

## RACE, PEREMPTORIES, AND CAPITAL JURY DELIBERATIONS

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In Lonnie Weeks's capital murder trial in Virginia in 1993, the jury was instructed:

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternativ[e aggravating factors], and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment . . . .<sup>1</sup>

This instruction is plainly ambiguous, at least to a lay audience. Does it mean that if the jury finds an aggravating factor it *must* impose the death penalty, or that in that situation it has to make a further decision whether to do so? The first answer is wrong. That is not the law in Virginia, and if it were it might amount to an unconstitutional "mandatory" scheme for imposing death sentences without considering evidence the defendant may offer in mitigation. And yet a jury could easily think the instruction means just that—that a decision that "the death penalty is not justified" *means* a decision that neither aggravating factor has been proven.<sup>2</sup>

But maybe juries do get it right. Maybe they understand that they have to consider mitigating evidence about the crime and the defendant *after* they have determined the existence of an aggravating factor. That is what the Supreme Court decided two years ago in another Virginia case in which this instruction was used, *Buchanan v. Angelone*,<sup>3</sup> despite a persuasive dissent by Justice Breyer, who pointed out that in the context of the other instructions that were given it was at least as easy to interpret this instruction to mean that the jury was supposed to consider evidence of mitigation solely for the purpose of deciding whether an aggravating factor exists, and that if they did find that there was an aggravating factor, then a death sentence was

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<sup>1</sup> *Weeks v. Angelone*, 120 S. Ct. 727, 730 n.1 (2000).

<sup>2</sup> The correct interpretation turns on noticing that the verb for the first option in this run-on sentence is "may," and for the second option "shall." The significance of this difference is not likely to leap to the minds of most non-lawyers, especially since the instruction does not mention how, when, or on what basis the jury should decide whether "the death penalty is not justified."

<sup>3</sup> 522 U.S. 269, 279 (1998).

automatic.<sup>4</sup> Lonnie Weeks's jury, however, left no room for doubt. After deliberating on the issue of penalty for several hours they sent a note to the judge asking the precise question that the Supreme Court had said this instruction already answered:

If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to *issue* the death penalty? Or must we *decide* (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?<sup>5</sup>

The judge responded as he had done a few hours earlier to another question from the same jury, by not answering. He sent the jury a note saying, “[s]ee . . . Instruction #2”<sup>6</sup>—the very same instruction that triggered the question in the first place. Judges often do this when they get questions from those they are supposed to instruct. Apparently they believe in an older “don’t ask, don’t tell” policy than the one that has been in the news: Don’t ask me anything, because I won’t tell you anything if you do.

The Supreme Court, in an opinion announced in January, 2000, was unfazed. In a five to four decision the Court held that “[a] jury is presumed to follow its instructions.”<sup>7</sup> And what about the fact that the jury itself said that it did not know how to follow those instructions? “Similarly, a jury is presumed to understand a judge’s answer to its question.”<sup>8</sup> Which was probably true, in this case. The jury—which already had the judge’s instructions in writing, the decipherable and the indecipherable alike—no doubt interpreted the answer exactly as it was intended: “Bug off.” The Supreme Court went on to say that “[h]ad the jury desired further information, they might, and probably would, have signified their desire to the court.”<sup>9</sup> Naturally. They had only been rebuffed by the judge twice, and must have been itching for another chance to have His Honor tell them to stop bothering him and get on with their work. But even if we ignore the unmistakable meta-message and assume that the jurors went back to studying the text of instruction, it is doubtful that after this exchange they somehow arrived at a correct understanding *of the very instruction* that they could not understand in the first place.

Cases like *Weeks* are not the products of judicial ignorance. It is tempting to think that if the Court had known more about juries it might have done a better job. Perhaps somebody should have told the justices about research that shows that jurors do misunderstand instructions like this one<sup>10</sup>—that in fact, they do a pretty bad job of

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<sup>4</sup> *Id.* at 281-82 (Breyer, J., dissenting).

