.S. 510, 521–22 (1968) ("Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.").

[243] *See* Lockhart v. McCree, 476 U.S. 162, 182 (1986) ("Unlike the Illinois system criticized by the Court in *Witherspoon*, . . . the Arkansas system excludes from the jury only those who may properly be excluded from the penalty phase of the deliberations under *Witherspoon* . . . .").

[244] *See, e.g.*, Edward J. Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 WOODROW WILSON J.L. 11, 13 (1980) ("[T]he exclusion of scrupled jurors under *Witherspoon v. Illinois* would tend to make the jury more conviction prone and less representative."); Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 4 (1970) (evaluating "whether [Colorado] jurors favoring the death penalty are more conviction prone than those who oppose it"); Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 L. & HUM. BEHAV. 53, 54–55 (1984) (noting that death-qualified juries are "unusually punitive" and lack proportional representation); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & HUM. BEHAV. 31, 46–48 (1984) (discussing how death qualification excludes one-sixth of fair, impartial jurors and discriminates against women and Black jurors, who "[c]ompared to the death-qualified

Court was not swayed by the studies that had been submitted into testimony at that time,[245] the wisdom underlying the challenge to death qualification has remained, and even intensified. Thirty years post-*Lockhart*, in a concurring opinion in *Baze v. Rees*, Justice Stevens expressed his continuing concern about death qualification, harkening back to the petitioner in *Lockhart*'s central claim:

> Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a "death qualified jury" is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.[246]

Justice Stevens's concerns, and the studies underlying them, have yet to sway the Court to declare death qualification

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jurors . . . are more concerned with the maintenance of the fundamental due process guarantees of the Constitution, less punitive, and less mistrustful of the defense"); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 L. & HUM. BEHAV. 121, 122 (1984) (analyzing whether the process of witnessing prospective jurors dismissed based on opposition to the death penalty creates biases in jurors' minds); George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 568 (1971) (conducting cognitive tests to assess the relationship between attitudes toward capital punishment and guilt determination); William C. Thompson, Claudia L. Cowan, Phoebe C. Ellsworth & Joan C. Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 L. & HUM. BEHAV. 95, 109 (1984) ("[D]eath-qualified jurors have a lower threshold of conviction than excludables.").

[245] *See Lockhart*, 476 U.S. at 173 ("Having identified some of the more serious problems with McCree's studies, however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries. We hold, nonetheless, that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases.").

[246] Baze v. Rees, 553 U.S. 35, 84 (2008) (Stevens, J., concurring).

unconstitutional. But, at the time of *Baze*, and certainly at the time of *Lockhart*, researchers had yet to empirically investigate the specific racial biasing effects of the death qualification process. Two studies published in 2007, only one year before *Baze* was decided, demonstrated that death qualified jurors are not only different from "excludable" jurors because they are more conviction prone; they differ in many ways.[247] And our research has shown, on three separate IATs as well as explicit bias measures, that death qualified jurors harbor higher levels of both implicit and explicit bias than jurors who would not be allowed to serve.[248] The results presented in Part IV add to this corpus of data. Although the Future Dangerousness IAT did not display such differences in death qualification in this study, the Symbolic Racism Scale did.[249] Thus, we are confronted with yet another study that shows that death penalty jurors are handpicked in a way that results in more racially biased juries. In the context of one of the most highly racialized areas of law in history, such a procedural result can hardly be considered legitimate. Thus, in light of the results of our study, and studies before it, courts should no longer permit—or even be

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[247] *See* Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 25 BEHAV. SCIS. & L. 57, 61 (2007) (listing the ways that death-qualified jurors think differently from "excludable" jurors, including that death-qualified jurors are "more likely to exhibit a high belief in a just world, espouse legal authoritarian beliefs, have an internal locus of control, and lend greater weight to aggravating factors"); Brooke Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process*, 25 BEHAV. SCIS. & L. 857, 865 (2007) ("[M]ore support for the death penalty was correlated with more negative attitudes toward women and higher levels of homophobia, racism, and sexism.").

[248] Levinson et al., *Race and Retribution*, *supra* note 103, at 880–81, 886 ("[P]articipants' implicit racial biases actually led to their death qualification status—the higher the bias, the more likely they were to be retributive generally, and the more likely they were to be death qualified."); Levinson et al., *Devaluing Death*, *supra* note 103, at 557–60, 567–71 (cataloguing data showing the various biases commonly displayed by death-qualified jurors); *see also* Butler & Moran, *supra* note 247, at 66 (finding that "[d]eath-qualified venirepersons . . . were significantly more likely to recommend the death sentence than were their excludable and civil libertarian counterparts"); Butler, *supra* note 247, at 865 ("As hypothesized, death-qualified venirepersons were more likely to have more positive attitudes toward the death penalty and higher levels of homophobia, modern racism and modern sexism.").

