

GRANTING PROSECUTORS CONSTITUTIONAL RIGHTS TO COMBAT DISCRIMINATION

*Tania Tetlow**

ABSTRACT

Prosecutors have a significant but unrecognized constitutional role in our criminal justice system to prevent juries from discriminating based upon the race or gender of the victim. The prosecutorial role to “do justice” includes the crucial responsibility to provide true equal protection of the law, yet prosecutors lack the constitutional tools they need for the job. This article argues that defendants’ constitutional procedural rights to root out unlawful jury discrimination should also be made available to prosecutors. From the acquittal of the police officers who beat up Rodney King on videotape to acquittals in countless rape cases with “imperfect” victims, prosecutors often lose battles against discriminatory acquittal because they lack any constitutional weapons for the fight. While the Supreme Court has created several different procedural remedies to prevent jury discrimination against defendants, the Court has never given prosecutors the equivalent constitutional language to enforce their own equal protection role.

Specifically, prosecutors should share the defendant’s constitutional right to voir dire jurors about their potential prejudices. Voir dire on juror bias is an imperfect but crucial procedural protection that has received very little scholarly attention. Currently, the Supreme Court allows defendants a very narrow right to voir dire about racism only when race will clearly be at issue in the case. This article concludes that both prosecutors and defendants should have a constitutional right to root out unlawful discrimination during jury selection through voir dire, and that right should apply in every case.

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* Felder-Fayard Associate Professor of Law, Tulane University; J.D., magna cum laude, Harvard Law School; and former Assistant United States Attorney. Special thanks for their helpful commentary to Janet C. Hoeffel, Claire Dickerson, Adam Feibelman, Gabriel Feldman, Claire Dickerson, Keith Werhan, Elizabeth Townsend-Gard, Saru Matambanadzo, Stacy Seicshnaydre, Pam Metzger, the participants of a faculty workshop at Washington University Law School and to the participants of the *Batson* Symposium at Iowa Law School, and to Sam Brandao, Jalisa Mathis, and Andrea Rush for their excellent research assistance.

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INTRODUCTION

The popular image of the heroic lawyer battling jury discrimination is that of the criminal defense lawyer, an Atticus Finch representing a black client before an all-white jury.¹ We tend not to remember the other brave lawyers, the prosecutors who charged lynchings and hate crimes despite the near-certainty of an acquittal from a racist jury. From the trials of defendants charged with killing Emmett Till and beating Rodney King, to domestic violence and rape cases, prosecutors frequently fight jury discrimination against minority and female victims.² Yet prosecutors have no constitutional proce-

¹ HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

² See generally M. SUSAN ORR-KLOPFER, *THE EMMETT TILL BOOK* (2005) (describing a case in which state prosecutors brought two white defendants to trial for the lynching of Emmett Till, a fifteen-year-old black boy who whistled at a white woman; subsequently an all-white jury acquitted the defendants, after which the defendants were free to brag about the murder with protection from double jeopardy); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991), available at http://www.parc.info/client_files/Special%20Reports/1%20-%20Christopher%20Commission.pdf (recounting the aftermath of the trial of several Los Angeles police officers charged with the beating of Rodney King—a case that gained national publicity because the beating was caught on videotape; in the aftermath, Los An-

dural rights to protect against what I term “discriminatory acquittal.”³ Courts have created numerous important procedural rights to try to prevent discrimination against defendants, but they have not yet recognized equivalent rights to protect victims from jury discrimination. Prosecutors should have the tools they need to provide true “equal protection” of the law.

Courts and scholars alike ignore jury discrimination against the victims of crimes, despite the enormity of the problem.⁴ Throughout our history, juries have purposely freed those who lynched, raped, and committed other hate crimes, sending a message of the permissibility of such violence.⁵ Rape conviction rates and death penalty rates correlate heavily with the race of the victim.⁶ Juries are significantly less likely to punish violence against black people in the same way as they punish violence against whites.⁷ In the context of gender, juries often put a victim of rape and domestic violence on trial based

geles erupted into riots following the acquittal, causing 53 deaths, 2383 injuries, more than 7000 fires, damages to 3100 businesses, and nearly \$1 billion in financial losses).

- ³ Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 80–81 (2009).
- ⁴ See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1325 n.25 (1997) (asserting that no legal literature exists dealing with acquittals); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1715–17 (2006) (noting that scholars rarely address underenforcement of the law).
- ⁵ See *infra* Part I. Discriminatory acquittal constitutes an important subset of the general problem of discriminatory underenforcement of the law, a problem which has received more scholarly attention. See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29–135 (1997) [hereinafter KENNEDY, RACE, CRIME, AND THE LAW] (describing the destructive effects of racially selective underprotection of the law); see also Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1267 n.55 (1994) (quoting LEON WHIPPLE, OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES 144 (1927) (“[T]he most extensive and frequent losses of liberty are not due either to court or executive, but to the failure of the force of the government to protect men from violence and mobs. The history of liberty could almost be written in terms of mobs that got away with it, and were never punished—from the Tory-hunters of 1778 to the Ku Klux Klan of 1927.”)); Natapoff, *supra* note 4 at 1717; William J. Stuntz, *Accountable Policing* 42–43 (Harvard Pub. Law, Working Paper No. 130, 2006), available at <http://ssrn.com/abstract=886170>.
- ⁶ See McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987) (finding that juries’ death penalty verdicts correlate highly to the race of the victim); see also Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 36–38, 41 (2006) (arguing that while the differences in the rates of reported rapes are statistically insignificant between black and white rape and sexual assault victims, the rate of dismissals and rejections in rape cases involving black victims was nearly 30% higher than those involving white victims); Tetlow, *supra* note 3, at 89–90 (“Before 1977, . . . jury verdicts demonstrated an extraordinary rate of disparate sentencing [in rape cases] according to the race of both the victim and the defendant . . . Modern statistics also show a marked disparity in conviction rates according to the race of the rape victim.”).
- ⁷ See *id.*

on whether she behaved as a “proper” woman, rather than focusing on the culpability of the defendant.⁸ As a result of this endemic problem, prosecutors have a crucial obligation to fight for true equal protection of the law.

We invest prosecutors with the ethical role of “doing justice” but do not consider whether they have any constitutional tools to help them do so.⁹ The trial procedures used to prevent discrimination against defendants should also be available for prosecutors to prevent discrimination against victims. At the moment, however, the prosecutor picking a jury in a hate crime or domestic violence trial has no constitutional language to describe the risk of juror discrimination against the alleged victim.

As a start, prosecutors should share in the equal protection rights given to defendants during jury selection. In *Georgia v. McCollum*, the Supreme Court granted prosecutors one of these rights; the Court held that the *Batson v. Kentucky* rule banning the racial use of peremptory challenges should also govern defense counsel.¹⁰ While *McCollum* failed to ground its reasoning on the rights of the black victims in that hate crime case, it did provide support for the role of prosecutors in protecting the fairness of the entire system.¹¹ The Court should go further, acknowledge the real scope of the equal protection rights at stake, and extend the remaining protections against jury discrimination to prosecutors.

One of the most important and overlooked equal protection rights during jury selection, and the one that I focus on here, is the right to voir dire jurors about their potential prejudices. Voir dire is no panacea, but it is one of the only tools available to root out jury discrimination.¹² Skillful use of voir dire can give lawyers important

⁸ See *id.*; Tetlow, *supra* note 3, at 76–77, 93–94.

⁹ Instead we ground prosecutors’ procedural rights in vague and discretionary notions of fair play in an adversarial system. See *infra* Part III.

¹⁰ *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (relying upon *Batson v. Kentucky*, 476 U.S. 79 (1986)). In *McCollum*, the Court, relying upon *Batson*, the Sixth Amendment, and the Georgia Constitution, concluded that, if the State demonstrates a prima facie case of racial discrimination by the defendant in jury challenges, the defendant must present a racially neutral explanation for peremptory challenges. *Id.*

¹¹ *Id.* at 55–59. In *McCollum*, white defendants charged with a hate crime attempted to use peremptory challenges on every black potential juror. *Id.* at 45. The Court held that the *Batson* rule should apply to defense counsel, banning the racial use of peremptory challenges by either party. *Id.* at 48–50. *McCollum* provides some support for the constitutional rights of prosecutors, but it is a missed opportunity to recognize discriminatory acquittal. Instead, the Court relied on the prosecutors’ third-party standing to protect the public’s perception of race-neutral justice and the rights of potential jurors against being stereotyped. *Id.* at 55–56.

¹² See *infra* Part III.

information about potential jurors' degrees of empathy for minorities or antipathy towards women, and about jurors' positions on hate crimes and rape.¹³ Currently, only the defendant can lay claim to a constitutional right to voir dire about racial bias and only in overly limited circumstances.¹⁴

Part I of the Article defines categories of "discriminatory acquittals" and summarizes the historical and empirical evidence of the size of the problem.¹⁵ Part II addresses third-party standing for prosecutors to raise the equal protection rights of victims and explains why it is appropriate to task prosecutors with representing the collective equal protection rights of victims.¹⁶ No one else can properly fill this role. While civil law systems give victims direct participation in trials, our Constitution creates an adversarial system that does not comport with third-party involvement, no matter how invested the third party is in the outcome.¹⁷ Part III describes the importance of voir dire to protect against discriminatory juries, and argues that a defendant's right to voir dire about juror prejudice should also apply to prosecutors and that the right should be expanded for both.¹⁸

I. DISCRIMINATORY ACQUITTAL IS A PERVASIVE CONSTITUTIONAL VIOLATION

Discriminatory acquittals violate the Equal Protection Clause for the same reasons that discriminatory convictions do.¹⁹ Jury verdicts constitute state action bound by the Constitution and must not be motivated by race or gender discrimination.²⁰ The Supreme Court has been adamant in its proclamations that discrimination should have no place in a criminal trial, and in its *McCleskey v. Kemp* decision, did not question the idea that jury discrimination based on the race of victims would violate the Equal Protection Clause.²¹

¹³ *Id.*

¹⁴ *See* *Ristaino v. Ross*, 424 U.S. 589, 597 (1976) (holding that "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were [black]" did not warrant a need to question potential jurors specifically about racial prejudice).

¹⁵ *See infra* Part I.

¹⁶ *See infra* Part II.A.

¹⁷ *See infra* Part II.B.

¹⁸ *See infra* Part III.

¹⁹ *See* Tetlow, *supra* note 3, at 103–05 (arguing that discriminatory acquittals violate the Equal Protection Clause).

²⁰ *Id.* at 105–07; Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1682 (1985).

²¹ *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). *McCleskey* involved the awkward procedural posture of a defendant arguing that he was less likely to have received the death penalty

Prosecutors encounter two broad types of discriminatory acquittal by juries, which I briefly describe below: (1) acquittals motivated by condoning racial or gender violence, particularly when the violence seems to punish the victim for failure to obey racial²² or gender rules;²³ or (2) a general lack of empathy for minority victims.²⁴

We have a long history of juries acquitting in order to affirmatively condone racial violence.²⁵ Well into the twentieth century, defendants could lynch, assassinate, and commit hate crimes with impunity.²⁶ In the rare cases in which police made an arrest and prosecutors brought charges, all-white juries remained the ultimate protector of private racial violence.²⁷ Their verdicts sent clear signals about the

had he killed a minority victim, but nevertheless, the Court accepted at face value the viability of those claims based on jury discrimination against the race of the victim. *Id.* at 291–92, 308–09.

22 The protection of black victims from private violence shielded by all-white juries motivated the ratification of the Thirteenth Amendment. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 38 (1990) (describing an instance in which Congressman William Kelley read into the congressional record an 1864 New Orleans newspaper editorial criticizing an all-white jury's acquittal of a man who admitted to killing a black man).

23 Serena Mayeri, Note, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1081–83 (2001) (describing the ways in which proponents of the Violence Against Women Act's civil rights remedies made comparisons between racially-motivated crimes and the underenforcement of gender-based violence).

24 See Tetlow, *supra* note 3, at 81–82; see also Colbert, *supra* note 22, at 112 (citing Marina Miller & Jay Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. SOC. PSYCHOL. 21, 159–60 (1978)) (describing a study showing that 80% of black jurors voted to convict a black defendant of raping a black woman, versus 32% of white jurors).

25 What was deemed criminal assault or homicide, if committed by a white person against a white person, became acceptable and effectively decriminalized when the victim was black. Colbert, *supra* note 22, at 18–22, 28, 40–42. The murder of a slave by a white person was not considered a crime and slaves were denied access to courts and prevented from testifying against white people. *Id.* at 18–19. In the unusual event that a northern colony recognized the crime of raping a black woman, the legislature provided special de jure protection for the white offender; immediately following the Civil War, violence against black victims often went unpunished since local law enforcement refused to prosecute white offenders. *Id.* at 28, 40. In Texas, whites were indicted and charged with 500 murders of blacks between 1865 and 1866, but all-white juries acquitted every one of the defendants). *Id.* at 41.

26 See Tetlow, *supra* note 3, at 82–84 (describing the reign of terror after Emancipation, marked with private violence used to enforce the racial order, lynchings, and the assassination of civil rights workers); see also Colbert, *supra* note 22, at 87 (showing that between 1955 and 1965, white southerners were charged with fifty-eight civil rights killings, but only six were convicted and fewer received prison sentences).

