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# Criminal Trials and Reforms Intended to Reduce the Impact of Race: A Review

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## Abstract

This review collects initiatives and legal decisions designed to mitigate discrimination in pretrial decision making, jury selection, jury unanimity, and jury deliberations. It also reviews initiatives to interrupt implicit racial biases. Among these, Washington's new rule for jury selection stands alone in treating racism as the product of both individual actors' decisions and long-standing legal structures. Washington's rule shows the limits of recent US Supreme Court decisions addressing discrimination in cases with unusual and clearly problematic facts. The court presents these cases as rare remediable aberrations, ignoring the well-documented history of racism in jury selection. The final section juxtaposes limited reforms with the contemporary prison abolitionist movement to illuminate boundaries of incremental reforms. Reforms must reflect cognizance of the extent to which racism exists at multiple levels. Reforms that do not are less likely to make change, because they are either narrow in scope or focused on discrimination by individuals.

## INTRODUCTION

We live in a time when the volume of criminal justice reforms exceeds even the aspirations of advocates working against the political tide. Reforms abound and intersect at multiple levels (Eaton & Oppell 2019, Marshall Proj. 2019). Moreover, concerns about the influence of race during criminal trials are now commonly expressed in mainstream discourse (see, e.g., Buck 2019, Liptak 2019). Influential social movements seek to correct over-incarceration, end wrongful convictions, and make clear that Black Lives Matter (**https://blacklivesmatter.com**).

These reform initiatives focus on many different dimensions of the criminal justice system, but concerns about racial inequalities feature prominently. We focus herein on trial-level reforms but seek to situate our discussion in the broader adjudicative context. In particular, we recognize that a trial is the product of a series of decisions, all of which are affected by race (see Gross et al. 2017).

Ongoing critiques of the criminal justice system as racist and unjust are not new. In fact, critiques arise most clearly out of the work of critical race scholars who have exposed how racism exists at multiple levels in all aspects of society. These scholars have illuminated and challenged structural forms of racial inequality inherent to our understanding of criminality (Bell 1992, Butler 2010, Carbado 2002, Carbado & Roithmayr 2014). Some critical scholars have identified a possibility that more limited legal reforms can lead to meaningful change and that these reforms may be identified through social science research (Carbado & Roithmayr 2014, Meares 2015).

Our review presents a limited set of incremental changes. We identified some of these reforms as more likely to address the endemic racial injustices because they are structural in nature (Carbado & Roithmayr 2014). Even the best, however, remain bounded by the system in which they are deployed. The final section of the review briefly presents a reform movement with the express goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment. As such, it stands in juxtaposition to the incremental changes and suggests an alternate vision. The remaining sections focus on pretrial release; jury selection, unanimity, and decision making; implicit bias initiatives; and the prison abolition movement.

## PRETRIAL RELEASE DECISIONS

Pretrial detention has been widely acknowledged to have an adverse impact on defendants and the communities in which they live. Reforming conditions of pretrial release matters for trials in two important ways. First, suspects often enter a quick guilty plea rather than going to trial because the plea offers the best chance to secure release from jail quickly, even when the evidence of guilt is far from overwhelming. Second, defendants who are detained pretrial face higher rates of conviction, in part because they are less able to consult with defense counsel and assist in their defense (see Jones 2013 and Sardar 2019 for reviews).

In addition, a significant body of research agrees that pretrial detention impacts black defendants more adversely than others. Critical scholars have documented again and again the perverse symbiotic relationship between crime and race, in which "crime is racialized (when we think of crime, we have African Americans in mind)" and "race is criminalized (when we think of African Americans, we have crime in mind)" (Carbado & Roithmayr 2014, p. 152). Not surprisingly, black defendants face higher bail and harsher bail outcomes and, perhaps as a result, experience pretrial detention at a higher rate (Arnold et al. 2018, Rajagopal 2019, Van Brunt & Bowman 2018). Some research suggests that Latinx defendants face similar discrimination (Nejdl 2018).

