COMMENTARY

PROPOSED INSTRUCTION

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It is a great pleasure and honor to be asked to comment on papers by Professors David Baldus and Bill Bowers and their collaborators.[1] Professors Baldus and Bowers are two of the most important and influential researchers on issues of race and capital sentencing, and I have long admired their work. I thank the *University of Pennsylvania Journal of Constitutional Law* for giving me this opportunity, and for organizing such an interesting and provocative symposium.

I must say, my first impression on reading the results of the two studies presented at the symposium was a profound lack of surprise. The studies document phenomena that as a lawyer I always assumed and that as an academic I always feared to be true. Of course, as my co-commentator Professor Sam Gross aptly noted, sometimes "what everybody knows" turns out to be completely false. But in this case, the studies reported by Professors Baldus and Bowers have painstakingly documented some painful pieces of received wisdom. Professor Bowers's study—part of the valuable work done by the Capital Jury Project—tells us that black and white jurors often vote differently from one another in capital sentencing, and that this effect is most pronounced in cases involving black defendants and white victims.[2] Given that black and white Americans vote differently in politics and on polls of just about every stripe,[3] this racial divide in the highly

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[1] David C. Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001); William J. Bowers, et al., *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 (2001). Although I am well aware that these papers were collaborative efforts, for ease of reference I will refer to them as "Professor Baldus's paper" and "Professor Bowers's paper." I mean no disrespect to the excellent work of their collaborators.

[2] *See* Bowers et. al., *supra* note 1, at 225-34.

[3] *See, e.g.*, Baldus et. al., *supra* note 1, at 20 n.40 (citing studies showing racial differences). *See also Whites and Blacks Hold Sharply Different Views*, N.Y.L.J., June 2, 1999, at 2 (Quinnipiac College/*New York Law Journal* poll showing that black and white New Yorkers held very different views about how well police in New York State perform their jobs); Will Higgins, *Christians Divided on President's Fate; Race Appears to Play a Role in Argument Over Whether He Should Remain in Office*, INDIANAPOLIS STAR, Jan. 17, 1999, at B1 (noting a *New York Times*/NBC poll revealing substantial racial divide on the issue of whether President Clinton should resign in the wake of the Lewinsky scandal); Robert Stacy McCain, *Poll Finds Ambivalence About Diversity: Support for Con-*

charged arena of cross-racial capital trials is hardly surprising.[4] Professor Baldus's study is similarly unsurprising in its results. Professor Baldus reports that prosecutors and defense lawyers (accurately) perceive the very sort of racial divisions that the Bowers study documents, and that they use their peremptory challenges accordingly.[5] Also unsurprising is the Baldus study's conclusion that the Supreme Court's attempt to prohibit racial and gender-based discrimination in the use of peremptory strikes has had some—but only quite modest—impact on lawyers' behavior, given the lawyers' perceived incentives and their likelihood of actually being sanctioned for violations.[6] Less widely anticipated—indeed, perhaps entirely unanticipated—is Professor Baldus's documentation of the comparative advantage that prosecutors have in jurisdictions like Philadelphia, where the "prime targets" for prosecutorial use of peremptory strikes are considerably smaller in number than the "prime targets" for defense peremptories.[7] This disparity in peremptory power leads Baldus and his colleagues to consider a number of reforms to the law and practice regarding peremptory strikes.[8]

Not being an empirical researcher or statistician myself, I will not attempt to analyze or comment upon the research methodology of the two studies; rather, I will turn my attention to the legal implications of the studies' findings, assuming their validity. What should the law's response be to studies of this kind? What should we do?

One obvious way to go—and, indeed, Professor Baldus explicitly leads us there—is to think about how to structure the jury selection process so as to preserve, insofar as possible, the representativeness of the resulting jury. Professor Baldus considers reforms of the law and practice of peremptory strikes that are geared toward minimizing or preventing the skewing of capital juries away from minority representation in jurisdictions such as Philadelphia.[9] Presumably, Professor Bowers would applaud such efforts as well, given his study's finding of the effect of black jurors on outcomes in capital trials, particularly those involving inter-racial murders.[10] This focus on restructuring jury selection is quite natural and sensible. After all, our commitment to juries rather than judges—for criminal trials in general, and

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cept Trumps Practice, WASH. TIMES, Dec. 27, 1999, at A4 (Opinion Research Corp. International poll showing that blacks and whites differed on value of diversity); John L. Mitchell & Sandy Banks, *Wearying Realities of Race Again Hit Home: Latest Simpson Verdicts Spotlight a Gap That Stubbornly Refuses to Close. Diverse Reactions Reflect Issues' Painful Complexity*, L.A. TIMES, Feb. 7, 1997, at A1 (Gallup poll revealing large racial divide in perceptions of O.J. Simpson's guilt or innocence in the murder case in which he was acquitted).