27 See, e.g., John Herbers, *Beckwith's 2d Trial Ends in Hung Jury*, N.Y. TIMES, Apr. 18, 1964, at 1 (reporting how, in two trials, all-white juries refused to convict Byron De La Beckwith for the murder of Medgar W. Evers, an NAACP official).

permissibility of racial violence, particularly violence meant to enforce the racial order.²⁸ Acquittals proved to be far more public signals than the refusal of the police and prosecutor to act.²⁹

We still see suspicious acquittals in hate crime prosecutions,³⁰ but the more common modern example of discriminatory acquittal is the continuing acceptance of sexual violence against black women.³¹ Empirical evidence shows that the race of a victim matters enormously to the conviction rates for rape.³²

It is also far easier for defendants to claim self-defense for violence against a black victim than a white victim. Jurors tend to project racial stereotypes of aggression and hostility onto black victims in ways that make it easier for defendants to claim that alleged victims were actually the initial aggressors.³³ From the acquittals of Bernard Goetz to the Los Angeles Police Department (“LAPD”) officers who beat Rodney King,³⁴ the public perception of jury discrimination against black victims has led to great public controversy, and even to riots.³⁵

28 See Tetlow, *supra* note 3, at 84 (“Even more than the silent inaction of police and prosecutors, such jury verdicts made dramatic statements about the permissibility of racially-motivated violence.”).

29 *Id.*

30 *Id.* at 84–85 (citing the infamous Rodney King incident as a modern-day hate crime prosecution).

31 *Id.* at 88–90 (describing the history of legalized rapes of black women during slavery and the refusal to enforce rape laws against black women thereafter); see also Colbert, *supra* note 22, at 18, 28.

32 Tetlow, *supra* note 3, at 90 (“Modern statistics also show a marked disparity in conviction rates according to the race of the rape victim.”).

33 See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 8 (1989) (providing an empirical discussion of the implications of stereotypes and prejudice).

34 See, e.g., Stephen L. Carter, Comment, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 428 (1988) (describing the acquittal of Bernard Goetz for the shooting of four young black men on a subway, based on his unsupported claim of self-defense); Jesse McKinley, *Officer Guilty in Killing that Inflamed Oakland*, N.Y. TIMES, July 9, 2010, at A11 (recounting a conviction of a transit officer for involuntary manslaughter, as opposed to second-degree murder, after contending that the shooting of the unarmed victim, Oscar Grant, was an accident prompted by his confusion of his sidearm with his Taser); see REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, *supra* note 3 (citing as the impetus for the report the acquittal of Los Angeles police officers on charges of beating Rodney King, a black man, despite the fact that the violence was caught on videotape); see also Robert D. McFadden, *Verdict Bares Sharp Feelings on Both Sides*, N.Y. TIMES, Feb. 26, 2000, at A1 (outlining racial divisions following the acquittal of four white police officers in the shooting death of an unarmed black man); Rocco Parascandola, *N.Y. Prepares For Verdict in Fifty-Shot Killings*, L.A. TIMES, Apr. 24, 2008, at A21 (showing New York City’s preparation for uprising in anticipation of the acquittal of three police officers in the fifty-bullet shooting of a black man); John Seewer, *Ohio Officer Acquitted of Killing Mom Holding Baby*, ASSOCIATED PRESS, Aug. 4, 2008 (referring to protests in the wake of a white

Empirical evidence reveals another more subtle type of discriminatory acquittal, what Randall Kennedy generally calls “racially selective empathy.”³⁶ Studies of the death penalty show a marked discrimination against black victims, far more pronounced than that against defendants.³⁷ The Baldus study, presented to the Supreme Court in *McCleskey v. Kemp*, proved that juries in Georgia were 4.3 times more likely to impose the death penalty for the killers of white victims than for the killers of black victims.³⁸ These disparities continue.³⁹ Whether conscious or not, juries in the aggregate tend to devalue the lives of murdered black victims.⁴⁰

In the context of gender, the conviction rate for rape and domestic violence is demonstrably lower than other kinds of violent crimes because juries do not necessarily disapprove of such violence.⁴¹ Just as juries have allowed violence against black people who violated the racial code,⁴² juries still famously focus on whether female victims deserved the violence against them. Conviction rates in rape and domestic violence cases correspond to the perceived virtue of the victim and whether she behaved as a properly obedient woman.⁴³

At a minimum, discriminatory acquittals indicate that violence against certain categories of people matter less. At their worst, discriminatory acquittals grant very public permission for violence against those who violate the racial order or who do not behave as

police officer’s acquittal of misdemeanor charges of negligent homicide and negligent assault after shooting a black woman while she was holding her one-year-old child).

35 See Tetlow, *supra* note 3, at 84–85.

36 KENNEDY, RACE, CRIME, AND THE LAW, *supra* note 5, at 384–85 (coining the term “racially selective empathy” and describing its possible effects on criminal punishments for drug offenses).

37 *McCleskey v. Kemp*, 481 U.S. 279, 286–87 (1987).

38 *Id.* at 287.

39 Tetlow, *supra* note 3, at 86–87 (describing empirical studies from the 1990s that showed continued racial disparity in the imposition of the death penalty according to the race of the victim).

40 Empirical studies tend to focus on the death penalty, so we have to extrapolate to criminal conviction rates; but as discussed above, rape conviction rates also vary based on the race of the victim. See Carter, *supra* note 34, at 447 (“American legal and political culture seems to suggest . . . that there are two varieties of people who are involved in criminal activity, black people and victims. So perhaps when victims happen to be black, the culture rationalizes the seeming contradiction by denying that there has been a crime.”).

41 Tetlow, *supra* note 3, at 90–94.

42 *Id.* at 76–77 (describing lynchings for violations of the racial order, specifically the example of Emmett Till, killed after whistling at a white woman).

43 *Id.* at 93–94 (asserting that rape trials focus less on the defendant’s intent to rape than on whether the victim somehow deserved the assault because of her lack of virtue or unwillingness to fight to the death, just as domestic violence trials often focus on whether the victim provoked the abuse by nagging or cheating).

proper women.⁴⁴ Women and minorities understand that breaking certain rules means that they can be beaten or raped with impunity.⁴⁵ Given the importance and the scope of the problem, we should grant prosecutors the constitutional procedures to prevent jury discrimination against victims.

II. VESTING THE PROSECUTOR WITH THE DUTY TO DEFEND AGAINST JURY DISCRIMINATION

At the moment, prosecutors have few rights rooted in the Constitution, which correctly prioritizes the rights of defendants against the State.⁴⁶ The prosecutorial rights I propose are grounded in the Supreme Court's clear mandate that race and gender discrimination have no place anywhere in a jury trial, and that we should give prosecutors the tools to help combat such discrimination.⁴⁷ As *McCleskey v. Kemp* itself made clear, discrimination by juries against either defendants or victims violates the Equal Protection Clause.⁴⁸

We should recognize a role for prosecutors to battle the endemic problem of jury discrimination against victims.⁴⁹ Particularly when prosecutors participate in jury selection, they should be able to articulate the constitutional import of their efforts to root out discrimi-

44 Natapoff, *supra* note 4, at 1759–60, 1772 (asserting that underenforcement of the law exposes residents to crime and insecurity, as well as reinforcing the idea that the state has abandoned them).

45 KENNEDY, CRIME, RACE, AND THE LAW, *supra* note 5, at 29–75 (arguing that discriminatory underenforcement of the law and the private violence it permits do more to restrict the liberty of women and minorities than does direct discrimination by the state).

46 *See Georgia v. McCollum*, 505 U.S. 42, 56 (1992) (holding that a state has a right to protect the fairness and integrity of its own judicial process). Prosecutors also have the right to enormous discretion in charging decisions based on an argument for the separation of powers. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) (describing the great deference that is given to prosecutorial discretion).

47 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (“Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.”) (citing *Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

48 481 U.S. 279, 349–58 (1987) (Blackmun, J., dissenting). For a more in-depth consideration of why discriminatory acquittal violates the Constitution, see *Tetlow*, *supra* note 3, at 103–16.

49 *See generally Tetlow*, *supra* note 3. Such procedures should be granted to prosecutors. One possibility is to prohibit defense lawyers from urging the jury to violate the Constitution by discriminating against the victim's race or gender. *Id.* at 127–28. In addition to the existing evidentiary problems with such prejudicial arguments, appeals to discrimination invite constitutional error. *Id.* at 128. Prosecutors should also have a right to use broad voir dire and peremptory challenges to root out bias against victims. *Id.* at 126–27. This Article fleshes out the most important category of these procedures—that involving jury selection.

nation. As yet, the Supreme Court has never granted third-party standing to protect the equal protection rights of victims.⁵⁰ The Court instead has granted prosecutors a much more tepid role to represent the interest in the “public perception of fairness.”⁵¹

We must ask the question of whether prosecutors can ethically, pragmatically, and constitutionally fulfill the role that I propose. Doing battle against discriminatory acquittal falls squarely within a prosecutor’s ethical duty to “do justice”⁵² and should easily meet third-party standing requirements. I also firmly believe that prosecutors will choose to exercise their newfound rights for the very same self-interested reason that lawyers like to win cases once they go to trial.

It is also worth asking whether such a role might better be fulfilled by others. We might assign the obligation to root out jury discrimination entirely to trial judges, for example, though judges have less incentive to conduct the thorough voir dire that I propose. More intriguing, the Supreme Court recently came perilously close to deciding the constitutionality of private prosecutions by victims themselves, who might do better to root out jury discrimination aimed at them.⁵³ Unfortunately, the direct participation of victims, common in our history and still common in civil law systems, seems too onerous a task to impose on victims and too disruptive to the rights of defendants in our adversarial system.

Ultimately, prosecutors are the best situated in our adversarial system to protect against discriminatory acquittal. As they choose juries and conduct trials, prosecutors have the ethical obligation to do justice and the pragmatic desire to win convictions. They need not represent victims individually in order to protect against collective discrimination against women and minorities as such.

50 For a broader discussion of why victims have such equal protection rights, see Tetlow, *supra* note 3, at 122–28.

51 As I describe below, in *McCullum*, the Court allowed prosecutors to complain about the racial use of peremptory challenges by the defendant and stretched state action doctrine to apply the Equal Protection Clause to defense attorneys. 505 U.S. 42, 56 (1992). But, *McCullum* missed the opportunity to rely on the rights of victims, an argument prosecutors never made to the Court in that hate crime trial.

52 See *infra* note 78.

53 *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2185 (2010).

A. *Prosecutors Can Exercise Third-Party Standing on Behalf of the Collective Right of Victims to Equal Protection of the Law*

In the context of jury selection, the Supreme Court has proved extremely willing to grant both prosecutors and defense lawyers broad third-party standing to protect criminal trials from equal protection violations.⁵⁴ In the *Batson* line of cases, the Court allows both sides to raise the equal protection rights of potential jurors against the use of peremptory challenges based on race⁵⁵ or gender.⁵⁶ Both sides can also act to protect the public's interest in the perception of fairness.⁵⁷

Yet the Court has never recognized the prosecutor's role in protecting against discriminatory acquittal, despite being offered the perfect opportunity to do so in *Georgia v. McCollum*.⁵⁸ McCollum was a white defendant charged with a racially-motivated crime against black victims, who then sought to exercise all of his peremptory strikes against black jurors.⁵⁹ The Court granted prosecutors' interlocutory appeal, and held that the *Batson* rule should apply to defendants and forbid the racial use of peremptory challenges by defense attorneys.⁶⁰ Notably, neither party raised the interests of the alleged black victims against the striking of black jurors.⁶¹

54 The Court has even granted third-party standing for defendants to complain about exclusion of potential jurors of a different race. See generally *Powers v. Ohio*, 499 U.S. 400, 411–15 (1991) (holding that the defendant had standing to assert the equal protection rights of a juror because he was able to show: that he had suffered an injury in fact because of his sufficient interest in having neutral jury selection processes, that he had a close relation to the third-party (excluded juror) in their common interest to eliminate racial discrimination, and that it is nearly impractical for a juror to bring suit himself).

55 See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 95 (1986) (holding that “a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*.”); *McCollum*, 505 U.S. at 59 (holding that “the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges”).

56 See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (“Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.”).

57 See *id.* (“Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the ‘deck has been stacked’ in favor of one side.”); *Batson*, 476 U.S. at 87 (“Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”); *Georgia v. McCollum*, 505 U.S. 42, 56 (1992) (noting that “a State suffers a similar injury when the fairness and integrity of its own judicial process is undermined”).

58 *McCollum*, 505 U.S. at 56.

59 *Id.* at 45.

60 *Id.* at 59.

61 See Petitioner's Brief on the Merits, *McCollum*, 505 U.S. 42 (1990) (No. 91-372), 1990 WL 512752; Respondents' Brief on the Merits, *McCollum*, 505 U.S. 42 (1992) (No. 91-372),

The Court did not focus on a prosecutor's standing to fight for meaningful, race-neutral justice for the black victims of the charged hate crime, but ironically granted prosecutors standing to protect the appearance of race-neutral justice.⁶² Ruling in the wake of the two-month old Rodney King acquittal and the resulting conflagration in Los Angeles, the Court cited the prevention of riots as a reason to preserve public confidence.⁶³ "In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal judicial system is essential for preserving community peace in trials involving race-related crimes."⁶⁴ The actual injustice motivating the rioters did not merit a mention.