Bail decisions typically happen too hastily for these disparate impacts to be explained by courts' careful consideration of legitimate differences between white and black defendants. Furthermore, research has confirmed that "even when relevant background information of white and African

American arrestees is taken into account by researchers,. . .white defendants still receive more favorable bail decisions than do African American defendants" (Jones 2013, p. 944). The discriminatory treatment arises from persistent racial bias, as well as from inaccurate and unsubstantiated stereotypes that exaggerate the perceived danger of releasing black defendants (Arnold et al. 2018, Carbado 2002, O'Flaherty & Sethi 2019).

These studies and decades of experience have produced a strong movement to eliminate money bail. Many community bail projects work to end money bail, limiting the risk that people will be in jail because they cannot afford bail (**https://bailproject.org**; **http://nationalbailout.org**). Many activists and researchers agree, however, that ending bail alone would be insufficient (Pretrial Justice Inst. 2019). Race-conscious structural changes are necessary.

In August 2019, a US district court in Texas ruled that "Galveston County must provide any indigent felony arrestee with counsel to represent the arrestee at the initial hearing concerning conditions of pretrial release" [*Booth v. Galveston County* (2019), p. 43]. This is the only court of which we are aware to mandate representation at these stages. The vast majority of pretrial suspects face court alone. The court reasoned,

> Unrepresented defendants, especially those that have had no experience in the criminal justice system, are in no position at an initial bail hearing to present the best, most persuasive case on why they should be released pending trial. A lawyer would unquestionably provide invaluable guidance to a criminal defendant facing a bail determination. (p. 23)

Consider the change that might result if well-trained lawyers represented defendants in every pretrial proceeding. The attentive lawyer could provide information about written policies and patterns of racial disparities, as well as actual evidence about the case and defendant, before the court. These are often missing in fast-moving proceedings today (Jones 2013).

Prioritization of individualized, evidence-based decision making can improve fairness (Jones 2013, Pretrial Justice Inst. 2019). Reform advocates urge that discretion in bail decisions be guided by factors set out in advance as part of bail laws. This helps discourage reliance on "long-standing, informal policies and practices which have the unintended consequence of overincarcerating pretrial defendants and creating racial disparities among pretrial detainees" (Jones 2013, p. 955). Research has shown, however, how reducing such factors in algorithmic risk assessments mirrors, extends, and expands documented racial disparities. This happens because "prediction tends to rely on factors heavily correlated with race" and, therefore, "appears poised to entrench the inexcusable racial disparity so characteristic of our justice system, and to dignify the cultural trope of black criminality with the gloss of science" (see Mayson 2019, p. 2222).

Requiring documentation of the factual basis of any bail determination "is a critical component of insuring that the bail officials (some of whom are not lawyers and have no legal training) comply with state bail laws and do not make arbitrary bail determinations based on impermissible factors (i.e., the race or ethnicity of the defendant)" (Jones 2013, p. 959). Training on basic principles of bail and the details of each jurisdiction's rules on pretrial detention can also play an important role in addressing racial disparities (Jones 2013).

Research also suggests that better training of judges can mitigate the influence of race. Arnold et al. (2018, pp. 1889–90) found that both full-time and more experienced part-time judges made fewer racially biased decisions than less experienced or part-time judges. In this study, researchers divided bail judges in Miami by level of experience: Experienced judges averaged 9.5 years of experience working in the bail system, whereas inexperienced judges averaged 2.5 years of experience. They used the risk of pretrial misconduct via the probability of rearrests prior to case disposition as a proxy for the accuracy of pretrial release decisions.