[4] *See, e.g.*, Baldus et. al., *supra* note 1, at 52.

[5] *Id.* at 48-57.

[6] *Id.* at 68-91.

[7] *Id.* at 57-60.

[8] *Id.* at 107-16.

[9] *Id.*

[10] *Id.* at 52-60.

for capital sentencing in particular—arises at least in part from the capacity of multi-member juries to represent the community through their very plurality in a way that a single judge necessarily cannot. Thus, one important project a reformer might initiate in light of the results of the Bowers and Baldus studies is an attempt, through law, to prevent jury composition from being systematically skewed away from minority representation.

Indeed, a great deal of the legal literature on race and criminal justice focuses on this or related questions already. Many academics, judges, and policy-makers have debated whether peremptory strikes ought to be eliminated entirely, as Justice Thurgood Marshall suggested in his concurrence in *Batson v. Kentucky*.[11] Others have focused on the inefficacy of *Batson* in combating intentional racial discrimination in the use of peremptory challenges; they suggest additional or alternative remedies, such as more stringent self-imposed ethical standards for prosecutors and trial court judges[12] or peremptory challenges that are "blind" to race and based on written instead of live voir dire.[13] Still others have urged the revitalization of the Sixth Amendment's "fair cross-section" requirement as an important addition to the Equal Protection Clause to combat racial discrimination in jury selection.[14] Yet others have urged that we more fundamentally rethink jury selection practices; they suggest various affirmative schemes to promote diverse representation rather than merely to combat racial discrimination.[15] These representation-preserving and representation-forcing projects are worthy of serious attention precisely because of our hope and belief that it is the representativeness of juries—at least in part—that makes them better decision-makers than judges in criminal cases.

But it would be a mistake if these projects became the sole legal

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[11] Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring); *see also* Baldus et al., *supra* note 1 at 33 n.11.

[12] Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475 (1998).

[13] Jean Montoya, *The Future of the Post-*Batson *Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981 (1996).

[14] Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93 (1996); Mitchell S. Zuklie, Comment, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101 (1996).

[15] Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 382-88 (1999) (suggesting a jury selection process drawn from electoral districting law, whereby representation would be mandated from smaller "jural districts" representing "communities of interest" within the larger jury district); Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 760-76 (1993) (supporting some forms of race-conscious jury selection procedures); Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161 (promoting a scheme of "affirmative selection" whereby each party to a criminal case would be able to use "affirmative" peremptories to include a certain number of already qualified jurors on the jury panel, which would then be subject to a smaller number of traditional peremptory challenges from each side).

strategy inspired by the work of Professors Baldus and Bowers, for a number of reasons. First, even in the worlds dreamed about by many of the jury representation reformers, it will not always be possible to achieve the optimal representation they envision. After all, jury districts are not always particularly diverse themselves, and the luck of the venire will sometimes create anomalies even in diverse districts, even in the complete absence of systematic skewing of the pool or intentional discrimination in the selection process. Moreover, it is not by any means evident that representation that "looks like the jury district" or "looks like America" will be representation that has much effect on verdicts, given the "dominance effects" observed in Professor Bowers's study.[16] Finally, jury representativeness, even when achieved, is merely a necessary, but not a sufficient, condition for deliberation informed by the airing of diverse views. As Professor Bowers's qualitative data show, minority voices may be overwhelmed in the heated context of capital trials, or racial tensions may lead jurors to feel confirmed in their own pre-existing stereotypes of jurors of other races. So representation-preserving and representation-forcing legal strategies have their limits as methods for promoting the distinctive benefits of jury decision-making in capital trials.