While the Supreme Court missed an opportunity in *McCollum* to stake a claim against racial bias against victims, the case does provide support for the government's standing to protect the fairness and integrity of its own judicial process.⁶⁵ Whether the prevention of discriminatory acquittal constitutes a community-wide good or the protection of individual victims, it represents an important step in the Court's desire for a justice system free of race and gender prejudice. The ruling in *McCollum* would have been much more convincing, however, had it recognized the real issues at stake.⁶⁶ In order for prosecutors to assert third-party standing to protect victims against unlawful discrimination, they must demonstrate: (1) serious obstacles preventing the victims from asserting their own rights; (2) injury-in-fact to the victim seeking third-party standing; and (3) a suffi-

1993 WL 449264; Reply Brief for the Petitioner, *McCollum*, 505 U.S. 42 (1992) (No. 91-372), 1992 WL 541450.

⁶² *McCollum*, 505 U.S. at 59.

⁶³ *Id.* at 49.

⁶⁴ *Id.* (citing Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 195-96 (1989)) (using evidence of rioting following two Miami trials in which black jurors were peremptorily struck by white defendants accused of a racial beating to demonstrate of the necessity of "public confidence in the integrity of the criminal justice system" in order to maintain the peace in racially charged trials).

⁶⁵ *McCollum*, 505 U.S. at 56.

⁶⁶ The dissenters lambasted the majority for trumping the rights of criminal defendants to use peremptory challenges as they choose, with the seemingly less important right of the public to confidence in the system and rights of jurors against unstated race consciousness. *Id.* at 68-69 (O'Connor, J., dissenting). The majority did not assert the rights of black people to serve on juries, which poses interesting questions of the nature of jury service as governance, but instead claimed that jurors are injured by the racial stereotyping of peremptory challenges. *Id.* at 48-50.

cient nexus between the interest of the litigant and the victim to assure vigorous advocacy of the victim's rights.⁶⁷

Because our bilateral criminal justice system all but excludes victims from the criminal justice process, the first requirement of "serious obstacles" is easily met.⁶⁸ Victims cannot assert their own rights to an impartial jury. The only procedural rights afforded to victims, by federal and state statutes and by some state constitutions, are rights to be present during proceedings and to speak at bond hearings and sentencings.⁶⁹ None of these rights is self-executing.⁷⁰ Victims clearly have no rights to participate in voir dire or jury selection.⁷¹

The second requirement of injury-in-fact could prove slightly more difficult. Current doctrine does not recognize the injury suffered by victims when a guilty attacker is set free. Courts do not even recognize that victims suffer injury when a convicted defendant fails to pay restitution, holding instead that it is society as a whole that is harmed by the failure to properly penalize and rehabilitate the defendant.⁷²

In the equal protection context, however, the Court proves quite willing to recognize injury when participants in the criminal justice

67 See Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 756 (1992) (applying third-party standing as it pertains to jurors).

68 See Anne M. Morgan, *Criminal Law—Victims Rights: Remembering the "Forgotten Person" in the Criminal Justice System*, 70 MARQ. L. REV. 572, 572 (1987) (citing Marlene A. Young, *Victims of Crime: The Great American Scandal*, JUDGES' J., Spring 1984, at 8; Lois Haight Herrington, *Victims of Crime: What the Government Can Do*, JUDGES' J., Spring 1984, at 17) (indicating that the devaluation of the victim's role in the criminal justice process has been coined the "Great American Scandal").

69 See generally Walker A. Matthews, III, Note, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998) (describing various state and federal approaches to the expansion of victims' rights).

70 Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 559–60 (2005); Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 337 (1999) ("If additional litigants, such as victims, have a stake in this process . . . they must rely on the prosecutor to represent adequately their interests for them."). As an example, the Supreme Court upheld the constitutionality of victim impact statements at sentencing as relevant information to the court and of healing power to the victim. *Payne v. Tennessee*, 501 U.S. 808, 821–25 (1991). Yet, victims have no right to make such a statement if the prosecutor chooses not to present the testimony. Bandes, *supra*, at 341.

71 Bandes, *supra* note 70, at 337 ("The adversary system, in a criminal case, assumes only two parties: the government and the defendant."); FED. R. CRIM. P. 24 (providing that peremptory challenges are available only to the defendant and to the government); see cases cited *supra* note 74.

72 Bandes, *supra* note 70, at 339 ("The punishment for the justly convicted inures to the good of the polity.").

system suffer racial and gender discrimination, even in the absence of underlying substantive rights. For example, while victims have no right to prosecution of their cases, victims do have the right to challenge charging decisions motivated by the race of the victim.⁷³ No individual has a right to serve on a particular trial jury; yet, the Court has given both prosecutors and defense lawyers third-party standing in order to protect jurors from suffering from racial and gender stereotyping.⁷⁴

Increasingly, racial stereotyping itself seems to create the requisite injury to produce standing, even in the absence of any particularized harm. In the *Batson* line of cases, the Court relied in part on injury to potential jurors allegedly arising from the prosecutor's unspoken motives for exercising peremptory challenges.⁷⁵ Similarly, in *Shaw v. Reno*, the Court granted standing to voters who claimed that their congressional district line might have been drawn in an awkward shape based on racial stereotypes about voting behavior.⁷⁶ Surely a crime victim whose attacker is set free because the jury chooses to discriminate against the victim's race or gender suffers a more palpable and serious injury.

Moreover, since *Georgia v. McCollum* held that the perception of unfairness is worthy of prosecutorial standing, surely the reality of unfairness should also qualify. It would be ironic if the prosecutor charging Los Angeles Police Department officers with beating Rodney King could not act to protect King himself from injustice, but only to protect against the perception of injustice and the possibility of public unrest.

⁷³ Compare *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (denying standing to citizens challenging the underenforcement of criminal law), with *United States v. Armstrong*, 517 U.S. 456, 458 (1996) (allowing standing to respondents asserting a discriminatory effect of criminal prosecution).

⁷⁴ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (holding defendant has standing to assert the rights of potential jurors against gender discrimination); *Georgia v. McCollum*, 505 U.S. 42, 55 (1992) (holding prosecutors have third-party standing to assert the rights of potential jurors); *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (holding defendant has standing to assert the rights of potential jurors).

⁷⁵ *Batson*, 476 U.S. at 121 (Burger, C.J., dissenting) (noting when racial stereotypes are exercised as silent peremptory challenges, they avoid the overt "trafficking in the core of truth in most common stereotypes" that would cause offense (quoting Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 553 (1975))). The Court did not rely on any right to serve on a jury, but instead relied upon the harm resulting from racial stereotyping. *Batson*, 476 U.S. at 87.

⁷⁶ 509 U.S. 630, 646 (1993) (holding that the given reapportionment scheme was prima facie irrational and could only be understood as an attempt to segregate voters into districts on the basis of race and that such an attempt was without sufficient justification).

Finally, prosecutors must show a sufficient nexus between their interests and the victims' rights to assure a vigorous advocacy on their behalf. This requirement is easily met because the "State's interest in every trial is to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner."⁷⁷ For the reasons described immediately below, I believe there can be no conflict between the prosecutor's obligation to the defendant, to the public, and to race and gender-neutral justice for the victim.⁷⁸ The rights at stake are collective rather than individual, and concern the systemic reputation and fairness of the criminal jury system. Equal protection rights are better protected through the government's broad obligation to do justice.

B. Preventing Discriminatory Acquittal Falls Squarely Within a Prosecutor's Ethical Obligation to Do Justice

The ethical role of a prosecutor is not to represent victims as clients, nor for that matter, to represent the government itself.⁷⁹ Instead prosecutors have the ethical duty, unique among lawyers, to do "justice" rather than to advocate the interests of a particular client.⁸⁰ The Supreme Court famously described the role of a prosecutor as a "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."⁸¹ Ethical prosecutors do not solely consider the interests of individual crime victims: they are obligated

⁷⁷ *J.E.B.*, 511 U.S. at 137 n.8.

⁷⁸ Morgan, *supra* note 68, at 591 (citing Nat'l Judicial Coll. Victims' Rights Conference Participants, *Victims of Crime: What Judges and Lawyers Can Do*, JUDGES' J., Spring 1984, at 12, 13 (contending that victims' rights "can be accomplished without impairing the constitutional and statutory safeguards appropriately afforded all persons charged with crime")).

⁷⁹ See *State ex rel. Romley v. Superior Court*, 891 P.2d 246, 250 (Ariz. Ct. App. 1995) ("[A] prosecutor does not 'represent' the victim in a criminal trial; therefore, the victim is not a 'client' of the prosecutor."); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION, & DEFENSE FUNCTION § 3-3.2 cmt. (1993) ("[T]he prosecutor's client is not the victim but the people who live in the prosecutor's jurisdiction."); Carol A. Corrigan, Commentary, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537 (1986) ("The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole.").

⁸⁰ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13(3) (2004) (stating that prosecutors must "seek justice"); see also STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION & DEFENSE FUNCTION § 3-1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

⁸¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

to protect the fair functioning of the system, including, for that matter, the defendant's rights.⁸²

This distinction frequently matters. Prosecutors face ethical dilemmas in balancing the interests of the community against the interests of a particular victim, and against the collective interests of victims.⁸³ Domestic violence cases present archetypal examples of when those interests diverge and provide a context relevant for our consideration of discriminatory acquittal. Victims of domestic violence often ask a prosecutor to drop charges out of rational calculations for their own safety and survival.⁸⁴ Prosecutors then must decide whether to honor victims' wishes, while balancing the safety of this particular victim against the deterrent effect of prosecution against the defendant batterer.⁸⁵ More difficult still, prosecutors must balance the safety of a particular victim against the deterrent effect of prosecution on all batterers, thus trading off the safety of a particular victim against the safety of all future victims.⁸⁶ In the course of these agonizing decisions, prosecutors frequently and explicitly elevate the interests of the community over the interests of a victim.⁸⁷

I do not propose that prosecutors represent the specific interests of victims as they would a client, but instead that they represent the far more collective rights of victims to equal protection of the law. Fighting for the rights of victims to verdicts free from race or gender discrimination cannot create a conflict of interest. Equal protection of the law fits too squarely within our definition of "justice."⁸⁸

82 See Matthews, *supra* note 69, at 741 (1998) (noting that prosecutors must consider "1) liberty and due process; 2) public order and safety; and 3) governmental efficiency and economy").

83 See Gershman, *supra* note 70, at 561 (evaluating the changing role of victims in the criminal justice system).

84 See Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 298, 308-09 (1993) (describing how prosecutors are starting to focus on the long-term accountability for the abuser). See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) (exploring a system where victims must proceed with charges despite their own fears and concerns).

85 The stakes are high. The Los Angeles District Attorney's office, for example, made the decision to honor Nicole Brown Simpson's desires to drop domestic violence charges against her husband O.J. Simpson. Hanna, *supra* note 84, at 1850-51.

86 *Id.*

87 Failure to do so can constitute an ethics violation. See Gershman, *supra* note 70, at 561 (describing the risk of ethical violations when prosecutors elevate interests of the victim in vengeance against the defendant's rights, or against broader public interest in offering a plea bargain to reward cooperation).

88 See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 52 (1998) (arguing that prosecutors have duties to protect the community,

The Supreme Court has made clear time and time again that discrimination anywhere in a trial is anathema to the precepts of our trial system.

[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds . . . [and where] juries render verdicts⁸⁹

The Court also has rejected the argument that “gender discrimination . . . , unlike racial discrimination, is tolerable in the courtroom,” even though gender classifications receive only intermediate scrutiny under the Equal Protection Clause.⁹⁰ A just criminal justice system is one that does not operate based on race or gender of the participants. As such, the obligation to prevent verdicts based on unconstitutional discrimination cannot conflict with the obligation to do justice. The Court tasks all of the participants in the criminal justice system with the obligation to protect against such discrimination.⁹¹

Obligation does not equate to willingness, so it is also important to ask the pragmatic question of whether prosecutors will care enough about the equal protection rights of victims to fulfill this responsibility. Indeed, empirical studies evidence race-of-the-victim bias in charging decisions made by prosecutors.⁹² Studies also show bias against charging gender-based violence depending on the perceived virtue of the female victim.⁹³ Prosecutors too often exhibit internal bias or the willingness to anticipate the bias of juries, or both, so it might seem strange to vest them with responsibility of fighting discriminatory acquittal. After all, jury discrimination is a mere subset of the discriminatory underenforcement of the law. Before a case ever gets to a jury, police officers and prosecutors exercise great discretion about whether to make an arrest, whether to charge

and to “ensure that victims and defendants in the criminal justice system are treated fairly, equitably and in a nondiscriminatory manner”).

⁸⁹ Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991).

⁹⁰ J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994).

⁹¹ See *Batson v. Kentucky*, 476 U.S. 79, 88–89 (1986) (“[T]he State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at ‘other stages in the selection process’”).

⁹² See Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 446 (1979) (finding that when a victim was white, prosecutors were more likely to pursue the highest available charge in a leading statistical study conducted to determine whether prosecutors consider race when determining whether to proceed with the most severe charges found).

⁹³ See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1130 (1986) (describing the archaic theorem that a “truly unwilling woman would fight nearly to the death to protect her virtue”).

a defendant, and whether to allow him to plead guilty before trial.⁹⁴ Law enforcement officials prove far more likely to bring charges for violence against a white victim or for gender-based violence against a “virtuous” woman.⁹⁵

But when prosecutors do bring charges in cases made difficult by the possibility of jury discrimination, we should give them the tools they need to counter it. The prosecutors brave enough to bring the killers of Emmett Till and Medgar Evers to trial deserved a constitutional foothold to describe the importance of their uphill battles.⁹⁶ At the moment, prosecutors can rely on nothing more than the trial judge’s sense of relative fairness and relevance.