<sup>5</sup> *Weeks*, 120 S. Ct. at 730.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 733.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Stephen P. Garvey, et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital*

understanding legal instructions in general<sup>11</sup>—but that when such instructions are explained or revised it does help and does affect their decisions.<sup>12</sup> However, I do not believe that would have helped. The *Weeks* decision is an example of willful blindness, if not hypocrisy. The truth is readily apparent in the majority opinion itself: After deliberating for several hours, the jurors asked if once they found an aggravating factor they could still sentence the defendant to life imprisonment; the judge refused to say; the jurors returned with a sentence of death.<sup>13</sup> Obviously at least some of the jurors must have concluded—erroneously—that they had no choice. But the Supreme Court has the power to ignore simple truths.

This attitude is not a new or rare phenomenon. It is a central theme of many appellate decisions on jury decision making: We don't want to know.<sup>14</sup> We don't want to know what instructions jurors understand, or what information they remember, or whether they consider evidence that was excluded, or what facts they rely on, or what they say in deliberations, or how they arrive at their decisions. And I don't mean simply that judges would rather not be bothered to find out these things; I suggest that they would rather not know even if that requires denying the obvious. The Court's underlying theory seems to be something like this: One reason why we commit decisions to juries is to get unchallengeable results. Understanding jury decision making does not serve that goal. Viewing the institution as an impenetrable black box is a much more successful strategy. Once we decide that we can't *know* what juries do, we may safely "presume" that whatever it is, it's okay.

Cases, 85 CORNELL L. REV. 627, 629-33 (2000) (studying the precise instruction used in the *Weeks* case); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225-26 (1996) (studying juror confusion over instructions on aggravation and mitigation).

<sup>11</sup> VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 120-27 (1980); Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J.L. REFORM 213, 215 (1999); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589 (1997); Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 223 (1989).

<sup>12</sup> Garvey et al., *supra* note 10; Diamond & Levi, *supra* note 10; Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539 (1992).

<sup>13</sup> *Weeks*, 120 S. Ct. at 730-31.

<sup>14</sup> For example:

One enduring element of the jury system . . . is insulation from questions about how juries actually decide . . . Instead of inquiring what juries actually understood, and how they really reasoned, courts invoke a "presumption" that jurors understand and follow their instructions . . . It is a rule of law—a description of the premises underlying the jury system, rather than a proposition about jurors' abilities and states of mind. . . .

Social science has challenged many premises of the jury system . . . Still, the ability of jurors to sift good evidence from bad is an axiom of the system, so courts not only permit juries to decide these cases but also bypass the sort of empirical findings that might help jurors reach better decisions.

Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993); *see also* United States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997) ("The jury as we know it is *supposed* to reach its decisions in the mystery and security of secrecy. . . .").

But what about death penalty cases? Here the stakes are at their highest, and jurors are asked to perform an unusual function, to make a once-in-a-lifetime moral judgment—whether a man should live or die—rather than a factual decision about what happened. Should we not be more careful to make sure that in these difficult and extremely important cases jurors understand the law correctly and apply it fairly? There was a time when the Supreme Court believed that, and acted on that belief. A large edifice of case law was built on that basis, starting in 1968 with *Witherspoon v. Illinois*,<sup>15</sup> which held that states could not exclude opponents of the death penalty from capital sentencing juries if they could follow the law and consider imposing a death sentence. It includes the Court's landmark 1972 decision in *Furman v. Georgia*,<sup>16</sup> that all death penalty laws then in effect in the United States were unconstitutional because they allowed for uncontrolled discretion by the capital sentencers, and produced arbitrary and discriminatory death sentences. That body of law also includes the Court's 1976 decision in *Gregg v. Georgia*<sup>17</sup> that several new post-*Furman* death penalty laws were (at least presumptively) constitutional because of procedural rules that guided capital sentencing discretion,<sup>18</sup> and it includes the first seven years of cases attempting to apply the complex and contradictory rules in *Furman* and *Gregg*. For example, in 1978, in *Lockett v. Ohio*,<sup>19</sup> the Court held that a capital sentencer must be permitted to consider any evidence about the crime or the criminal that a capital defendant offers as a basis for a sentence less than death; and in 1980, in *Godfrey v. Georgia*,<sup>20</sup> the Court held that a defendant could not be sentenced to death on the basis of a finding that the killings he committed were "outrageously or wantonly vile, horrible or inhuman" unless that term is given specific content that meaningfully guides and limits the jury's discretion.<sup>21</sup> For a while, it seems, the Supreme Court led—or at least participated in—an effort to insure that jury decision making in capital cases actually lived up to the ideal that the Court had assigned to it.