Despite these limits, considerably less of the legal literature explores strategies beyond representation to deal with the issues raised by observed "race effects" in capital jury decision-making. I want to use this opportunity to begin a discussion about what alternative strategies we might imagine—not only because of the limits of representation as a means of promoting fairer decision-making, but also because representation *is not the only point* of juries in either criminal trials or capital sentencings. Our commitment to juries stems not only from what jurors, in their representational capacity, can bring to the decision-making process, but also from what we hope they, the jurors, will take from it. Alexis de Tocqueville, one of the most perceptive nineteenth-century analysts of the relatively new institutions of the fledgling American republic, saw that the American jury was "above all, a political institution" that "raises the people itself, or at least a class of citizens, to the bench of judges" and "invests the people, or that class of citizens, with the direction of society."[17] This crucial aspect of the jury—its relationship to the ideal of self-government—makes it a means as well as an end in itself. As Tocqueville realized, the jury "may be regarded as a gratuitous public school, ever open, in which every juror learns his rights,"[18] because the jury, "which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule

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[16] Bowers, *supra* note 1, at 192-201.

[17] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (Francis Bowen trans. 1862) (Phillips Bradley ed., Vintage Books 1945) (1835).

[18] *Id.* at 296.

well."[19] Tocqueville's observations remain pertinent today: jury service is one of the primary lessons in self-governance that our public institutions offer. Moreover, in our increasingly diverse polity, jury trials are one of the few opportunities for people from different races and classes to come together and interact as equal participants in a meaningful project.

What can we do to better educate our jurors in this free public school that is the jury—not only so that they will do a better job at the task at hand (here, the crucial job of capital sentencing), but also so that they will bring something other than deepened racial hostility away from the jury room?

This is no easy task, and there is no simple solution to the problem of racial polarization in jury deliberations, particularly with regard to capital sentencing. But we are not without options. Consider, as an analogy, the use of expert testimony and cautionary jury instructions on the issue of the reliability of cross-racial eyewitness identifications. The work of researchers like Elizabeth Loftus has demonstrated that despite the high confidence eyewitnesses have in their identifications, cross-racial identifications as a class are less reliable than same-race identifications.[20] As a result, courts often permit the introduction of expert testimony to combat the natural confidence in, and reliance upon, cross-racial identifications by juries in criminal cases. In some jurisdictions, such as my home state of Massachusetts, trial judges have discretion to give cautionary instructions on the unreliability of cross-racial identifications, even in the absence of expert testimony.[21] These legal strategies are meant to correct jurors' misperceptions about the meaning of certain evidence and thus to prevent miscarriages of justice.

What can we learn about capital trials from these cross-racial eyewitness identification strategies? In the capital sentencing context, we want to undermine jurors' confidence not in the meaning of certain evidence, but rather in their own perceptions and judgments, which are inevitably and powerfully shaped by their race. We want and need to have jurors searchingly examine and question their own presuppositions about the world and open their minds to listen to the alternative assumptions that likely also inhabit the jury room. Some capital sentencing schemes—like the federal death penalty statute—seek to defeat racial polarization in capital sentencing by asking each juror to certify that his or her final determination is not based on the "race, color, religious beliefs, national origin, or sex of the defendant

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[19] *Id.* at 297.

[20] *See generally* Robert J. Hallisey, *Expert Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237, 245-47 (1995).

[21] Commonwealth v. Hyatt, 647 N.E.2d 1168, 1171 (Mass. 1995) (explicitly acknowledging trial judges' discretion to give cautionary instructions on the unreliability of cross-racial identifications, though finding no error in the failure to give such an instruction in the case in question).

or the victim."[22] But such certifications are likely extremely ineffectual, because it seems probable that many of our deepest and most powerful racially influenced presuppositions are not the products of conscious thought, but rather habits developed over a lifetime. A better way to seek to upset or call into question such presuppositions might be the introduction of expert testimony on the general effects of juror race on capital sentencing combined with strong cautionary instructions from the trial judge.