Moreover, once a case goes to trial, prosecutors, like all lawyers, have a psychological incentive to win.⁹⁷ Much more than charging and plea-bargaining decisions, which most often occur in safe obscurity, prosecutors perceive trials as a public measure of their personal ability.⁹⁸ Imbuing the right to protect victims with prosecutors would harness the power of self-interest to help prosecutors root out jury bias against victims. Prosecutors might require better training to perform this obligation well, but they would have a great incentive to do so.

It also would create an important normative change to task prosecutors with the explicit role of protecting the equal protection rights

94 See *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 760–61 (2005) (describing the constitutional necessity of police discretion); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (describing the importance of prosecutorial discretion as a separation of powers issue).

95 Kennedy, *supra* note 5, at 29–75. See Estrich, *supra* note 93, at 1087–89 (sharing a story about how officers treated the “virtuous” author following her own rape); Pokorak, *supra* note 6, at 39–40 (highlighting the typical differences in the women raped and the jurors who decide their cases); Myers & Hagan, *supra* note 92, at 446 (describing a study showing prosecutorial bias based on race of victims).

96 See Tetlow, *supra* note 3, at 82–84. Often these were federal prosecutors, who may or may not have come from the communities in which the murders occurred, but in the cases of Emmett Till and Medgar Evers, Mississippi district attorneys brought the cases to trial. See ORR KLOPFER, *supra* note 2; ADAM NOSSITER, *OF LONG MEMORY: MISSISSIPPI AND THE MURDER OF MEDGAR EVERS* (1994). In 1933, Professor James Chadbourn estimated that less than 1% of lynchings since 1900 resulted in a conviction. JAMES HARMON CHADBOURN, *LYNCHING AND THE LAW* 13–14 (1933).

97 See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 882 (1995) (describing the “desire to ‘win’” as a central characteristic of prosecutorial culture); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 *B.U. L. REV.* 125, 134, 138 (2004) (noting the emphasis district attorneys’ offices place on conviction rates).

98 Kenneth Bresler, Essay, “*I Never Lost a Trial*”: *When Prosecutors Keep Score of Criminal Convictions*, 9 *GEO. J. LEGAL ETHICS* 537, 541 (1996) (criticizing prosecutors who keep personal tallies for self-promotion).

of victims. At the moment, both police and prosecutors unabashedly use the specter of jury discrimination to legitimate their own anticipatory discrimination.⁹⁹ If juries probably will not convict for violence against certain kinds of victims, then law enforcement will expend fewer resources bringing such cases.¹⁰⁰ The result is that minority communities are less protected, and women are subject to epidemic rates of rape and domestic violence.¹⁰¹ Acknowledging discriminatory acquittal, and tasking prosecutors with battling it, will send prosecutors a very different message about the illegitimacy of anticipating jury discrimination. Granting prosecutors new procedural tools of constitutional priority would go a long way to communicating the urgency of the task.

C. Prosecutors Should Root Out Jury Discrimination Rather than Judges

Perhaps we could avoid any issue of granting equal protection rights and obligations to prosecutors by instead imbuing the obligation with the court. Unlike other procedural trial rights, voir dire often falls within the purview of the trial judge. Clearly the judge already has responsibility for ensuring fundamental fairness and an impartial jury.¹⁰² Investing the court with this power would make clear that the rights at stake are systemic, concerned with preserving the sanctity of the process. During jury selection, for example, we could ask the trial judge to voir dire about discriminatory attitudes and act on the results with dismissal of jurors biased against either defendant or victim.

Leaving such voir dire only to judges, however, would prove considerably less effective than granting it to lawyers.¹⁰³ First, studies show potential jurors are more likely to lie and to give the seemingly correct answer to judges as authority figures.¹⁰⁴ They do not want to

⁹⁹ See Davis, *supra* note 88, at 25–32, 53.

¹⁰⁰ Pokorak, *supra* note 6, at 49.

¹⁰¹ Kennedy, *supra* note 5, at 69–75.

¹⁰² Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL'Y REV. 149, 157 (2010).

¹⁰³ Colbert, *supra* note 22, at 121 n.584 (“For jury selection to be meaningful, the defense attorney must conduct the voir dire.”).

¹⁰⁴ See Bennett, *supra* note 102, at 160 (describing his experience as a district court judge receiving answers from jurors); Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987); Linda L. Marshall & Althea Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120 J. PSYCHOL. 205, 214 (1986).

embarrass themselves by giving the wrong answer to an apparently moral question, often in an extremely public setting.¹⁰⁵

More importantly, as described above, granting the responsibility to prosecutors harnesses the power of self-interest. Prosecutors have more incentive to ask voir dire questions well, in subtle ways designed to illicit information relevant to peremptory challenges, rather than the more rhetorical questioning common to judicial voir dire.¹⁰⁶ There is a big difference between a judge who asks jurors to raise their hand if they are incapable of being fair, compared to a lawyer's ability to inquire, in the course of individualized questioning, how a juror feels about particular race or gender signifiers.¹⁰⁷

D. *Why Not Give Victims Direct Participation?*

Should victims themselves be permitted to participate in trials to protect their own rights? It is a question serious enough to be taken up by the Supreme Court recently.¹⁰⁸ Victims and their counsel would likely prove more effective at directly rebutting the discrimination that leads to jury nullification.¹⁰⁹ The direct presence of victims in the proceedings might combat a discriminatory lack of empathy.¹¹⁰ Victims of gender-based crimes could more directly rebut attacks on their character for failing to meet expected gender roles.¹¹¹ Allowing victims to participate could give voice to the voiceless, and remind juries to contemplate the rights of victims to equal protection of the law.¹¹²

105 The possibility of public embarrassment can be alleviated by the more frequent use of jury questionnaires rather than just public questioning. These are no substitute for more individualized follow-up questions, but they do provide a different type of opportunity for jurors to more privately admit or hint at bias.

106 Bennett, *supra* note 102, at 160 (noting that lawyers know their cases better, have greater access to jury consultants, and generally do a better job than judges at voir dire).

107 *See id.*

108 In the last decade, there have been numerous proposals to expand the procedural rights of victims, including a proposed victim's rights amendment to the Constitution. None of these proposals, however, suggests the kind of direct trial participation necessary to guard against discriminatory acquittal. *See* Matthews, *supra* note 69.

109 William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System"*, 1999 UTAH L. REV. 349, 355 (1999) (noting that in Germany, sexual assault victims take an interest in participating at trial through counsel; as character and credibility are likely to come under attack by the defendant, victims feel as if their stakes in the trial are high).

110 *Id.* at 357 (recounting a "hotly contested" rape trial where an admitted drug addict claimed she had been raped by two defendants who insisted that she had agreed to have sex with them on the promise that they would give her heroin the following day).

111 *See id.*

112 *See, e.g.,* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (stating that historically, a citizen lacked standing to contest policies of prosecutors if he were neither subject to prose-

Many civil law systems around the world permit the direct participation of victims in criminal trials. Countries such as Germany and France allow victims to question witnesses and make closing arguments, using their own counsel if they choose.¹¹³ Civilian judges, however, actively supervise the actual investigation, rather than referee an entirely bilateral battle between state and defendant.¹¹⁴ As such, judges consider a much broader array of evidence and can invite participation by third parties without the same claims of prejudice.¹¹⁵

Even our own criminal justice system originally allowed the direct participation of victims, not as third parties, but as “private prosecutors.” Most of the American colonies initially followed the English tradition of allowing victims to prosecute their own cases.¹¹⁶ States did not invest prosecutorial authority in a public prosecutor until the end of the eighteenth century, and private prosecution continued in many areas throughout the nineteenth century.¹¹⁷ Today, a number

cution nor threatened with prosecution); Bades, *supra* note 70, at 347 (urging a broader definition of standing for victims, particularly those protecting their equal protection rights, but noting the “cynical conclusion” that “the only collective interest cognizable is the government’s own definition of its own interests, which it buttresses when necessary by claiming to represent victims or society as a whole”).

113 Victims and their counsel may question witnesses and make closing arguments. See Pizzi, *supra* note 109, at 358. Civilian systems often allow victims and their attorneys to stand beside prosecutors and defense lawyers, to question witnesses and to give closing arguments. See Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d’Assises*, 2001 U. ILL. L. REV. 791, 819–22 (2001); CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 17–18 (Christine Van Den Wyngaert et al. eds., 1993); R.L. Jones, *Victims of Crime in France*, 158 JUST. PEACE & LOC. GOV’T L. 795, 795–96 (1994); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT’L L. 1, 14 (1992) (stating that in Italy, injured persons are entitled to participate as parties to criminal cases from pretrial to appeal). In Germany, victim participation is allowed in cases very personal to victims or their families. William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT’L L. 37, 54–55 (1996).

114 Pizzi & Perron, *supra* note 113, at 54–55; Bades, *supra* note 70, at 337 (noting that a direct role for victims could not “be so easily grafted onto our system as currently structured”). Inquisitorial systems are far more directed towards truth-telling, using judges in an investigative role to flesh out all of the relevant facts without strict evidentiary exclusion. This more comfortably allows victims to speak directly to the court. *Id.* at 337–38.

115 See Pizzi, *supra* note 109, at 358.

116 See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515–21 (1994) (discussing the historical development of prosecution); Matthews, *supra* note 69, at 736–37 (describing the American divergence from the English approach, allowing greater protection of defendant’s rights but at the expense of victims’ rights).

117 Matthews, *supra* note 69, at 737.

of jurisdictions allow some form of private prosecution, usually as to minor crimes.¹¹⁸

With a few exceptions, the modern version of private prosecution permits victim's counsel to participate alongside the public prosecutor.¹¹⁹ Unlike civil law systems, private prosecution envisions the victim as a replacement of sorts for the prosecutor, rather than as a third party representing her own interests.¹²⁰ It is precisely this blurring of roles that has given the Supreme Court and many scholars concern about the constitutionality of private prosecution.¹²¹

The fundamental differences between the ethical duties of a prosecutor and of a lawyer with a private client create potential conflicts of interest.¹²² The public prosecutor is vested with the obligation to do justice, not to seek retribution on behalf of any particular victim.¹²³ States have attempted to solve this problem by investing the private prosecutor with the same ethical obligations of the public prosecutor, but that simply exacerbates the conflict of interest between that attorney's actual client, the victim, and a prosecutor's obligation to do justice more broadly defined.¹²⁴

118 See Bessler, *supra* note 116, at 529; Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279, 282 (2001).

119 See Pizzi, *supra* note 109, at 350–53.

120 See generally Bessler, *supra* note 116.

121 See *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 802 (1987) (holding that civil attorneys were precluded from serving as private prosecution in a criminal contempt proceeding arising out of the same civil case because this dual representation created a conflict of interest but not concluding that private prosecution is per se unconstitutional); see Nichols, *supra* note 118, at 289–91; see also Bessler, *supra* note 116, at 558 (“Because private prosecutors have financial incentives that public prosecutors do not, and because private prosecutors create, at the very least, an appearance of impropriety, private prosecutors violate defendants’ due process rights.”).

122 Many of these concerns about conflicts focus on the attorneys who represent victims both in private prosecutions and in civil cases in which the attorney may directly benefit. See *Jones v. Richards*, 776 F.2d 1244, 1247 (4th Cir. 1985) (“[U]se of private prosecutors who are also representing plaintiffs in civil actions against the criminal defendant should be discouraged”); Nichols, *supra* note 118, at 281. One could ban this practice, however, and still allow victims to employ independent counsel to represent them solely in the criminal proceeding. Several states have done so. See Bessler, *supra* note 116, at 530.

123 See *supra* Part II.B.

124 See *New Jersey v. Imperiale*, 773 F. Supp. 747, 748 (D.N.J. 1991) (finding a conflict of interest for a private citizen pursuant to state rule to initiate and prosecute assault charges); *Woods v. Linahan*, 648 F.2d 973, 977 (5th Cir. 1981) (expressing “concern about the practice of using a private attorney, paid by family and friends of the victim, to prosecute persons accused of murdering a person dear to the people paying the private prosecutor[.]” though rejecting the argument that use of a private prosecutor requires reversal); see also Nichols, *supra* note 118, at 293–94 (discussing conflict of interest); Bessler, *supra* note 116, at 542–71 (arguing that due process forbids use of private prosecutors because of inherent conflicts).

In 2010, the Supreme Court came tantalizingly close to addressing the issue of a private prosecution by a domestic violence victim in the case of *Robertson v. United States ex rel. Watson*.¹²⁵ The Court granted certiorari in the case to consider whether the victim of domestic violence could prosecute the defendant for criminal contempt for violation of a civil restraining order.¹²⁶ The victim proceeded over the objections of the federal prosecutor, who had previously worked out a plea bargain with the defendant to punish him for an earlier assault.¹²⁷ Ultimately, however, a majority of the Court decided that the relevant issues were not clearly presented by the facts of the case, and the Court denied certiorari as “improvidently granted.”¹²⁸

Chief Justice Roberts wrote a twelve page dissent, joined by Justices Scalia, Kennedy, and Sotomayor, urging the Court to reject private prosecution because “[o]ur entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another. The ruling below [affirming the contempt conviction] is a startling repudiation of that basic understanding.”¹²⁹ Chief Justice Roberts questioned whether a victim bringing criminal contempt proceedings would be subject to all of the constitutional criminal procedural requirements of a government prosecutor, including revealing exculpatory information or administering *Miranda* warnings before interviewing the defendant.¹³⁰ Regardless of how the Court ultimately decides this issue, it is clear that our adversarial system of criminal justice does not comfortably allow for private prosecution, even in the context of contempt proceedings of a civil order.