Variance in the rate of pretrial misconduct by race suggested that "bail judges rel[ied] on inaccurate stereotypes that exaggerate the relative danger of releasing black defendants versus white defendants at the margin" (Arnold et al. 2018, p. 1929). In addition, they found that experience mitigated this disparity. Among inexperienced judges, they found statistically significant disparities in the likelihood that marginally released white defendants were to be rearrested when compared with marginally released black defendants. But among experienced judges, they found no statistically significant evidence of racial bias (Arnold et al. 2018, p. 1928).

Finally, research suggests that oversight and accountability help identify errors and keep practice in line with the law. Including trained defense counsel in pretrial proceedings serves in part to increase accountability. It is also important that courts, nongovernmental organizations, and attorneys actively and purposively monitor for racial disparities among bail decisions (Community Advocacy Groups 2017, Jones 2013, Mayson 2019).

## JURY DECISION MAKING

### Jury Selection

Race has long played a central role in jury selection (Forman 2004). Racism—intentional and structural—has produced racial disparities in how the jury venire is selected, whom the court excuses for cause, and how the lawyers exercise their peremptory strikes (Diamond & Rose 2018). Of those three points in the process, researchers, courts, and policy makers have paid the most attention to the exercise of peremptory strikes (Frampton 2020).

Lawyers may not strike a prospective juror on the basis of race [*Batson v. Kentucky* (1986)]. The court's *Batson* procedure intended to identify and eliminate the influence of race on jury selection. Social science research and litigation across the United States provide compelling evidence that *Batson* provides little relief (Baldus et al. 2001, 2011; Diamond & Rose 2018; Eisenberg 2017; Grosso & O'Brien 2012). Our research on the influence of race on the prosecutorial exercise of peremptory challenges in 173 North Carolina capital cases in which the defendant was sentenced to death provides one such example. Our study found that prosecutors in North Carolina capital cases between 1990 and 2010 exercised peremptory challenges against black potential jurors at twice the rate as they did against jurors of other races, even after controlling for alternative grounds for removal (Grosso & O'Brien 2012). Interviews with excluded qualified black jurors echo these findings and explain the ways in which their underrepresentation and exclusion harm society and the court system itself (Diamond & Rose 2018, Equal Justice Initiat. 2010).

To establish a claim under *Batson*, the movant must first make a prima facie case that a peremptory strike has been exercised on the basis of race. If the movant satisfies that first step, the side exercising the strike must offer a race-neutral reason for striking the potential juror. The trial judge must then consider all the evidence to determine whether the movant has shown purposeful discrimination [*Miller-El v. Dretke* (2005)].

A major criticism of *Batson* is the ease with which parties can supply a plausible race-neutral reason for a challenged strike. Because *Batson* frames the problem of racial discrimination in jury selection as one of intent rather than impact, the party challenging the strike decision must establish that the opposing party is motivated by animus. If the opposing party offers an ostensibly race-neutral reason for the strike—such as the lawyer's unflattering read of the potential juror's demeanor or the juror's prior contact with the criminal justice system—the *Batson* motion fails unless the court finds that the proffered reason is pretextual.

This framework undermines *Batson*'s effectiveness in eradicating racial discrimination in jury selection in two ways. First, coming up with a race-neutral reason to justify a strike is easy. Trial

courts rarely reject a proffered race-neutral reason for a strike as pretextual (Bellin & Semitsu 2010), and the court has held that any reason—no matter how "silly or superstitious"—can satisfy the second prong so long as the reason is race neutral [*Purkett v. Elem* (1995), at 768]. Second, commonly accepted race-neutral reasons—such as experience with police or the criminal justice system—disproportionately apply to some racial groups more than others (Butler 2015). Consider again, for example, how the dialectical relationship between race and crime (recall the idea from above: "Crime is racialized" and "race is criminalized") would feed race-informed stereotypes (Carbado & Roithmayr 2014).