It is not enough, however, for judges to exhort jurors to set aside their racial presuppositions, because jurors may very well be unaware of what, exactly, those presuppositions might be. I therefore urge defense lawyers to request and trial judges, at least in inter-racial capital cases, to give instructions that ask jurors to do a "race-switching" exercise—that is, to imagine their evaluation of the evidence if the races of the defendant and the victim were reversed. This exercise, it must be warned, is not meant to suggest that whatever result the jurors would reach in the switched-race context is any more correct, or free from racial presuppositions, than their initial judgment. Rather, the exercise is meant to get each juror to reflect upon and to encourage his or her colleagues to reflect upon the role of race in their perceptions of the world. The idea behind such an instruction is that it is impossible to remove race and its influence upon jurors' perceptions from the jury room; the best we can hope for is that jury service will be a means for jurors to grapple sincerely with their own limited perspectives and to attempt to open themselves up to new ones. I am emboldened in this project by some of the data from Professor Bowers's study, data that reveal that although there is great racial polarization through the trial and the first vote on sentencing, there is also tremendous movement by both white and black jurors during sentencing deliberations, so that the final results are much less polarized than any of the votes that came before.[23] Something is happening during deliberation, and it is that fragile process that my suggestion seeks to nurture.

A model instruction might sound something like the following:

> Ladies and Gentlemen of the jury, as you heard in evidence at trial [if there was expert testimony admitted], studies have shown what you might have suspected in your hearts to be true: race plays a role in how jurors perceive evidence and how they vote in capital sentencing hearings, both their own race and the race of the defendants and victims in the cases be-

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[22] 21 U.S.C. § 848(o)(1).

[23] Bowers, *supra* note 1, at 197-98 tbl. 2. The data show that at the most racially polarized point of the capital process—the first vote on punishment—67.3% of white jurors favored death as compared to only 8.6% of black jurors. Conversely, at the same point, 71.4% of black jurors favored life, as compared to only 26.9% of white jurors. At the final vote on punishment, however, white jurors for death had dropped to only 41.8% and black jurors for death had risen to 30.6%, whereas black jurors for life had dropped to 69.4%, while white jurors for life had risen dramatically (more than doubled) to 58.2%.

> fore them.
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> You may well believe that this is not true of you, because you sincerely find your heart free of overt racial hatred or bias. But our race and the road upon which it takes us in the world necessarily affects us in ways that we cannot completely see or know.
>
> You have sworn to decide the case before you without fear or favor. In order to help you to do this, I ask you collectively to perform an exercise in the jury room. I ask each of you to imagine your reaction to the evidence presented in this case if the races of the defendant and the victim were reversed. I do not ask you to do this in order to suggest to you that your decision under the conditions of the exercise is any more correct than your decision under the conditions as they actually exist. Rather, I ask you to perform this exercise in order to encourage you to reflect upon—and to urge the other members of the jury to reflect upon—the effect of race upon your perceptions of the evidence before you.
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> I ask each of you to listen carefully and respectfully to each other's views, particularly the views of jurors whose race is different from your own. If there are no jurors whose race is different from your own on the jury, try as best you can to imagine what such a juror might say to you.
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> It is my hope that this exercise will help you return a verdict in which you can confidently assert that racial bias—either conscious or unconscious—plays no part.

More than fifty years ago, Jerome Frank called prejudice "the thirteenth juror."[24] Today, in light of the important work of empirical researchers like Professors Baldus and Bowers, we can see that race is often the thirteenth juror, silent and invisible at the table of deliberations. Minority representation on juries alone is not enough to promote the crucial ends of jury participation in capital sentencing. Rather, we need to tear away the silence and invisibility surrounding the issue of race and force our juries to confront it head on. This is no magic bullet; there is no guarantee that such confrontations will reduce, as opposed to exacerbate, existing racial tensions and polarization. But the legal instructions that jurors receive, as Tocqueville evocatively explained, are part of their rare and valuable tutelage in self-government as a diverse people. Such instruction may just be our best hope for racial justice—not just in capital sentencing, but outside the jury room as well.

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[24] United States v. Antonelli Fireworks Co., 155 F.2d 631, 659 (2d Cir. 1946) (Frank, J., dissenting) ("A keen observer has said that 'next to perjury, prejudice is the main cause of miscarriages of justice.' If government counsel in a criminal suit is allowed to inflame the jurors by irrelevantly arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent. He should not be permitted to summon that thirteenth juror, prejudice.") (footnotes omitted).