I do not believe that a drastic expansion of victim participation in all criminal trials is desirable or necessary. As a practical matter, requiring victims to enforce their own equal protection rights within the criminal justice system by hiring private lawyers would have limited impact.¹³¹ Most victims cannot and would not pursue hiring a

125 See *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2185 (2010) (dismissing writ of certiorari as improvidently granted in a case questioning whether an action for criminal contempt in a congressionally-created court cannot be brought in the name and pursuant to the power of a private person).

126 *Id.* at 2185–86 (Roberts, C.J., dissenting).

127 *Id.* at 2185.

128 *Id.*; Justice Stephen Breyer, Lecture before the Tulane Law School Summer Program at Cambridge University (July 12, 2010).

129 *Robertson*, 130 S. Ct. at 2188 (Roberts, C.J., dissenting).

130 *Id.* at 2187–88.

131 See Pizzi & Perron, *supra* note 113, at 55 n.76 (stating that in the German civil law legal system, victim participation was only 19.2% in cases where victims were eligible to participate); see also Pizzi, *supra* note 109, at 355 (stating that German crime victims rarely wish

private prosecutor for the very reasons they do not pursue the civil tort remedies already available to them.¹³² Victims fail to find lawyers to represent them even for tort cases that come with financial remedies, and also find such cases too dangerously provocative against a violent perpetrator.¹³³

More importantly, requiring resources to obtain equal protection of the law is anathema to our criminal justice system. We have already traveled too far down the road of private policing in wealthy communities, allocating the resources of law enforcement according to the ability to pay.¹³⁴ We should not start privatizing prosecution for those who can afford it.¹³⁵

The risk of discriminatory acquittal does not occur in every case involving a victim, and the inclusion of individual victims in trials would be an unwieldy attempt to address the issue. Instead, the prosecutor is well-placed to enforce the rights of victims to race-neutral, or gender-neutral, justice as part of our existing system.¹³⁶

III. GIVING PROSECUTORS CONSTITUTIONAL PROCEDURES TO ROOT OUT UNLAWFUL DISCRIMINATION DURING JURY SELECTION

Jury selection lies at the center of the constitutional criminal procedures designed to protect defendants' equal protection rights, efforts that have always relied more on preventive procedures than on direct remedies.¹³⁷ Though defendants can appeal and seek reversal of discriminatory verdicts (unlike prosecutors), as a practical matter, sexism and racism on the part of jurors is almost impossible to

to participate in the trial, relying instead on the state's attorneys and judges to reach a fair verdict and sentence).

¹³² Bessler, *supra* note 116, at 586–87.

¹³³ See ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 94–95 (2000) (describing the danger of bringing tort suits for domestic violence injuries).

¹³⁴ See M. Rhead Enion, Note, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 DUKE L.J. 519, 519 (2009) (describing the ubiquitous use of private police forces and resulting constitutional concerns).

¹³⁵ See Nichols, *supra* note 118, at 286–87 (stating that transforming the role of the “public prosecutor into a pure advocate and representative of the crime victim” with privatization is “contrary to our entire system of criminal justice”).

¹³⁶ Indeed, the equal protection rights of victims necessarily involve a more collective form of justice, as in the rights of women and minorities against systematic devaluation and as subject to sanctioned private violence. It has always proved awkward in antidiscrimination law to present collective equality as an individual right. See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976).

¹³⁷ See Tetlow, *supra* note 3, at 102–03 (stating that jury discrimination is difficult to prove and measure, and therefore “[c]ourts may have no choice about relying on procedure and prevention rather than regulating the results and the accuracy of jury deliberations”).

prove.¹³⁸ Instead, the Court created much of constitutional criminal procedure in order to prevent discriminatory jury convictions.¹³⁹ In *McCleskey v. Kemp*, the Court overtly acknowledged the cynical truth that “[t]here is, of course, some risk of racial prejudice influencing a jury’s decision in a criminal case. . . . The question is ‘at what point that risk becomes constitutionally unacceptable.’”¹⁴⁰ The Court threw its hands up at proving or curing discrimination after the fact, and instead hoped to *prevent* jury discrimination through procedures.¹⁴¹

To prevent verdicts based on racial or gender discrimination, the Court understandably focuses on jury selection. After a biased jury is chosen and seated, even the most carefully conducted trial in the world will not prevent discrimination.¹⁴² The Court governs jury dis-

138 *McCleskey* held that defendants must show discrimination in their specific jury’s deliberations and cannot rely on statistical evidence of an increased likelihood of discrimination. 481 U.S. 279, 292–97. Modern discrimination often remains unspoken, and almost always remains hidden within the secrecy governing jury deliberations. *See id.* at 296–97. *See generally* Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 772–73 (2005) (arguing for an amendment of jury secrecy rules in capital cases to prevent against prejudicial and erroneous decision making). Jury secrecy has been justified on several policy grounds: (1) preserving the finality of verdicts from speculation about jury deliberations; (2) deference for the jury’s role as fact-finder, a role that would be challenged if judges could simply substitute their own judgments; (3) avoiding the harassment of jurors after a verdict; (4) fostering free and open deliberations by jurors without concern for future embarrassment; and (5) preserving public confidence in the jury, by hiding the quality of deliberations from the public. *Id.* at 806–13.

139 *See generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000); Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359 (2001). For examples of the Court’s superficial treatment of the racial issues at stake, see, for example, *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (referring to the defendants as an “indigent Mexican defendant” and an “indigent Los Angeles Negro”); *Brown v. Mississippi*, 297 U.S. 278, 281 (1936) (quoting *Brown v. State*, 161 So. 465, 470 (Miss. 1935) (noting the lower court’s description of the defendants as “all ignorant negroes”); *Powell v. Alabama*, 287 U.S. 45, 49 (1932) (“The petitioners . . . are negroes charged with the crime of rape . . . of two white girls.”).

140 *McCleskey v. Kemp*, 481 U.S. 279, 308–09 (1987) (quoting *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986)).

141 *See McCleskey*, 481 U.S. at 309 (citing *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (proclaiming a ban on the racial use of peremptory challenges)); *Holland v. Illinois*, 493 U.S. 474, 511 n.8 (1990) (Stevens, J., dissenting) (“[T]he jury system and the fair-cross-section principle were designed to eliminate any discrimination in the imposition of sentence based on race of *the victim*.”).

142 For example, in the Scottsboro boys cases, the Supreme Court twice reversed the convictions of nine African American boys falsely accused of raping two white women on a train, eight of whom were sentenced to death. The Court continued to create new procedures designed to limit the impact of jury discrimination, yet Alabama juries continued to convict the defendants after each remand. *Powell v. Alabama*, 287 U.S. 45, 53, 56 (1932) (finding that defendants received inadequate counsel when every lawyer in the county

crimination in multiple ways: it bans the exclusion of minorities and women from the jury pool;¹⁴³ it gives defendants the right to voir dire potential jurors about potential discrimination;¹⁴⁴ and it bans the racial or gendered use of peremptory challenges by lawyers during jury selection.¹⁴⁵ In interesting and sometimes contradictory ways, the Court strives for jury diversity, governs juror impartiality, and regulates the motives of lawyers picking juries.¹⁴⁶

While the Court has never granted prosecutors the right to ferret out jury discrimination against victims,¹⁴⁷ *Georgia v. McCollum* did

was jointly appointed to represent them); *Norris v. Alabama*, 294 U.S. 587, 599 (1935) (reversing a defendant's conviction because all blacks were excluded from the jury). See generally DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1979) (presenting another instance in which biased jurors continued to convict the defendants).

143 See *Strauder v. West Virginia*, 100 U.S. 303, 310, 312 (1880) (banning exclusion of blacks from jury venire); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (banning exclusion of women).

144 *Ristaino v. Ross*, 424 U.S. 589, 594, 598 (1976) (holding that "the demands of due process could be satisfied by [the defendant's] more generalized but thorough inquiry into the impartiality of the veniremen").

145 See *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) (affirming the principle that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause" (internal quotation marks omitted)); see also *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race"); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (holding that "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges").

146 As I argue in a forthcoming article, the Supreme Court has three constitutional procedural mechanisms to serve the Sixth Amendment purposes of an "impartial jury" as informed by the Equal Protection Clause's guarantee of a jury unbiased by race or gender. See Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. (forthcoming 2012). First, the Court focuses on rooting out *individual bias* in jurors through voir dire and the use of challenges. *Ristaino*, 424 U.S. at 595 (explaining that judge-directed voir dire is part of "the State's obligation to the defendant to impanel an impartial jury"). Second, the Court uses *diversity* as a proxy for impartiality, for example, guaranteeing a jury pool chosen from a "fair cross section of the community." *Taylor*, 419 U.S. at 526-27. Finally, and most confusingly, the *Batson* rule regulates discrimination *against potential jurors*. *Batson*, 476 U.S. 89. Despite the fact that courts and scholars focus most obsessively on this last principle, it proves the least connected to the goal of an impartial and nondiscriminatory jury. See Tetlow, *supra*.

147 The Court's Sixth Amendment protections against banning women and minorities from the jury pool have the effect of protecting both victims and defendants. Though the right to challenge exclusions from the jury pool belongs to the defendant and not the prosecutor, such challenges have long since resulted in an inclusive pool that benefits both sides. See Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 378-79 (2010) ("[P]eremptory challenges are beneficial when used properly—that is, when based on factors that legitimately may affect or indicate a juror's view of the evidence or willingness to vote for one side or the other—because they help ensure an impartial jury, a right protected by the Sixth Amendment.").

create one procedural right that unintentionally protects against discriminatory acquittal. It gave prosecutors the constitutional right to object to the racial use of peremptory challenges by defense lawyers.¹⁴⁸ As described above, this provides a starting point and some precedent for the rights I urge. Yet the case proves less useful than it should because the Court chose shakier foundations than the battle against discriminatory acquittal. The Court worried more about the public's confidence in the appearance of equality rather than the victim's substantial interest in its reality.¹⁴⁹

Beyond peremptory challenges, I focus on more uncharted territory in the jury selection process. The right to ask potential jurors questions during voir dire about bias remains one of the most important, and often overlooked, protections against jury discrimination.¹⁵⁰ The Supreme Court frequently acknowledges the importance of voir dire, yet strangely limits the constitutional right to inquire into bias, instead leaving the scope of voir dire almost entirely to the discretion of trial judges.¹⁵¹ I argue that the Court should strengthen the right to voir dire about bias, and apply it to protect against any verdict that rests on illegal discrimination, whether conviction or acquittal.

A. *Applying the Defendant's Voir Dire Rights to Prosecutors to Protect Against Discriminatory Acquittal*

The process of voir dire, conducted before the exercise of peremptory challenges, is an enormously valuable and overlooked source of jury regulation.¹⁵² It is a source of profitable business for jury consultants and obsession by trial lawyers, but because it falls largely within the discretion of trial judges, it is the subject of few ap-

148 See *McCullum*, 505 U.S. at 59 (holding that “the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges”).

149 *Id.* at 49 (stating that “[s]election procedures that purposefully exclude African Americans from juries undermine [the] public confidence” and that “[t]he need for public confidence is especially high in cases involving race-related crimes”).

150 See Richard J. Crawford & Daniel W. Patterson, *Exploring and Expanding Voir Dire Boundaries: A Note to Judges and Trial Lawyers*, 20 AM. J. TRIAL ADVOC. 645, 662 (1997) (stating that “[o]pening up the questioning process is likely to enhance the quality of juror screening without doing violence to the fair trial ideal”); see generally Barbara Allen Babcock, *supra* note 75, at 549 (describing the importance of voir dire in rooting out potential discrimination).

151 See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143–44 (1994) (recognizing the importance of voir dire); see also discussion of the limits on that right *infra* Parts III.A.1–2.

152 See Babcock, *supra* note 75, at 546; see also Crawford & Patterson, *supra* note 150, at 662.

peals.¹⁵³ In the abstract, voir dire simply proves less interesting to scholars than to lawyers who actually choose juries.¹⁵⁴ Yet, I argue that the breadth of voir dire on the subject of bias can do far more to improve the impartiality of the jury than any *Batson* challenge.¹⁵⁵

1. *Voir Dire on the Subject of Bias*

Jury selection procedures strive for an impartial jury through a selection process designed to avoid the most biased extremes on either side.¹⁵⁶ First, the voir dire process collects information about individual jurors.¹⁵⁷ The judge then focuses on removing the most clearly biased jurors “for cause.”¹⁵⁸ We then harness the self-interest of the parties and ask each side to use dueling peremptory strikes.¹⁵⁹ After this process of inquiry and winnowing, the first twelve are seated as the trial jury.¹⁶⁰

153 See *State v. Allred*, 169 S.E.2d 833, 838 (N.C. 1969) (holding that a party is not allowed appellate review of a trial court’s denial of a motion to strike a juror for cause unless the party: (1) uses a peremptory challenge to strike the juror in question; (2) exhausts the peremptory challenges allowed by statute; and (3) asserts its right to challenge peremptorily an additional juror).