The US Supreme Court seems fully aware of *Batson*'s shortcomings in remedying racial discrimination in jury selection. In fact, the court has been more open to cases alleging race discrimination in the exercise of peremptory strikes, and more likely to rule in favor of criminal defendants in these cases, than in any other context (Tokaji 2003). Supreme Court decisions in recent years—starting with the *Miller-El* cases more than 10 years ago and continuing through *Flowers v. Mississippi* (2019)—have tried instead to strengthen the *Batson* framework by recognizing plainly valid claims and expanding the evidentiary framework.

In three recent *Batson* cases, the court calls out racism and intervenes. The court found that the prosecutor violated *Batson* in all three cases. Each case identifies and documents compelling evidence of intentional discrimination by prosecutors in the exercise of peremptory challenges. All three cases involve black defendants facing a death sentence. After excluding every single black prospective juror, the prosecutor in *Snyder v. Louisiana* (2008) "inflamed the [all-white] jury's passion" by invoking parallels between Snyder's prosecution and the O.J. Simpson murder trial [Steiker & Steiker 2019, quoting *State v. Snyder* (2006), Johnson, J., dissenting]. The record in *Foster v. Chatman* (2016, p. 1744) included actual prosecutorial jury selection notes highlighting the names of black prospective jurors and listing these jurors as "definite NO's." *Flowers v. Mississippi* involved six separate criminal trials by a single prosecutor. The Mississippi Supreme Court found the prosecutor to have violated *Batson* in the third case. In addition, the court knew that "in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck," and "in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors" [*Flowers v. Mississippi* (2019), p. 2235].

The opinions report the damning evidence in exacting detail. In doing so, the court appears to set these cases apart as highly unusual, properly identified and corrected, and unlikely to be repeated (Steiker & Steiker 2019). Importantly, however, the evidence in these cases is stark but not rare. Similar prosecutorial notes and training materials have been identified in other jurisdictions. Similar strike disparities have been documented in many cases (Grosso & O'Brien 2012, 2016–2017).

The treatment of each case as a remediable aberration belies the stark history of race and jury selection. The court corrects findings of fact in each case without considering *Batson*'s fundamental structural flaws that we discussed above—namely, its focus on intentional discrimination. In so doing, the court ignores "the broader context of systemic racial bias in the capital and criminal justice processes" (Steiker & Steiker 2019). The earlier cases strengthening the *Batson* framework are no different. By looking at discrimination "as the product of isolated, individual decisions and behaviors," the court "inappropriately ignore[s] the structures that produce and perpetuate them, as well as the cumulative and continuing influence of preceding decisions" (Carbado & Roithmayr 2014), and thereby curtails any potential for meaningful change.

One response to this evidence might be to eliminate peremptory challenges altogether, an approach Canada recently adopted [Act to Amend the Criminal Code, Youth Criminal Justice Act and Other Acts and to Make Consequential Amendments to Other Acts, S.C. 2019, c. 25

(June 21, 2019)]. Washington State chose, instead, to confront the evidence directly. In 2018, Washington responded to criticisms of *Batson* as toothless by promulgating Rule 37, with the stated purpose of "eliminat(ing) the unfair exclusion of potential jurors based on race or ethnicity" (Washington General Court Rule 37 on Jury Selection). Although the rule shares *Batson*'s objective, the framework it sets forth for adjudicating a challenge to a peremptory strike differs in significant ways and gives the movant a meaningful chance for relief.

Recall that the first step of the *Batson* inquiry requires the movant to make a prima facie case of discrimination. This step is not supposed to be onerous, but unless the movant meets this burden, the responding party need not proffer any justification for the strike [*Johnson v. California* (2005)]. Rule 37, in contrast, does away with the need to make a prima facie case. The party exercising the challenged strike must offer its reasons "(u)pon objection" by the moving party.

Under *Batson*, once the party seeking to exercise the strike offers its reason, the court must determine whether the proffered reason is credible or is instead a pretext for discrimination. The focus on credibility means that the inquiry turns on the striking party's state of mind and honesty about their motives. Under Rule 37, however, the court "need not find purposeful discrimination to deny the peremptory challenge" but should "evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances." In doing so, "[i]f the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied."