In 1983, however, a competing trend emerged,<sup>22</sup> and it has become ever stronger and more dominant. A consensus emerged on

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<sup>15</sup> 391 U.S. 510 (1968).

<sup>16</sup> 408 U.S. 238 (1972).

<sup>17</sup> 428 U.S. 153 (1976).

<sup>18</sup> *Id.* at 206-07.

<sup>19</sup> 438 U.S. 586 (1978).

<sup>20</sup> 446 U.S. 420 (1980).

<sup>21</sup> *Id.* at 427-29.

<sup>22</sup> See, e.g., *Zant v. Stephens*, 462 U.S. 862, 888-91 (1983) (death sentence upheld after one of three statutory aggravating factors struck down as unconstitutional); *Barclay v. Florida*, 463 U.S. 939, 956-58 (1983) (death sentence upheld even though one of several aggravating factors considered in imposing death penalty held to be improper under state law); *Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983) (upholding expedited review of federal habeas corpus decisions for death penalty cases). For an excellent discussion of these cases, see Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (1984).

the Supreme Court (and on other courts, and in legislatures) that too many death sentences were being reversed, that the review of capital cases was too exacting, and that the legal process must be redesigned so executions would happen more often and with less delay. The age-old legal aphorism that "death is different"—which used to mean that capital cases were reviewed with special care and held to an uncommonly high standard of justice—was turned on its head.<sup>23</sup> It now means that constitutional issues in capital cases get especially short shrift because it is important to avoid setting precedents that might slow down executions. *Buchanan* and *Wechs* are excellent examples of this trend. The Court seems to have written these opinions—indeed, it seems to have taken these cases—to broadcast a message to the lower courts: Intelligible jury instructions on mitigating evidence are *not* required in capital cases, and answers to jury questions on instructions are *not* required either.

This is the legal context for the two empirical studies that appear in this issue, by David Baldus, George Woodworth, David Zuckerman, Neil Weiner, and Barbara Proffitt;<sup>24</sup> and by William Bowers, Benjamin Steiner, and Marla Sandys.<sup>25</sup>

The lead authors of these articles, David Baldus and Bill Bowers, represent the polar opposite of the viewpoint now prevalent on the Supreme Court. They are scholars; they deal in knowledge, in facts. Each has devoted the lion's share of his career to studying how the death penalty actually operates in the United States at the end of the twentieth century. Dr. Bowers, it seems, has studied almost every aspect of capital punishment. Among other projects, he conducted the first post-*Furman* study of racial discrimination and arbitrariness in capital sentencing,<sup>26</sup> developed an original and widely-copied measure of public support for the death penalty,<sup>27</sup> and has been the moving force behind the monumental decade-long multi-state Capital Jury Project,<sup>28</sup> from which the data that he presented here were de-

<sup>23</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 347-48 (1987) (Blackmun, J., dissenting) ("The Court today seems to give a new meaning to our recognition that death is different. Rather than requiring 'a correspondingly greater degree of scrutiny of the capital sentencing determination,' *California v. Ramos*, 463 U.S. 992, 998-999 (1983), the Court relies on the very fact that this is a case involving capital punishment to apply a lesser standard of scrutiny. . .").

<sup>24</sup> 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)

<sup>25</sup> 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).

<sup>26</sup> William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); see also WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, at 193-269 (1984).

<sup>27</sup> William Bowers, *Capital Punishment and Contemporary Values: People's Musings and the Court's Misperceptions*, 27 LAW & SOC'Y REV. 157 (1993).