154 But see John C. Reinard & Darin J. Arsenault, *The Impact of Forms of Strategic and Non-Strategic Voir Dire Questions on Jury Verdicts*, 67 COMM. MONOGRAPHS 158, 158 (2000) (stating that “[s]cholars have dedicated time to isolate functions of voir dire questions”).

155 See Barat S. McClain, Note, *Turner’s Acceptance of Limited Voir Dire Renders Batson’s Equal Protection a Hollow Promise*, 65 CHI.-KENT L. REV. 273, 274–75, 306 (1989) (presenting the idea that voir dire can be important to eliminating jury discrimination without violating the essence of *Batson*’s prohibition on presuming such prejudice according to race); see also Kimberly Wise, Comment, *Peering Into the Judicial Magic Eight Ball: Arbitrary Decisions in the Area of Juror Removal*, 42 J. MARSHALL L. REV. 813, 815–17 (2009) (explaining that voir dire is used to accomplish the “seemingly insurmountable task of providing an impartial jury” and that “[t]he main purpose of voir dire is to ensure that the selected jury is impartial, meaning that it is unbiased and without prejudice”).

156 See *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (quoting *Batson v. Kentucky*, 476 U.S. 79, 91 (1986)) (“Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of ‘eliminat[ing] extremes of partiality on both sides,’ thereby ‘assuring the selection of a qualified and unbiased jury.’”).

157 See FED. R. CRIM. P. 24(a) (permitting attorneys to examine prospective jurors).

158 See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (holding that the appropriate standard for determining when a prospective juror may be excluded for cause is “whether the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,” which “does not require that a juror’s bias be proved with unmistakable clarity” (internal quotation marks omitted)).

159 See Ford, *supra* note 147, at 377 (“Attorneys try to shape jury selection by exercising peremptory [strikes].”).

160 See V. HALE STARR & MARK MCCORMICK, *JURY SELECTION: AN ATTORNEY’S GUIDE TO JURY LAW AND METHODS*, 352 (2d ed. 1993) (discussing the benefits of judge-conducted voir dire and the disadvantages of attorney-conducted voir dire). The Constitution also allows

The process of questioning potential jurors about their backgrounds and beliefs occurs within the parameters set out by individual judges, and within the rules and traditions of their respective courts.¹⁶¹ The leeway that judges give to lawyers to suggest voir dire questions, or to ask the questions directly themselves, varies wildly.¹⁶² In many federal courts, judges limit voir dire to information about a juror's occupation, place of residence, potential conflicts of interest, and whether the juror or their immediate family has been arrested or has been a crime victim.¹⁶³ The judge then asks rhetorical questions about the willingness to obey instructions and to be impartial.¹⁶⁴ Meanwhile, in many state courts and in some federal courts, lawyers conduct their own voir dire with great flexibility and use a seemingly limitless array of personal questions.¹⁶⁵ Judges determine the breadth of voir dire by balancing judicial efficiency against fairness to the liti-

juries of less than twelve. See *Williams v. Florida*, 399 U.S. 78, 86 (1970) (allowing a jury of six).

- 161 Before a jury is selected, the trial judge conducts voir dire, questioning potential jurors about their qualifications and backgrounds. Many judges question jurors themselves, though frequently they allow prosecutors and defense lawyers to do so directly. Judges vary widely by jurisdiction and discretion in the leeway they give attorneys in voir dire. See *Ristaino v. Ross*, 424 U.S. 589, 594 (1976) (“Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.” (internal citations omitted)).
- 162 See Abbe Smith, “*Nice Work If You Can Get It*”: “Ethical” Jury Selection in Criminal Defense, 67 *FORDHAM L. REV.* 523, 525–26 (1998) (describing a judge who was from the “Any-Twelve-in-the-Box-Will-Do” school of jury selection and would not allow attorneys to conduct voir dire).
- 163 See Nancy S. Marder, *Juries, Justice, & Multiculturalism*, 75 *S. CAL. L. REV.* 659, 674–75 (2002) (arguing that using only basic and limited questions in a “cursory process at best” is likely due to judicial desire for efficiency, but has the negative consequence that very little information is provided in order to root out biased jurors and provide as close to an impartial jury as possible). In other cases, judges (and lawyers) probe deeper into private attitudes and practices. For example, they sometimes ask about religious beliefs, drinking habits, jobs, hobbies, etc. See Alschuler, *supra* note 64, at 158.
- 164 See *Mu’Min v. Virginia*, 500 U.S. 415, 451 (1991) (Kennedy, J., dissenting) (“There is no single way to voir dire a juror. . . . [A trial] judge can also evaluate impartiality by explaining the trial processes and asking general questions about the juror’s commitment to follow the law and the trial court’s instructions.”).
- 165 See Bennett, *supra* note 102, at 159 (stating that federal courts generally allow less lawyer involvement); see also *FED. R. CRIM. P.* 24(a) (stating that the court may examine prospective jurors or permit attorneys to do so); *Ristaino*, 424 U.S. at 594 (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895)) (“Voir dire ‘is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.’”); Anne M. Payne & Christine Cohoe, *Jury Selection and Voir Dire in Criminal Cases*, 76 *AM. JUR. TRIALS* 127, 143 (2000) (stating that “[m]ost states give trial counsel broad discretion in questioning prospective jurors”).

gants.¹⁶⁶ There is no per se right for lawyers to have jurors questioned about their biases.¹⁶⁷

The most direct approach to rooting out bias during voir dire would simply allow lawyers to question potential jurors directly on the issue of prejudice in an effort to uncover discriminatory beliefs.¹⁶⁸ The skillful use of voir dire might identify racial or gender bias against either the defendant or victim.¹⁶⁹ The judge could strike those jurors for cause in obvious cases, or lawyers could use their peremptory challenges in subtle ones.¹⁷⁰

Voir dire about bias is clearly no panacea.¹⁷¹ Questioning a jury panel does not often result in defiant expressions or tearful confessions of discrimination.¹⁷² Even those jurors conscious of their own discrimination will be loathe to admit to it in public, particularly in a

166 See Laura A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?*, 3 RUTGERS J.L. URB. POL'Y 287, 296 (2006) (citing *Aldridge v. United States*, 283 U.S. 308, 310 (1931)) (stating that trial judges have "broad discretion to determine the scope and breadth of the voir dire process"); *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (recognizing the broad role of the court with respect to voir dire); *Mu'Min*, 500 U.S. at 422–24 (recognizing the importance of the discretion of the trial court with respect to voir dire); *United States v. Padilla-Valenzuela*, 896 F. Supp. 968, 970 (D. Ariz. 1995) (asserting that trial judges have broad discretion to determine both the scope and breadth of the voir process).

167 See *Mu'Min*, 500 U.S. at 421–31 (affirming petitioner's conviction despite the trial judge's refusal to allow defendant to thoroughly voir dire about the effect of pretrial publicity); see also *State v. Zola*, 548 A.2d 1022, 1027–28 (N.J. 1988) (finding that defendants have no constitutional right to attorney-conducted voir dire).

168 See Kathleen M. McKenna, *Current Developments in Federal Civil Practice 2010*, 821 PRAC. L. INST. 581, 586 (William P. Frank and John L. Gardiner eds., 2010) (stating that attorney-conducted voir dire allows attorneys to explore biases based on in-depth knowledge about their own cases).

169 See Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 45 (2005) (discussing use of voir dire to eliminate jurors with gender prejudices); see also McClain, *supra* note 155, at 306 (discussing the importance of voir dire to eliminating jury discrimination without violating *Batson's* prohibition on presuming such prejudice according to race).

170 See discussion of bias against victims as a basis for a "for cause" strike *infra* Part III.B; see also Smith, *supra* note 162, at 566 n.201 (describing a personal anecdote in which the author admits that she and her co-counsel exercised almost all of their peremptory strikes to excuse whites, since they wanted as many black and Hispanic jurors as they could get to help their defendant's case).

171 Some research observers have been unimpressed with the effectiveness of attorneys' efforts to uncover juror bias. See generally Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 710–17 (1991) (explaining that, based on statistical models, "an attorney's ability to predict appears limited by a very low ceiling of precision").

172 See Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 650–51 (1991) (arguing that voir dire "fails to elicit accurate or honest responses from potential jurors" and is therefore ineffective to root out prejudice").

setting in which such views are anathema.¹⁷³ The kind of blunt admissions required to convince hesitant judges to dismiss a juror for cause are indeed rare.¹⁷⁴

Nevertheless, a juror who does not proclaim bias may hint at it. Voir dire elicits a great deal of subtle information that can prove useful to the exercise of peremptory challenges.¹⁷⁵ A juror may not proclaim a refusal to enforce rape laws because of gender bias, but might signal a general skepticism towards rape victims.¹⁷⁶ A juror may not profess racism but may express concerns about racial “quotas.”¹⁷⁷ Unless the judge allows the attorney to ask such questions, however, that potential bias will remain hidden, and lawyers will rely on far more superficial information.¹⁷⁸

The Supreme Court has accorded defendants the constitutional right to voir dire jurors about potential racism if there is a significant likelihood that prejudice will likely affect jurors.¹⁷⁹ In *Ristaino v. Ross*

173 Marshall & Smith, *supra* note 104, at 214; Johnson, *supra* note 20, at 1675 (discussing tendency of potential jurors to hide their racist attitudes and the difficulty of penetrating this shield through voir dire).

174 This is particularly true because judges tend to avoid striking for cause. See Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 414–15, 414 at n.230 (“Commentators have noted judicial reluctance to challenges for cause. This may be particularly true in jurisdictions where judges are subject to reelection . . . [and] some judges engage in ‘aggressive rehabilitation,’ asking challenged jurors if they could set aside their experiences and feelings and follow the judge’s orders . . .”); Julie A. Wright, Comment, *Challenges For Cause Due to Bias or Prejudice: The Blind Leading the Blind Down the Road of Disqualification*, 46 BAYLOR L. REV. 825, 825–26 (1994); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143–44 (1994) (“Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.”).

175 See *People v. Williams*, 628 P.2d 869, 877 (Cal. 1981) (holding that counsel should be allowed to ask questions to elicit bias on voir dire). The court in *Williams* recognized that: “[A]lthough we must presume that a potential juror is responding in good faith when he asserts broadly that he can judge the case impartially, further interrogation may reveal bias of which he is unaware or which, because of his impaired objectivity, he reasonably believes he can overcome. And although his protestations of impartiality may immunize him from a challenge for cause, they should not foreclose further reasonable questioning that might expose bias on which prudent counsel would base a peremptory challenge.” *Id.* at 873 (internal quotations omitted).

176 In trials where gender is a subtler issue, voir dire is used to minimize gender discrimination by eliminating jurors who possess such prejudice. Fowler, *supra* note 169, at 44–45.

177 See Wendy Parker, *Juries, Race, and Gender: A Story of Today’s Inequality*, 46 WAKE FOREST L. REV. 209, 212 (2011) (stating that “many studies demonstrate a bias of white jurors against black defendants”).

178 *Ross v. Ristaino*, 508 F.2d 754, 757 (1st Cir. 1974) (“[W]e do not allow the possibility of a false answer to serve as an excuse for not asking these questions.”), *rev’d on other grounds*, 424 U.S. 589 (1976).

179 *Ristaino v. Ross*, 424 U.S. 589, 594–98 (1976) (holding that, unlike *Ham*, the circumstances herein “did not suggest a significant likelihood that racial prejudice might infect [the defendant’s] trial” and therefore the right to voir dire about racial prejudice did not

and *Turner v. Murray*, the Court held that both the Sixth Amendment and the Equal Protection Clause require voir dire on the subject of race discrimination when there is a clear risk of it affecting the verdict.¹⁸⁰ The Court explained the constitutional necessity of trumping the trial judge's broad discretion about the scope of voir dire:

On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law [for the death penalty]. . . . More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.¹⁸¹

A defendant who can meet the standard of showing a likelihood of racial discrimination can thus invoke a constitutional right to require voir dire on racism.

2. *Prosecutors Should Have a Corresponding Right to Voir Dire on the Subject of Bias*

The Court has never recognized a commensurate right for prosecutors to voir dire jurors about potential unlawful discrimination against victims; thus, a prosecutor asking permission for voir dire on bias would have to base the request on vague notions of fairness. She would not have access to the defendant's binding equal protection and Sixth Amendment guarantees.¹⁸² Prosecutors currently have no right to ask jurors about their racial attitudes in the trial of a hate crime.¹⁸³ They have no right to question potential jurors in the trials

rise to "constitutional dimensions"); *see also* *Ham v. South Carolina*, 409 U.S. 524, 524–25, 529 (1973) (holding that a known civil rights activist on trial for marijuana possession had right to voir dire prospective jurors on racial prejudice).

180 *Ristaino*, 424 U.S. at 595–96; *Turner v. Murray*, 476 U.S. 28, 36 n.9 (1986). The Court has not yet ruled on this subject in the context of gender.

181 *Turner*, 476 U.S. at 35.