The rule goes further by explaining that "an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors" in the state. In other words, Rule 37 seems to require judges to grant the objecting party's motion and deny the peremptory strike if the strike even appears to have been tainted by racism, even if the court does not believe that the striking party was actually motivated by race.

Washington's system for countering race-based peremptory strikes goes even further. Rule 37 directs judges to consider whether a proffered reason for a strike "might be disproportionately associated with a race or ethnicity" and "whether the party has used peremptory strikes disproportionately against a given race or ethnicity, in the present case or in past cases." This reform expressly rejects the ineffective color-blind approach adopted time and again by the Supreme Court (Grosso & O'Brien 2012, 2017) and instead recognizes, as Justice Sotomayor said, that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race" [*Schuette v. Coalition to Defend Affirmative Action* (2014), Sotomayor, J., dissenting].

Moreover, the new Washington rule sets forth a list of presumptively invalid reasons, explaining that the listed reasons have historically "been associated with improper discrimination in jury selection" in the state. The presumptively invalid reasons include prior contact with or expressing a distrust in police, having close relationships with people who have been convicted of crimes, living in a high-crime neighborhood, and not being a native English speaker. The rule also makes it harder to justify a strike based on a potential juror's objectionable demeanor without having first brought it to the court's attention so that the striking party's perceptions can be verified. In other words, if a lawyer wants to strike a prospective juror for having poor eye contact or seeming inattentive, they must alert the judge and other parties to this objection. If the alleged behavior is not corroborated, the court shall not accept the given reason for the peremptory challenge.

To date, there are no published decisions in which Washington courts have applied this rule. It remains to be seen whether the courts ultimately apply the rule in such a way that gives teeth to the prohibition on considering race in jury selection or water it down to such a degree that it is no more effective than *Batson*. It is nevertheless remarkable that the Washington Supreme Court, in promulgating Rule 37, has explicitly recognized the need to look beyond an individual actor's

explicit motivation not only to implicit or unconscious motives but also to how certain actions perpetuate racial discrimination even in the absence of the decision-maker's animus.

This shift away from an exclusive focus on a lawyer's personal motivation in the moment they exercise a strike to acknowledging the importance of historical context, the influence of race, and the ongoing impact of past discrimination is significant. The rule explicitly allows trial courts to consider the role of implicit bias in discrimination, which signals a step away from the narrower conception of discrimination as conscious racial animus. But it goes further than that, which is vital because initiatives meant to counter implicit bias typically focus on the motivations of the decision maker at the time they act, without sufficient regard for the system in which they operate and the history that produced it (Kahn 2017). We further discuss the limits of initiatives to counter implicit bias below.

Rule 37 is remarkable because it frames the inquiry as broader than individual decision making. It does so by foreclosing reasons traditionally proffered to justify strikes that were rooted in racial stereotypes and have a disparate impact on racial minorities, and by recognizing structural threats as well. As such, it stands in contrast to the jurisprudence of the US Supreme Court in this area.

## Jury Unanimity

In 2018, Louisiana voters repealed a law that allowed noncapital defendants to be convicted without a unanimous jury verdict. The new law, however, applied only prospectively, and Evangelisto Ramos, who had been convicted of a 2014 murder, challenged the constitutionality of Louisiana's nonunanimous jury rule. The Supreme Court agreed and overruled its earlier decision in *Apodaca v. Oregon* (1972), now holding that the right to a unanimous jury verdict applies to the states [*Ramos v. Louisiana* (2020)].

Before the decision in *Ramos*, only Oregon still allowed nonunanimous verdicts. On its face, a rule allowing convictions by nonunanimous juries is race neutral. Anyone—regardless of race—could be convicted even though the prosecution failed to convince all the jurors of their guilt beyond a reasonable doubt. Nor did the rule have anything explicitly to do with the race of the jurors. Nevertheless, the historical origins of allowing nonunanimity, as well as the consequences of so doing, are starkly racially discriminatory. In that way, dispensing with jury unanimity "reinforces white supremacy without explicitly mentioning race" (Butler 2015, p. 1442; see also Roithmayr 2000).