<sup>28</sup> For a general description of the Capital Jury Project, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995); see also William J. Bowers, et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (multistate data); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced*

rived. Professor Baldus was the lead investigator in the path-breaking study of arbitrariness and racial discrimination in capital sentencing in Georgia<sup>29</sup> that was before the Supreme Court in *McCleskey v. Kemp*,<sup>30</sup> a study that permanently changed our common knowledge of the death penalty in America. He has since conducted comparable studies in New Jersey<sup>31</sup> and Colorado,<sup>32</sup> and most recently here in Philadelphia.<sup>33</sup> No other living researcher has contributed more to our understanding of capital punishment than these two men. Their work is a rebuke to the ignorance and complacency of judges who write opinions like *Weeks v. Angelone*.

These two studies both deal with the racial composition of capital trial juries. This is a subject of great importance. As these researchers and others have demonstrated, capital sentencing in the United States is infected with racial discrimination—most strongly and pervasively by the race of the victim, but in some jurisdictions, including Philadelphia, by the race of the defendant as well.<sup>34</sup> Are these patterns caused, at least in part, by the race of the capital trial jurors? Everybody who has worked in the area has always assumed that is so, but until now, nobody had actually studied the issue systematically. And no wonder—it is very hard to do, as these papers show.

Professor Baldus and his colleagues examined racial disparities in the exercise of peremptory challenges in jury selection, the initial stage of a capital trial. It has been common knowledge for decades that prosecutors and defense attorneys use race as a basis for deciding which potential jurors to challenge and which to accept. Since *Batson v. Kentucky*<sup>35</sup> in 1986, it has been possible—at least in theory—for a defendant to challenge race discrimination by the prosecutor in the exercise of peremptory challenges in his individual case, and since *Georgia v. McCollum*<sup>36</sup> in 1992, a prosecutor could make a similar claim against a criminal defendant. But what actually happens on the ground? Anecdotal evidence suggests that prosecutors continue to target minority jurors—especially blacks—and that defense attorneys continue to target white jurors, and that (judging from published

*Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999) (multistate data).

<sup>29</sup> DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990).

<sup>30</sup> 481 U.S. 279 (1987).

<sup>31</sup> DAVID C. BALDUS, DEATH PENALTY PROPORTIONALITY REVIEW PROJECT: FINAL REPORT TO THE NEW JERSEY SUPREME COURT (1991); David C. Baldus & George Woodworth, *Proportionality Review of Death Sentences: The View of the Special Master*, 6 CHANCE: NEW DIRECTIONS FOR STATISTICS AND COMPUTING 18 (1993).

<sup>32</sup> See BALDUS, ET AL., *supra* note 29, at 268 n.20.

<sup>33</sup> David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

<sup>34</sup> For excellent overviews of the many studies on this issue, see U.S. GEN. ACCTG. OFC., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990); Baldus et al., *supra* note 33, at 1658-70, 1742-45.

<sup>35</sup> 476 U.S. 79 (1986).

<sup>36</sup> 505 U.S. 42 (1992).

opinions) the constitutional remedy provided by *Batson* is not much of a check on this process.<sup>37</sup> Anecdotal evidence, however, can be misleading, and published opinions—which are only available in cases in which the defendant was convicted, appealed and raised the issue—are hardly a fair reflection of trial practice. Unfortunately, going to the source is a huge task that requires compiling detailed records on hundreds of cases and thousands of potential jurors. And this information is not sitting around on the shelves waiting for curious researchers; it has to be found, at great cost. Just determining the race of the potential jurors in any large sample of cases is very difficult; in this study, it required a major investigation. Gathering the case-by-case and juror-by-juror data that we see here is a huge task, and analyzing those data once compiled is nearly as much work again.

Judging from the findings that Professor Baldus and his co-researchers report, practice in Philadelphia capital cases mirrors common racial stereotypes. Prosecutors use their peremptory challenges to target prospective jurors who are black, young, and residents of integrated neighborhoods. They do so more assertively when the defendant is black and less so when the victim is black. Defense attorneys do the opposite on every count. The results are mixed. Overall, the proportion of blacks on capital juries is slightly higher than in the jury pool from which those juries are chosen—a reflection of the fact that defense attorneys use more of their peremptory challenges than do prosecutors. On the other hand, prosecutors are more successful than defense attorneys at eliminating their highest priority target group—young black (and especially young male black) venire members—since blacks are only about 35% of the pool, and young blacks are a small slice of that fraction. This means that the young black capital defendants—66% of the total in Philadelphia—are overwhelmingly tried by juries that include no young black jurors. Defense attorneys are less successful at eliminating their prime targets—older white venire members—simply because they are a much larger group.