182 As a practical matter, such a right might seem superfluous because a trial judge required to permit voir dire on discrimination for a defendant will probably give commensurate leeway to the prosecutor. But in the very cases where the risk of discriminatory acquittal is highest, the defense lawyer may have no interest in requesting such voir dire. A defendant in a rape trial or a hate crime trial, would likely have no incentive to ask jurors about race or gender bias, and on the contrary, would want to keep bias against the victim hidden. Thus prosecutors need an articulable right to demand voir dire to protect against discriminatory acquittal.

183 *See McClain*, *supra* note 155, at 306 (discussing the importance of voir dire to eliminating jury discrimination without violating *Batson's* prohibition on presuming such prejudice according to race).

of gender-based violence about their attitudes towards women and the permissibility of rape or domestic violence.¹⁸⁴

The Court's constitutional reasoning in *Ristaino* and *Turner* should apply to allow prosecutors to root out bias against victims because the Constitution prohibits both discriminatory convictions and acquittals.¹⁸⁵ I have argued elsewhere that the Equal Protection Clause forbids juries from basing verdicts on race or gender discrimination.¹⁸⁶ When individuals serve on a jury, they function as state actors bound by the Equal Protection Clause, just as judges do when they decide a bench trial.¹⁸⁷

A jury may no more acquit because of the race of the victim than the jury might convict because of the race of the defendant. The Supreme Court held in *McCleskey v. Kemp* that a jury may not render a death penalty verdict based on the defendant's race, nor indeed, based upon a victim's race.¹⁸⁸ As described above, prosecutors should have third-party standing to invoke the constitutional rights of victims to true equal protection, much as prosecutors already have third-party standing to protect the public's confidence in a fair system.

The other source of authority in the voir dire cases, the Sixth Amendment, textually belongs to the defendant. Yet the Supreme

184 See Fowler, *supra* note 169, at 8–10; see also Mark Soler, "A Woman's Place . . .": *Combating Sex-Based Prejudices in Jury Trials Through Voir Dire*, 15 SANTA CLARA L. REV. 535, 568–70 (1975) ("The Supreme Court, however, has not applied the same constitutional test to sex discrimination as it has to racial discrimination.")

185 See Tetlow, *supra* note 3, at 103–16, 128 (outlining the argument as to why discriminatory convictions and acquittals violate the constitution).

186 I do not argue that victims have a right to any particular verdict in a criminal trial, nor to a resulting panoply of procedural rights, but only that victims retain an equal protection right against acquittals based upon discrimination. It is not necessary to imbue victims with procedural due process rights in order to protect their equal protection rights. See *id.* at 109–11 (arguing that the Equal Protection Clause generally prohibits state action based on discrimination).

187 For discussion of state action of juries, see *id.* at 105–06. Perhaps the most exciting and seemingly obvious insight produced by the recognition of discriminatory acquittal is that jurors must in fact be state actors. The Supreme Court repeatedly states in dicta that jury verdicts are "a quintessential governmental body." *Georgia v. McCollum*, 505 U.S. 42, 54 (1992). Jurors are selected and paid by the state to serve a governmental function, to apply the law to the evidence in a trial, and to render a verdict that will have the force of law. In bench trials, we would never question the idea that a judge performing these same functions would be governed by the Equal Protection Clause.

188 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) (arguing that such discrimination treats victims and defendants as a "faceless, undifferentiated mass" rather than individual, unique human beings, thus resulting in a devaluation of the lives of black victims (internal quotation marks omitted)). *McCleskey* "held that the jury system and the fair cross-section principle were designed to eliminate any discrimination in the imposition of sentence based on the race of the victim." *Holland v. Illinois*, 493 U.S. 474, 511 n.8 (1990) (Stevens, J., dissenting).

Court has often described the right to an “impartial jury” as belonging more broadly to society as a whole.¹⁸⁹ “Although the constitutional guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored.”¹⁹⁰ The defendant does not have a right to a jury that tips towards his cause, but to an impartial jury.¹⁹¹ As such, courts have equal obligations to root out bias towards either side.¹⁹²

A truly “impartial jury” could not allow discrimination against the victim to be the deciding factor in an acquittal. The interplay of the Sixth Amendment and equal protection rights requires, as a bare minimum, a jury that does not use race or gender as the basis of the verdict.¹⁹³ If a potential juror displays bias that would lead to conviction or acquittal, such a juror has no place on a constitutionally sound jury.

Our criminal justice system may ignore the equal protection rights of victims because they lack a direct, obvious remedy within the criminal justice system,¹⁹⁴ but it has no excuse for refusing to protect vic-

189 See, e.g., *McCullum*, 505 U.S. at 49–50 (noting, among other rationales regarding the public as a whole, that “as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal”).

190 *Holland*, 493 U.S. at 483.

191 See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) (“[T]he Constitution guarantees a right only to an impartial jury, not to a jury composed of members of a particular race or gender.”).

192 Scholars have struggled for decades to come up with more results-oriented mechanisms to guarantee jury diversity, perhaps with a quota system. They have focused on the notion of juries as representative of the defendant rather than as representative of a fair cross-section of the community as a whole. See Harold A. McDougall, Note, *The Case for Black Juries*, 79 YALE L.J. 531, 548 (1970) (proposing proportional representational schemes for minorities in petit juries); Johnson, *supra* note 20, at 1698–99 (proposing at least three jurors be “racially similar” to the defendant); DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 467–68 (5th ed. 2004) (proposing a 50-50 “split jury” as basis for discussion). Acknowledging the issue of discriminatory acquittal, however, throws a significant wrench in such proposals. Why would we create a system that guarantees representation for the defendants charged with murdering Emmett Till and beating Rodney King without also providing jury representation based on the race of the victim? Instead, the Court’s existing focus on jury diversity as representative of the community makes sense as a protection of the broader equal protection rights at stake.

193 See Tetlow, *supra* note 3, at 109–11.

194 Several scholars argue convincingly that double jeopardy does not, and should not, ban the reversal of an acquittal obtained through fundamental defects in the judicial process, whether through witness tampering or misconduct by defense counsel. See, e.g., Thomas DiBiagio, *Judicial Equity: An Argument for Post-Acquittal Retrial When the Judicial Process is Fundamentally Defective*, 46 CATH. U. L. REV. 77, 78–79 (1996). The Supreme Court did not first hold that prosecutorial appeal violated double jeopardy until 1896, and then it

tims with the instrumental protections against jury discrimination. Prosecutors should be given the right and responsibility to exercise those protections. They should have the same rights to voir dire about bias as do defendants, based on the same reasoning.¹⁹⁵

B. The Supreme Court Should Expand Voir Dire Rights for Both Sides

It is not enough to apply the defendant's rights to voir dire on discrimination to prosecutors without also attempting to broaden those rights. The Supreme Court frequently acknowledges the importance of voir dire in dicta, yet strangely limits the constitutional right to inquire into bias, leaving the scope of voir dire almost entirely to the discretion of trial judges.¹⁹⁶ Worse yet, the Court seems determined to solve the problem of jury discrimination by pretending that it rarely exists,¹⁹⁷ and thus discourages trial judges from exercising their discretion to allow voir dire about discrimination. The Court should strengthen the right to voir dire about bias, and should apply it to protect against both discriminatory conviction and acquittal.

reversed positions on the subject until finally banning prosecutorial appeals and retrials in a closely-divided opinion. *Id.* at 83–89. I do not grapple here with the possibility of reversing course again and allowing prosecutorial appeals, though I believe it is worth considering for the reasons discussed in these articles.

¹⁹⁵ On a pragmatic note, one reason that courts have not articulated procedural rights to protect against discriminatory acquittal is because prosecutors cannot appeal acquittals, and appellate courts do not generally have occasion to consider whether anyone in the courtroom can act to protect against jury discrimination. Without guidance from appellate courts, trial judges will hesitate to recognize new procedural rights that might lead to reversal of a conviction. But these problems are not insurmountable. The procedural protections I propose can reach appellate courts in either of two ways. If prosecutors can persuade a few trial judges to apply protections to prevent jury discrimination, defendants will challenge those protections on appeal, creating further guidance for other courts. Conversely, prosecutors in some states could appeal the denial of such rights with an interlocutory appeal, as the State of Georgia did in *McCollum*. Federal law would not allow such an interlocutory appeal. 18 U.S.C. § 3731 (2006).

¹⁹⁶ *See, e.g.*, *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994); *see generally* Babcock, *supra* note 75, at 551 (describing the importance of voir dire in rooting out potential discrimination); Crawford & Patterson, *supra* note 150, at 662 (“Opening up the questioning process is likely to enhance the quality of juror screening without doing violence to the fair trial ideal.”).

¹⁹⁷ *J.E.B.*, 511 U.S. at 154 (Kennedy, J. concurring); *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring) (“In *Batson*, however, this Court began to depart from *Strauder* by holding that, without some actual showing, suppositions about the possibility that jurors may harbor prejudice have no legitimacy.”); *see* Carter, *supra* note 34, at 446–47 (noting that the Justices in *McCleskey* purposefully chose to ignore the pervasive problem of “racialism” in American society that pervades juries because the cost of acknowledgement is too high).

As described above, if a defense lawyer requests voir dire designed to expose any bias in the jury pool, the Supreme Court only *requires* a trial judge to grant the request if there is a “significant likelihood” that prejudice will likely affect jurors.¹⁹⁸ The problem lies in the Court’s extremely limited definition of when a risk of jury discrimination exists.¹⁹⁹

Empirical evidence shows a serious risk of racial discrimination against defendants (and an even greater risk of racial discrimination against victims) in every trial, but particularly in trials of interracial crimes.²⁰⁰ In *Ristaino*, however, the Court held that such bias cannot be presumed, even when the case involves an interracial crime.²⁰¹ Instead the trial must clearly involve an element of race, for example, a prosecution for a racially-motivated crime.²⁰²

Only in the context of the death penalty does an interracial crime require permission to voir dire on bias.²⁰³ In *Turner v. Murray*, a black defendant charged with murdering a white victim was not allowed to voir dire the jury about potential bias, and the resulting jury convicted him and sentenced him to death.²⁰⁴ The Supreme Court re-

198 *Ristaino v. Ross*, 424 U.S. 589, 596–98 (1976) (holding that the interracial nature of the crime did not require voir dire about racial prejudice because “[t]he circumstances thus did not suggest a significant likelihood that racial prejudice might infect [the defendant’s] trial”); *Ham v. South Carolina*, 409 U.S. 524, 529 (1973) (finding that a known civil rights activist on trial for marijuana possession had a right to voir dire on racial prejudice). To give an example of how unduly limited the right remains for defendants, the Fifth Circuit affirmed a conviction in which white supremacist defendants accused of defacing a synagogue and assaulting non-whites in a park were not permitted to voir dire jurors about bias because those issues were not clearly relevant to the trial. *United States v. Greer*, 939 F.2d 1076, 1084 (5th Cir. 1991).

199 The Court grants trial judges great discretion on whether to voir dire about bias broadly defined. In *Mu’Min v. Virginia*, for example, the Court upheld the defendant’s conviction despite the refusal of the trial judge to allow thorough voir dire about the jury’s exposure to pretrial publicity. 500 U.S. 415, 431–32 (1991).

200 William J. Bowers, Marla Sandys & Thomas W. Brewer, Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White, 53 DEPAUL L. REV. 1497, 1531–32 (2004); 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, 259–61 (2001).

201 *Ristaino*, 424 U.S. at 596–98 (holding that a criminal defendant does not have a constitutional right to voir dire about racial bias based solely on the interracial nature of the charged crime).

202 *See id.* at 596–97 (explaining that in *Ham*, “[r]acial issues . . . were inextricably bound up with the conduct of the trial” because the defendant was a prominent civil rights leader whose position as such was “likely to intensify any prejudice that individual members of the jury might harbor”).

203 *Turner v. Murray*, 476 U.S. 28, 36–38 (1986).

204 *Id.* at 29.

versed the sentence but not the murder conviction, though the verdicts were rendered by the same jury.²⁰⁵ The Court's unusual parsing of the right to voir dire led to the classic Brennan response: "King Solomon did not, in fact, split the baby in two, and had he done so, I suspect that he would be remembered less for his wisdom than for his hardheartedness."²⁰⁶ The majority nevertheless did split the baby, and reversed the death penalty verdict, but upheld the unexamined jury's murder conviction.²⁰⁷

Is a constitutional right really necessary to convince trial judges of the importance of voir dire on bias? The Supreme Court, for example, has invited judges to permit voir dire about racial bias, even when not required to do so, as "the wiser course."²⁰⁸ Because judges have vast discretion to make decisions about the scope of voir dire, they also have the authority to permit questioning about potential juror bias against either defendant or victim.²⁰⁹ If the trial judge can be persuaded of the importance of voir dire on the subject of bias, there need be no constitutional demand.²¹⁰

My own experience, however, is that judges rarely do allow such questioning, for reasons rooted in the Supreme Court's attitude towards both the nature of impartiality generally, and discrimination specifically.²¹¹ There is a fundamental disconnect between the ways that many judges perceive jury selection, and the realities of an adversarial and balanced self-interested process.

Judges who severely limit the breadth of voir dire often do so because of discomfort with the very nature of using an adversarial process to pick a "fair jury." Our system does not actually task lawyers with selecting an impartial jury, but rather attempts to harness self-interest and the adversarial process to eliminate the extremes on either side.²¹² Lawyers do not generally believe in the mythical creature of an "impartial juror." Instead, they try their best to distinguish be-

205 *Id.* at 37–38.