[249] *See supra* Section IV.D.*6*.

constitutionally allowed to permit—the process of death qualification in capital cases.

C. IMPLICIT BIAS AND FUTURE DANGEROUSNESS OF LATINO MEN

Previous research on race and the death penalty, as well as scholarship examining the role of racial bias in the criminal justice system more generally, has focused primarily on the impact of racial bias on Black defendants.[250] Our study amplifies the concerns raised by prior research on the effects of implicit and explicit bias on Black defendants in capital cases; it also expands research on implicit bias in the criminal justice system by investigating potential bias against Latino men in the administration of the death penalty. As described in Part II, Latino men have been disproportionately charged with federal capital crimes based on future dangerousness.[251] Indeed, future dangerousness has been alleged against Latino defendants at a disproportionate rate—higher than that against Black, White, or other minority defendants.[252] More specifically, there has been an allegation of future dangerousness against 81% of Latino defendants authorized for the federal death penalty, compared to 67% in all other cases.[253] Furthermore, an allegation of future dangerousness has been made against 95% of the Latino defendants tried for federal capital murder since late 2007.[254]

The empirical study we conducted expands the reach of implicit bias in criminal law discourse to reflect this reality in which Latino men may be disproportionately alleged—and believed—to be future dangers. Our study's IAT results indicate specifically that death qualified jurors automatically associated Latino men with future dangerousness and White men with future safety.[255] These results not only support the claims raised about the constitutional

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[250] *See supra* notes 88, 96 and accompanying text (reviewing empirical studies focusing on anti-Black discrimination in the death penalty and beyond).

[251] *See supra* notes 85–86 (presenting data about future dangerousness, gathered by one of this Article's authors, G. Ben. Cohen).

[252] *See supra* notes 85–88 and accompanying text.

[253] *See supra* note 86 and accompanying text.

[254] *See supra* notes 86–88 and accompanying text.

[255] *See supra* Section IV.D.*3*.

permissibility of future dangerousness in the death penalty but also necessitate additional research regarding Latino defendants within the death penalty realm, and elsewhere in the criminal justice system.

D. FUTURE DANGEROUSNESS BEYOND THE DEATH PENALTY

This Article, and the empirical studies we conducted, were framed around the continuing convergence of racial bias and the death penalty. Considering that the overwhelming majority of executions have occurred in states where future dangerousness testimony is permitted, as well as the continuing racial disparities in the administration of the death penalty,[256] this framing was intentional. However, it is notable that many of our empirical study methods and results likely have import beyond the realm of capital punishment. Although determinations of future dangerousness by juries are a unique attribute of the modern death penalty, the subjectivity of predicting a defendant's future dangerousness is relevant to other areas of criminal justice as well. For example, prosecutors' estimates and judges' determinations of a defendant's future dangerousness are at the heart of daily decisions regarding whether to detain defendants pre-trial.[257] While commentators have

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[256] *See, e.g.*, Cohen, *supra* note 230, at 92–98 (illustrating a link between the historical development of the death penalty, its retributive rationale, lynchings, and "racialized vigilante 'justice'"); Catherine M. Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement* Furman*'s Narrowing Requirement*, 66 UCLA L. REV. 1394, 1426–39 (2019) (presenting study results regarding how the application of California's death penalty statute affects defendants of various ethnic and racial backgrounds disproportionately); Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 585, 587 (2020) ("[T]he overall execution rate is a staggering seventeen times greater for defendants convicted of killing a white victim."); *see also* David C. Baldus, Catherine M. Grosso, George Woodworth & Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1300 (2012) ("[T]he 1984 executive order designed to bring military law into conformity with *Furman* failed to purge the risk of racial prejudice from the administration of the death penalty in the United States Armed Forces from 1984 through 2005.").

[257] *See* 18 U.S.C. § 3142 (requiring in multiple sections that a judicial officer, before releasing a defendant, consider whether or not the defendant will pose a danger to someone or the community); United States v. Salerno, 481 U.S. 739, 755 (1987) (holding that future dangerousness considerations under 18 U.S.C. § 3142 are constitutional because those

indeed raised the prospect of racial biases operating in such bail decisions,[258] and statistics have long supported those concerns,[259] our empirical study results offer a unique look at the way Black and Latino men may automatically be perceived as dangerous, sometimes even without the perceiver's awareness.