Baldus and his colleagues interpret these results as indicating that *Batson v. Kentucky* has been only partially successful in eliminating racial discrimination in the use of peremptory challenges. But *Batson* was never a serious attempt to *eliminate* race as a basis for peremptory challenges. *Batson* has to be understood against the backdrop of the notorious case of *Swain v. Alabama*,<sup>40</sup> in which the Supreme Court simultaneously held that racial discrimination in the exercise of peremptory challenges by prosecutors violates the Equal Protection

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<sup>37</sup> See, e.g., Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502-03 (1996); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 274-75 (1993).

<sup>40</sup> 380 U.S. 202 (1965).

Clause, and insulated that discrimination from challenge by creating a "presumption" that "in any particular case" the state has used its peremptory challenges "to obtain a fair and impartial jury."<sup>41</sup> To overcome this presumption, a black defendant had to show that:

the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of [all] Negroes . . . who have survived challenges for cause, with the result that no Negroes ever serve on [trial] juries. . . ."<sup>42</sup>

The impulse for this preposterous standard was the desire to protect the unreviewable discretion that was understood to be the essence of the right to exercise peremptory challenges. *Batson* represents a major retreat from the absolute protection of peremptories that was embodied in *Swain*, but it preserves a great deal of room for unreviewable discretion by prosecutors and defense attorneys alike.

*First*, for *Batson* to be triggered the opposing attorney must make a prima facie showing of discrimination. That typically requires a strong pattern of racially disproportionate peremptory challenges; any one or two or three challenges will not be enough, whatever the challenger's motivation. *Second*, once *Batson* is triggered, the attorney who made the questioned peremptory challenges is permitted to offer non-racial justifications for them. As later Supreme Court cases make clear, trial court judges may accept such justifications even if they are implausible<sup>43</sup> or have obvious disproportionate racial impacts.<sup>44</sup> For example, a prosecutor may strike all qualified jurors who have been convicted of crimes, even though that will have the effect of disproportionately removing black men.

The limitations of *Batson* are not news. Justice Marshall pointed them out in a concurring opinion in *Batson* itself, and argued that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge."<sup>45</sup> Justice Marshall proposed eliminating the practice entirely,<sup>46</sup> but his proposal was rejected, in part because the peremptory challenge was seen as an "historic trial practice, which long has served the selection of an impartial jury. . . ."<sup>47</sup> That may or may not be so, but peremptory challenges are certainly deeply embedded in our system of jury selection. Trial lawyers like peremptory challenges; who doesn't like to exercise unreviewable power? Trial judges may have misgivings

<sup>41</sup> *Id.* at 222.

<sup>42</sup> *Id.* at 223.

<sup>43</sup> *Purkett v. Elem*, 514 U.S. 765 (1995).

<sup>44</sup> *Hernandez v. New York*, 500 U.S. 352 (1991).

<sup>45</sup> 476 U.S. 79, 105 (1980) (Marshall J., concurring).

<sup>46</sup> To be exact, since *Batson* itself only concerned the exercise of peremptory challenges by the State, Justice Marshall proposed "banning the use of peremptory challenges by prosecutors and . . . allowing the States to eliminate the defendant's peremptories as well." *Id.* at 107-08.

<sup>47</sup> *Id.* at 99 n.22.



about peremptories (just as some jurors may resent them), but they would have a hard time doing without them, for two reasons: (1) without them voir dire would have to be more detailed and searching, to uncover potentially disqualifying biases; and (2) the availability of peremptories insulates most contested decisions on juror impartiality from review on appeal, since a party cannot generally complain about the judge's failure to excuse a juror for cause unless the party has exhausted its peremptory challenges.<sup>48</sup> And, judging from the case law since *Batson*, appellate judges are not interested in Justice Marshall's proposal either, in part, no doubt, because in the absence of peremptories they would have to scrutinize jury selection more carefully.