206 *Id.* at 44 (Brennan, J., concurring in part and dissenting in part).

207 The Court provided a somewhat more stringent requirement on federal courts as a matter of supervisory authority. In *Rosales-Lopez v. United States*, a plurality of the Court held that any crime involving alleged interracial violence invokes the right to voir dire about potential prejudices, though a non-violent or victimless crime does not. 451 U.S. 182, 192 (1981).

208 *Ristaino v. Ross*, 424 U.S. 589, 597 n.9. (1976).

209 *Rosales-Lopez*, 451 U.S. at 189–90.

210 *Id.* at 191 n.7.

211 For examples of trial courts refusing to conduct voir dire on racial bias, see Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 676–81 (2004).

212 See Babcock, *supra* note 75, at 559–62.

tween those jurors partial to their side and those jurors partial to the other side.²¹³ Judges, in contrast, are more likely to have an aspirational view of impartiality as an identifiable, and quite common, human characteristic.²¹⁴

The nature of the jury selection requires lawyers to seek the jury most favorable to their cause.²¹⁵ But for judges for whom that self-interest registers as unseemly, the kind of voir dire necessary to uncover partiality seems unnecessary and even harmful.²¹⁶ In-depth voir dire seems an unnecessary violation of privacy.²¹⁷ Voir dire on the subject of juror bias seems like a rude accusation. For these judges, it would almost suffice to look jurors in the eye and ask them, with great solemnity, if they can be impartial.²¹⁸

Judges tend to have even more discomfort with voir dire on the subject of discrimination because current doctrine suggests that raising the issue will create bias where it did not otherwise exist.²¹⁹ In *Ristaino*, the Supreme Court literally forbade trial judges from presuming too readily that the jury might indulge in racial bias.²²⁰ The idea itself seems too destructive, no matter how empirically proven. “In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a per se rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.”²²¹ The Court currently insists on the aspirational and counterfactual view that jurors are un-

213 *Id.*

214 *See* Bennett, *supra* note 102, at 158–60.

215 One might object that prosecutors lack a client, and thus do not have permission to be so self-interested. Yet by definition, a prosecutor bringing a case to trial is supposed to be acting in his or her own interests, and is psychologically motivated to do so, because he or she believes the case is just. In that situation, finding jurors partial to believing the government’s witnesses seems to the prosecutor to be “doing justice.”

216 *See, e.g.,* United States v. Dennis, 183 F.2d 201, 227 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951) (explaining, in an opinion by Judge Learned Hand, that “[i]t is of the nature of our deepest antipathies that often we do not admit them even to ourselves; but when that is so, nothing but an examination, utterly impracticable in a courtroom, will disclose them” and concluding that “[n]o such examination is required,” because “[i]f trial by jury is not to break down by its own weight, it is not feasible to probe more than the upper levels of a juror’s mind”).

217 *Id.* at 228.

218 *See* Bennett, *supra* note 102, at 160.

219 *Id.* at 158.

220 *Ristaino v. Ross*, 424 U.S. 589, 590 (1976) (holding that there is no constitutional requirement “that a question specifically directed to racial prejudice be asked during voir dire” anytime there is a confrontation in a criminal trial between people of different races).

221 *Turner v. Murray*, 476 U.S. 28, 50 n.8 (1986) (Powell, J., dissenting) (quoting *Ristaino*, 424 U.S. at 596 n.8) (emphasis omitted).

biased, and worse yet, the Court actually forbids recognition of the realities of jury discrimination.

Trial judges thus receive quite mixed signals about, on the one hand, their obligations to root out jury discrimination, and on the other hand, the unconstitutionality of assuming that jury discrimination exists.²²² The Supreme Court requires that trial judges constantly attest that they are ignoring the elephant in the room. Worse, the Court worries that to mention the elephant in the room will make everyone else see it for the first time. As Justice Powell explained explicitly: “Asking such a question [about prejudice] in the absence of circumstances that make clear a need for it could well have the negative effect of suggesting to the jurors that race somehow is relevant to the case.”²²³ The Court’s frequent rhetoric about the danger of introducing the subject of juror prejudice makes judges quite nervous about doing so, as if to name the issue will create it.²²⁴

The Court blunts the most useful weapons in its battle against the race and gender bias that clearly infects the criminal justice system, by denying that obvious fact. Its entire approach to tackling the terrible problem of jury discrimination, a problem so clearly proven by the empirical evidence presented in *McCleskey v. Kemp*, is to mandate a state of denial.²²⁵ To recognize the proven realities of endemic jury discrimination would prove too “divisive.”²²⁶

Even in the context of the Court’s colorblindness, surely the least controversial tool available to root out bias from juries is to question potential jurors on the subject before seating them. In the *Batson* line of cases, the Court banned lawyers from assuming that a juror’s race or gender could predict whether jurors would discriminate during deliberations.²²⁷ The Court pointed to the possibility of voir dire

²²² Bennett, *supra* note 102, at 158 (“[J]udge-dominated voir dire . . . actually perpetuate[s] legal fictions that allow implicit bias to flourish.”). See, e.g., *Commonwealth v. A Juvenile*, 485 N.E.2d 170, 175 (Mass. 1985) (explaining that racial inquiry “may activate latent racial bias in certain prospective jurors or may insult others without uncovering evidence of bias in hard-core bigots who refuse to acknowledge their prejudice” (internal citations omitted)).

²²³ *Turner*, 476 U.S. at 48 n.5 (Powell, J., dissenting).

²²⁴ See *Ristaino*, 424 U.S. at 596, n.8 (rejecting a rule that would have allowed questions on racial prejudice to be asked anytime participants in the case were of different races). This logic is similar to the idea that it is sex education that makes kids think about sex.

²²⁵ *McCleskey v. Kemp*, 481 U.S. 279, 293–97 (1987) (discussing the Baldus study presented to the Court, which showed significant statistical evidence revealing an increased likelihood that a defendant would receive the death penalty if convicted of killing a white person rather than a black person).

²²⁶ *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976).

²²⁷ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (“Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or

as a way to determine bias through individual inquiry rather than race or gender stereotypes.²²⁸ Yet the Court has not given litigants that right. Had the Supreme Court more broadly defined the right to voir dire about bias, it could have cured the problems it worried about.

Voir dire makes stereotypes less tempting by offering more accurate and individualized information about jurors.²²⁹ It replaces reliance on a juror's race and gender as proxies for belief with more salient information.²³⁰ If lawyers can instead ask jurors specific questions about their beliefs, lawyers will find it both possible and desirable to rely on other factors.²³¹ The more information derived, the more complex and individualized potential jurors will seem.

Broad voir dire, thus, harnesses the power of self-interest to avoid stereotyping.²³² Lawyers do not seek to skew the demographics of the jury for the sake of doing so. Lawyers seek a jury more favorable to their cause and less favorable to the other side's cause.²³³ They have a

from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138 n.9, 139 n.11 (1994) (asserting that statistical evidence linking gender and belief was "conjured up" and a "quasi-empirical claim"); *Powers v. Ohio*, 499 U.S. 400, 410 (1990) (calling the idea that race predicts belief "the very stereotype the law condemns").

228 *J.E.B.*, 511 U.S. at 143-44 ("If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." (emphasis omitted)).

229 *Id.*

230 *See* *United States v. Greer*, 968 F.2d 433, 445 (5th Cir. 1992) (en banc) (Higginbotham, J., writing for those who would reverse) (describing the importance of allowing broad voir dire on issues of potential prejudice in order to avoid *Batson* error).

231 *See* Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 55 n.301 (1988) ("Prosecutorial inquiry into the existence of specific bias, rather than merely striking because of broad assumptions based on race, age, or status, actually promotes the accuracy of peremptory challenges.").

232 Colbert, *supra* note 22, at 121 n.584 ("For jury selection to be meaningful, the defense attorney must conduct the voir dire."); *see generally* Andrew G. Gordon, Note, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 *FORDHAM L. REV.* 685, 705 (1993) (arguing that voir dire can be used to combat racial prejudice in jury trials); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 *WM. & MARY L. REV.* 21, 46 (1993) (promoting voir dire as a mechanism for fighting racial prejudice in jury trials); Charles J. Ogletree, *Just Say No!: A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 *AM. CRIM. L. REV.* 1099, 1127-28 (1994) (agreeing with the position that voir dire can effectively mitigate juror racial prejudice); McClain, *supra* note 155, at 300 (concurring in the position that voir dire is a desirable tool for combating racial prejudice in juries).

233 *See* Babcock, *supra* note 75, at 559-62 (discussing techniques lawyers have used to find a jury that will most likely decide in their client's favor).

tremendous vested interest in getting the guesswork of peremptory challenges right.²³⁴

Instead, the Supreme Court essentially mandates a state of denial about the possibility of jury discrimination. Lawyers may neither use a juror's race as a proxy for the risk that they will discriminate,²³⁵ nor may lawyers attempt to gather more information through individual voir dire about whether a juror tends to discriminate.²³⁶ The Supreme Court has grappled with jury discrimination by simply pretending by judicial fiat that it no longer exists.²³⁷ When the defendant in *McCleskey* presented evidence showing endemic racial discrimination by juries in death penalty cases, particularly based on the race of the victim, the Court blithely pointed to *Batson* and *Ristaino* as the solution.²³⁸

Before arguing to extend this flawed right to victims, I would strengthen it. There is no reason not to allow lawyers to voir dire about bias in any case. Given the Sixth Amendment imperative of an impartial jury and the Equal Protection Clause prohibition on jury discrimination, we should use every available tool to root out unconstitutional discrimination. The Court's argument that this tool should be made available only when discrimination is a "significant issue" ignores the empirically proven realities. Jury discrimination is ubiquitous.²³⁹

234 The systemic hope is that with dueling peremptory challenges (usually weighted towards the defendant in a criminal case), the remaining jurors will prove the least biased. See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (explaining that the function of peremptory challenges is "not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise").

235 *Batson v. Kentucky*, 476 U.S. 79, 104–05 (1986) (Marshall, J., concurring) ("Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the intelligence, experience or moral integrity to be entrusted with that role." (internal quotations and citations omitted)).

236 *Ristaino v. Ross*, 424 U.S. 589, 594–95 (1976). Ironically, the colorblind logic of *Ristaino* makes it more likely that lawyers will violate the colorblind logic of *Batson*, creating a never-never land of denial.

237 *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

238 *Id.* at 309 n.30. See also *Holland v. Illinois*, 493 U.S. 474, 511 n.8 (1990) (Stevens, J., dissenting) ("[*McCleskey*] held that the jury system and the fair-cross-section principles were designed to eliminate any discrimination in the imposition of sentence based on the race of the victim.").

239 Goode, *supra* note 211, at 677–79.

C. Prosecutors' Protection of Victims Does Not Prejudice Defendants

If it were true that raising the issue of potential discrimination creates it, then extending the right to prosecutors might prove prejudicial to defendants. But empirical evidence does not support the Court's contention, and in fact, the contrary seems to prove true. Challenging assumptions about race and gender stereotypes has demonstrable impact on reducing stereotypes.²⁴⁰ Indeed, discriminatory acquittals represent the other side of the same coin as discriminatory convictions.²⁴¹ Sending a message during voir dire (and during the rest of the trial) that jury discrimination is unacceptable against either the defendant or victim is a mutually reinforcing message. It serves the legitimate purposes of both sides.

CONCLUSION

Prosecutors should have a constitutionally-based right to voir dire about bias against victims of crime in order to actualize their duty to "do justice." Prosecutors have a crucial and unacknowledged role in fighting discriminatory acquittals in order to provide true equal protection of the law to minorities and women. Unless we give prosecutors the tools they need to fight these battles, we will continue to suffer endemic rates of jury discrimination against victims.

Discriminatory acquittal has enormous consequences. When juries freed the killers of Medgar Evers and Emmett Till, they gave very public permission for racial violence. When conviction rates for rape or the death penalty correlate highly with the race of the victim, juries send a message about the permissibility of violence against black people. When juries put female victims on trial for their obedience to gender rules before considering the conviction of a defendant for rape or domestic violence, they perpetuate the use of gender-based violence to regulate all women's behavior.

Prosecutors should have a right to examine jurors for such bias because a juror who expresses unconstitutional bias against a crime victim should be excused for cause or, at a minimum, struck with a peremptory challenge. Voir dire on prejudice is decidedly imperfect, but it is the most effective available tool to seek out racism and sex-

²⁴⁰ See generally Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 409–17 (2007) (collecting results of empirical studies on how confronting racial and gender biases helps to dissipate them and helps to improve the distortion of facts according to race and gender stereotypes).

²⁴¹ Tetlow, *supra* note 3, at 103–16 (drawing parallels between discriminatory acquittals and discriminatory convictions).

ism. At the moment, prosecutors lack any constitutional language to enforce their institutional role in preventing discriminatory acquittal.

Further, the constitutional right to voir dire about bias must be expanded for both prosecutors and defendants. The Court's inexplicable restrictiveness of this right has not received nearly enough attention given its enormous consequences. The Court limits the most important tool to seek an impartial jury, the chance to inquire individually of jurors about their discriminatory attitudes and beliefs. It does so by pretending that introducing the subject of prejudice during voir dire might actually create such prejudice, and it does so by positing that it would be "divisive" to assume that such bias occurs frequently.²⁴² This application of aspirational colorblindness creates a fundamental barrier to grappling with the proven realities of endemic jury discrimination.

242 *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976).