Beyond bail, the effects of race and ethnicity on future dangerousness judgments must be investigated in non-capital sentencing decisions, as well as in parole determinations. In the context of sentencing, it is judges whose susceptibility to implicit and explicit biases is most at issue. Prior research has established that judges are likely no different from the rest of the population when it comes to implicit bias.[260] The same is likely true for parole boards. Considering that parole's reach can be massive, there is some urgency to expand the research paradigm.

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determinations are out of "concern for the safety and . . . lives of . . . citizens"); *see also* Muhammad B. Sardar, *Give Me Liberty or Give Me . . . Alternatives?: Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1430–31 (2019) (detailing the history of 18 U.S.C. § 3142 and the rest of the Bail Reform Act and explaining Congress's reason for amending the Act "to include dangerousness to the community as a factor in assessing bail").

[258] *See* Sardar, *supra* note 257, at 1431 ("Th[e] increased discretion [regarding future dangerousness] can be problematic when one considers a judiciary that is often out of step with the jurisdiction they preside over and the inherent racial biases, be it implicit or explicit, against minority defendants."); Dana Paikowsky, *Jails As Polling Places: Living up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 829, 866–67 (2019) ("Dangerousness, however, is not and has never been a neutral criterion."); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 238 (2015) ("Throughout most of the twentieth century, race was used *explicitly* and *directly* as a predictor of dangerousness. From their inception in the 1920s to at least the 1970s, many of the prediction tools expressly used the nationality and race of the parents of the inmate as one of the central factors to predict future dangerousness.").

[259] *See, e.g.*, Sardar, *supra* note 257, at 1431 n.77 ("Empirical evidence has demonstrated that race and ethnic bias can contribute to disproportionate treatment of minorities in the setting of bail, use of peremptory challenges, plea bargaining, and obtaining adequate defense representation." (citing Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 47–48 (1994))).

[260] *See* Jeffery J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (concluding that judges hold similar implicit biases about race as the rest of the population); Levinson et al., *Judging Implicit Bias*, *supra* note 107, at 110–12 (finding that federal and state judges displayed negative implicit biases against Asian American and Jewish people on an IAT).

VI. CONCLUSION

In a post-*McCleskey* world, striking racial disparities have become the defining feature of capital punishment in America.[261] The courts have offered little respite, perhaps internalizing Justice Scalia's shoulder shrugging at racialized statistics as emotional precedent.[262] The expanding realm of the future dangerousness inquiry has done racial justice no favors either; what was seen as likely an unconstitutional effort by Texas to reestablish capital punishment in the 1970s has perhaps turned into America's biggest engine of unequal death.[263] Despite this bleak moment, modern empirical methods have offered new manners to investigate the ways that specific legal processes may be fueling the racialized machinery of the death penalty. The empirical studies presented in

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[261] *See, e.g.*, Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM HUM. RTS. L. REV. 34, 47 (2007) ("McCleskey is the Dred Scott decision of our time."); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 433 (1995) ("Capital punishment, one of America's most prominent vestiges of slavery and racial violence, is flourishing once again in the United States."); Cohen, *supra* note 230, at 72–78 (2012) (tracing the role of race in post-*McCleskey* death penalty administration); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) ("Professor Bedau does not exaggerate when he compares *McCleskey* to *Plessy* and *Korematsu*."); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 32 (2002) (concluding that the burden placed on Blacks by *McCleskey* "puts black defendants in the position of having their actions . . . punished more harshly than similarly situated white defendants," "shows a disregard for black victims," and "shows a systemic disregard for black communities"); David G. Savage, *How Did They Get It So Wrong*?*: Left and Right Differ on the Decisions, but Each Side Has its 'Worst' List*, 95 A.B.A. J., Jan. 2009, at 20, 21 (noting that a dozen surveyed law professors and court experts cited *McCleskey* as the Court's third worst decision in recent decades); John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS, Dec. 23, 2010, at 8, 14 (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010)) (describing Supreme Court jurisprudence and race in death penalty cases); Bryan Stevenson, Keynote Address at DePaul Law Review Symposium: Race to Execution (Oct. 24, 2003), *in* 53 DEPAUL L. REV. 1699, 1706 (2004) (stating that *McCleskey* illustrates that the Court views a certain amount of discrimination as "inevitable"); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 510 (1994) ("[I]t is precisely this acceptance of bias and the tolerance of racial discrimination that has come to define America's criminal justice system.").

[262] *See supra* note 98 and accompanying text.

[263] *See supra* notes 31–43 and accompanying text.

this Article were designed with this process-focused inquiry in mind, and the study results lead to the conclusion that race and ethnicity are automatically associated with—and are inseparable from—the death penalty's future dangerousness determination. These findings give rise to new and particularized constitutional concerns that deserve careful consideration.