As long as we keep peremptories, some level of racial discrimination in their use will occur. It is, in effect, built into the procedure. But that does not mean *Batson* is toothless. *Batson* gives trial-court judges a great deal of power to act or to refrain from acting on plausible claims of discrimination. Judges can choose to use this power to prevent egregious racial discrimination in jury selection. Across the country, *Batson* has probably done a great deal to reduce the number of black defendants who are tried by all-white juries, and to increase the proportion of black jurors in all trials. The extent of this effect depends, no doubt, on local factors that might have had some of the same effect even under *Swain*: A black population with significant political power—including the power to influence the appointment and election of judges and prosecutors—and a strong criminal defense bar. Philadelphia has both, and their impact is evident from these data: Overall, black jurors are, if anything, over-represented on capital juries.

Can we do something to eliminate subtler forms of race discrimination in the use of peremptories—at least in capital jury selection? I wonder. We could try tightening the procedure for reviewing decisions to strike.<sup>49</sup> But considering the latitude that is inherent in the concept of *peremptory* challenge—one that may be exercised for *any* reason (except race and sex)—and the difficulty of judging an attorney's motivation in the midst of trial proceedings, a move in that direction is unlikely to change much. For example, consider the principle problem that Professor Baldus and his colleagues have identified: The overwhelming exclusion of young black venire mem-

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<sup>48</sup> See, e.g., *United States v. Torres*, 960 F.2d 226, 228 (1st Cir. 1992); *United States v. Hardy*, 941 F.2d 893, 897 (9th Cir. 1991); *People v. Macrander*, 828 P.2d 234, 246 (Colo. 1992); *People v. Daniels*, 665 N.E.2d 1221, 1226 (1996); *State v. Mitchell*, 674 So. 2d 250, 254 (La. 1996); *Dergamo v. State*, 922 S.W.2d 256, 262-63 (Tex. Ct. App. 1996). See generally Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 857 (1997). This protection is reinforced by two common patterns of trial-court behavior: Attorneys avoid exercising all their peremptories, for fear of being stuck with a terrible replacement juror that they cannot remove; and judges deny close calls on challenges for cause, knowing that the losing attorney will probably be in no position to complain.

<sup>49</sup> See Baldus et al., *supra* note 24, at 33-35.

bers. Under current law, striking jurors because of their youth is permitted.<sup>50</sup> Striking them because they are young *and black* is unconstitutional—discrimination against *young blacks* is a form of racial discrimination—but as long as age discrimination is permitted, proving this type of race discrimination will be very hard. On the other hand, if we prohibit age discrimination in the use of peremptories, is there any logic to permitting discrimination by occupation, or by education, or by marital status? And if we prohibit these and other similar distinctions, aren't we back at Justice Marshall's rejected proposal to simply eliminate peremptories all together?

How about reducing the number of peremptories that are allocated to the State?<sup>51</sup> That might reduce the specific problem identified here, but it is not clear by how much. Prosecutors in capital trials in Philadelphia already use fewer peremptories than defense attorneys.<sup>52</sup> A drastic cut in their allotment—say, to ten, while leaving the defense at twenty—would force some prosecutors to cut back, but not necessarily enough to address the main problem Professor Baldus and colleagues have identified, considering that young black venire members (male and female together) average only about three to five per jury panel. Moreover, as the researchers note, defense attorneys are just as racially motivated as prosecutors in their use of peremptories; in some contexts, they too might be able to effectively exclude the racial groups they disfavor.<sup>54</sup> In short, as long as we continue to use peremptory challenges in criminal cases, it may be unrealistic to expect any application of *Batson* to produce juries that are substantially more representative than what we have seen thus far. Indeed, in many parts of the country it would be a considerable achievement to obtain capital juries that are as racially representative as those in Philadelphia, for all their warts.