Justice Gorsuch framed the majority's opinion with a discussion of the overtly racist history of nonunanimous juries [*Ramos v. Louisiana* (2020)]. Louisiana held a constitutional convention in 1898, at which it ratified its nonunanimous jury provision. Among its explicitly racist goals was to dilute the power of black jurors following the Civil Rights Act of 1875's assurance of a right to jury trial free from racial discrimination. The goal of the Louisiana convention was to "craft a constitution that would 'establish the supremacy of the white race. . .to the extent to which it could be legally and constitutionally done.'" (Ifill et al. 2019, p. 2). At the time, there were calls to allow nonunanimous verdicts to avoid hung juries that ensure that "one partisan" did not "disappoint or obstruct justice" (Ifill et al. 2019, p. 16). White Louisianans expressed concern that black jurors would not convict black defendants because of sympathy and racial loyalty and therefore sought to prevent black jurors from precluding a guilty verdict agreed upon by their white counterparts (Ifill et al. 2019).

The origin of Oregon's nonunanimous verdict rules is likewise a story of oppression of minorities, though the evidence is less overt (Frampton 2018, footnote 21). Oregon amended its constitution in 1934 to allow for nonunanimous jury verdicts in criminal cases other than first-degree murder. The amendment was passed following a high-profile verdict of manslaughter in

the murder trial of a Jewish man accused of killing a Protestant. Many in Oregon believed that the defendant should have been convicted of murder and sentenced to death, and the publicity surrounding the crime and the aftermath of the trial was replete with anti-immigrant rhetoric. For instance, a newspaper describing the ballot measure to allow nonunanimous juries argued that allowing immigrants from parts of the world "unfit for democratic institutions, lacking the traditions of the English-speaking peoples" threatened to undermine the trial process (Kaplan & Saack 2016, quoting "Debauchery of Boston Juries," *Morning Oregonian*, Nov. 3, 1933). This was typical of the sentiments expressed—with no meaningful rebuttal—leading up to the ballot initiative's passage.

Although the original motivations of the nonunanimity rule have been largely forgotten (or ignored), evidence suggests that its effects have been precisely as intended. Frampton (2018) analyzed 199 nonunanimous verdicts delivered by racially mixed juries from 2011 to 2017 in Louisiana and found that 190 of those were nonunanimous verdicts of guilt (see also Adelson et al. 2018). Among the nonunanimous juries, black jurors disproportionately cast the not-guilty votes that the other jurors' votes overrode. More precisely, black jurors were approximately 2.5 times more likely to be in the dissent than their nonblack counterparts. Moreover, black defendants were more likely to be convicted by a nonunanimous jury than their white counterparts. White defendants, in contrast, were overrepresented among those convicted by unanimous juries (Frampton 2018).

Louisiana voters amended their state constitution in 2018 to end the practice of conviction by nonunanimous juries. A bill to put a similar proposal on the ballot in Oregon died in the state senate in 2019, despite broad support among lawmakers and in the legal community (Wilson 2019). Few continue to defend the continued practice of using nonunanimous juries (though there have been unsuccessful proposals to allow nonunanimous juries in several states in recent years) (Kaplan & Saack 2016). Those who do advocate them highlight expected gains in efficiency and greater ease in convicting criminals (see Tulchin 2005), with no mention of race. But as Butler (2015, p. 1442) asserts, "The law often reinforces white supremacy without explicitly mentioning race."