Professor Baldus and his colleagues also examined the effect of the racial composition of the juries on the outcomes of these capital cases. They found that juries with more black members were considerably less likely to impose the death penalty than juries with fewer black members, particularly when the defendant was black.<sup>55</sup> This finding is especially striking because it is based on the decisions of those jurors who survived peremptory challenges. And it was a severe winnowing. A majority of all black venire members in the Baldus sample were excused by the prosecution, and a majority of all white venire members were excused by the defense. It is safe to assume that each side focused its fire—as best it could—on those potential jurors who were most likely to favor the opposition. That means the

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<sup>50</sup> See, e.g., Melilli, *supra* note 37, at 483-87.

<sup>51</sup> See Baldus et al., *supra* note 24, at 33-35.

<sup>52</sup> *Id.* at 116-17.

<sup>54</sup> For example, in *Georgia v. McCollum*, *supra* note 36, the issue was the use of peremptories by defense attorneys representing white defendants to exclude black jurors.

<sup>55</sup> See Baldus et al., *supra* note 24, at figs.5 & 6.

prosecutors removed the most predictably anti-death penalty blacks, and the defense attorneys got rid of the most clearly pro-death penalty whites. As a result, the black jurors who actually sat on these cases are likely to have been uncommonly similar to the remaining whites in their willingness to vote for death, and the whites who sat are likely to have been closer in that respect to the remaining blacks. The differences that Baldus et al. found were those remaining after the leveling effect of jury selection itself.

In other words, capital prosecutors and defense lawyers in Philadelphia know what they are doing. Race really is a powerful predictor of capital sentencing, especially in black-defendant cases, and it may also (as many attorneys believe) predict jurors' predispositions on guilt as well. But why?

William Bowers, Benjamin Steiner and Marla Sandys have studied the behavior of capital jurors by talking to them. This sounds simple enough, but in practice it is an even more daunting task than the one undertaken by Professor Baldus and his collaborators. The findings they report here are culled from the small mountain of data collected for the Capital Jury Project (CJP),<sup>56</sup> a decade-long collection of studies that includes in-depth interviews with 1,136 jurors who served on 332 capital trials in 14 states. The portion they report here concerns the effects of race; these are only initial findings, as the CJP was designed for other purposes. Doctor Bowers and his colleagues are now in the planning stages of a comparable study focusing specifically on the impact of race on capital juries.

As a group, the cases that Doctor Bowers and his colleagues examined are markedly different from those studied by Baldus and his associates. In Baldus's Philadelphia sample, 83% of the defendants (228/274)<sup>58</sup> and about 40% of the jurors who served were black.<sup>59</sup> In Bowers's CJP sample, fewer than 40% of the defendants (126/332) and fewer than 10% of the jurors (110/1,136) were black. Nonetheless, the racial effects on sentencing outcomes are similar. As in Philadelphia, Bowers and his colleagues report that as the number of black jurors increases, the proportion of death sentences decreases, especially in black-defendant cases. Bowers and his colleagues, however, find that in their sample this pattern is due primarily to striking differences in death-sentencing rates in cases with black defendants and white victims,<sup>62</sup> and that the effect seems to turn primarily on the presence or absence of male jurors: As the number of white males increases, the probability of a death sentence increases sharply; as the number of black males increases, it goes down at a comparable rate.

Unlike Baldus and his associates, Bowers et al. were able to ex-

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<sup>56</sup> See *supra* note 26.

<sup>58</sup> See Baldus et al., *supra* note 24, at fig.3.

<sup>59</sup> This calculation is a rough estimate from my analysis of the Baldus data.

<sup>62</sup> Bowers et al, *supra* note 25, at tbl.1

plore some of the reasons behind these stark racial differences in death sentencing. They identified three major determinants of capital sentencing. First, the jurors in their studies were less likely to sentence to death if they had *lingering doubts* about the guilt of the defendant, even after they had convicted him by proof beyond a reasonable doubt. Second, they were more likely to do so if they believed the defendant posed a *danger of future violence*. Third, they were often moved to mercy if they believed the defendant felt *genuine remorse* for his crimes. Black jurors were more likely than white jurors to view the defendant favorably on each of these issues; in cases with black defendants and white victims, these differences are striking.

It is not surprising to find these biases in American jurors. Given the history of racism and segregation, this is exactly what we ought to expect that white jurors would trust the State's witnesses more and the defendant less than would black jurors, and as a result have fewer doubts about the defendant's guilt; that white jurors would be more likely than black jurors to see a black defendant as a future threat—especially if he had already killed another white person; and that white jurors would be less likely than black jurors to trust expressions of remorse from a black defendant, especially one who had killed a white victim. Racial distinctions like these affect decision makers across the range of the criminal justice system, but there is every reason to expect that they are at their worst in capital sentencing. The decision to condemn a defendant to death or to spare him is extremely rare, and uniquely burdened with emotional and moral conflict. At the same time, it is an almost entirely discretionary choice that may be made on the basis of an indefinitely large range of factors. Because there are virtually no formal restrictions on this decision—and little effective direction—those jurors who want to discriminate deliberately are not restrained, and those who try to be even-handed have no guideposts to counteract their unconscious racial biases.

And how does all this apply to the trial of Lonnie Weeks? Did race play a role in his death sentence? We know that Weeks—who was executed on March 16, 2000—was black,<sup>64</sup> and that the man he killed was white.<sup>65</sup> The day after the killing Weeks spontaneously confessed and expressed deep remorse for his crime. He also voluntarily wrote a letter to a jail officer admitting the killing and expressing remorse.<sup>66</sup> He did so again from the witness stand, at the penalty phase of his trial.<sup>67</sup>

The jurors were clearly moved. Weeks had been stopped in a stolen car, and shot a State trooper six times, at point-blank range, with

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<sup>64</sup> NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A. REPORTER, Winter 2000 at 60.

<sup>65</sup> Weeks v. Commonwealth, 450 S.E.2d 379, 474 (Va. 1994).

<sup>66</sup> Weeks v. Angelone, 120 S. Ct. 727, 729-30 (2000).

<sup>67</sup> See *id.* at 739 (Stevens, J., dissenting).

hollow-point bullets. Nonetheless, they declined to find that he “would commit criminal acts of violence that would constitute a continuing serious threat to society.”<sup>68</sup> The jury, however, did find that the killing was “outrageously or wantonly vile, horrible or inhuman,” an aggravating circumstance that made him eligible for the death penalty.<sup>69</sup> They then asked the judge if they could nonetheless sentence Weeks to life imprisonment, and when the judge refused to answer, they sentenced him to death.<sup>70</sup> We also know that when they were polled on that verdict “a majority of the jury members [were] in tears.”<sup>71</sup> Still, in Chief Justice Rehnquist’s view, we cannot “know”<sup>72</sup> and should not “speculate”<sup>73</sup> about the one aspect of the jury’s deliberations that seems most clear: At least some jurors felt coerced by the judge’s instructions to return a verdict of death. The meaning of the Chief Justice’s pronouncements is no mystery: We don’t want to know, so we can remain free to speculate as we wish.

And what about race—did race influence the jury’s verdict? On that question, we are truly ignorant. We do not know the race of jurors who served (let alone of those who were excused), or how they interacted with each other, or how they reached their decision. Lonnie Weeks’s expressions of remorse seem to have been influential. Would they have carried the day had he been white, or had his victim been black, or if the proportion of black jurors (whatever it was) had been different? The research reported here suggests that these factors might have been influential, but we cannot tell. Doctor Bowers and his colleagues, like Professor Baldus and his, *do* want to know the answers to questions of this sort. Thanks to their efforts we have learned a lot about the impact of race on capital jury deliberations, and we stand to learn a great deal more yet.

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<sup>68</sup> *Id.* at 729-731.

<sup>69</sup> *Id.* at 731.

<sup>70</sup> *Id.* at 730-31. *See supra* notes 1-9 and accompanying text.

<sup>71</sup> *Id.* at 740 (Stevens, J., dissenting).

<sup>72</sup> *Id.* at 733.

<sup>73</sup> *Id.* at 734 n.5.