That the Supreme Court overruled *Apodaca v. Oregon* (1972) and held that the Constitution requires unanimity is not in itself remarkable. *Apodaca* was a plurality decision by a fractured court that did not find common ground in its rationale for allowing nonunanimous verdicts. What was remarkable, however, was the *Ramos* court's emphasis on the rule's overtly racist origins to justify its departure from stare decisis. Justice Gorsuch's majority opinion and concurrences by Justices Sotomayor and Kavanaugh explicitly rely on the law's racially discriminatory origins to find it unconstitutional [*Ramos v. Louisiana* (2020)].

## Jury Deliberations

The Sixth Amendment guarantees the right to a trial by jury in all non-petty criminal cases [*Duncan v. Louisiana* (1968)], and the court has recognized that this requires a jury of a size sufficient to ensure careful deliberations by jurors with some diversity of viewpoint and experience [*Ballew v. Georgia* (1978)]. As important as jury deliberations are to a fair process, what happens in the jury room must remain secret, immune from scrutiny that might chill honest and careful deliberations.

Accordingly, courts are generally unwilling to examine jurors' behavior during deliberations [see, e.g., Federal Rules of Evidence No. 606(b)]. In *Tanner v. United States* (1987), the court upheld the trial court's refusal to consider affidavits from jurors in Tanner's case attesting to other jurors' use of alcohol and illegal drugs during his trial for conspiracy and mail fraud. The court explained the rationale behind the juror anti-impeachment rule as necessary to promote "full and frank

discussion in the privacy of the jury room, to prevent the harassment of jurors by losing parties, and to preserve the community's trust in a system that relies on the decisions of laypeople" [*Tanner* (1987), p. 120].

Full and frank discussions among jurors with diverse views, however, may also lay bare racist and legally unacceptable considerations in how jurors are weighing the evidence. In *Peña-Rodriguez v. Colorado* (2017), Miguel Angel Peña-Rodriguez was charged with harassment, unlawful sexual contact, and attempted sexual harassment of a child. The prosecution alleged that he sexually assaulted two teenaged sisters in the bathroom of the horse-racing facility where he worked. The girls identified Peña-Rodriguez as their attacker, and after a three-day trial, the jury convicted him of unlawful sexual contact and harassment.

Defense counsel spoke with jurors immediately after the verdict. Two jurors told counsel that one juror made several overtly racially derogatory remarks during deliberations [*Peña-Rodriguez* (2017), p. 862]. He had also said that he discounted the defendant's alibi witness because he was an "illegal" [*Peña-Rodriguez* (2017), p. 862]. Defense counsel presented affidavits from the two jurors to the trial court, which denied the defendant's motion for a new trial because Colorado's rules of evidence protect deliberations from inquiry.

The Supreme Court, in a five-to-four decision, held that the Sixth Amendment requires an exception to the no-impeachment rule in cases of clear racial bias, "a familiar and recurring evil that, if left unaddressed, would risk systematic injury to the administration of justice" [*Peña-Rodriguez* (2017), p. 868]. Unlike other forms of misconduct that do not warrant interrogating the deliberations, racial bias is so pernicious and undermining of a fair trial that it warrants requiring trial courts to consider evidence that a juror made statements indicating overt racial bias in deciding whether the defendant was denied his or her right to a fair trial.

Justice Kennedy, writing for the majority, clarified that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment rule to allow further judicial inquiry" [*Peña-Rodriguez* (2017), p. 869]. Rather,

> there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. [*Peña-Rodriguez* (2017), p. 869]

In so holding, the court noted that a significant minority of jurisdictions already recognized a racial bias exception to the no-impeachment rule with no grave consequences for the integrity of the jury system. Its decision recognizes that other types of bias can infect jury decision making and yet be immune from inquiry, but it treats racial bias as a particularly malignant evil that warrants an exception to the no-impeachment rule.

This exception, however sensible, is extremely limited in scope and will likely do little to lessen the influence of race in jury decisions. Post-verdict investigations into jury deliberations may occur only upon an allegation that a juror expressed unambiguous and overt racial bias. Although it would be naïve to think that explicit racism is a relic of history, it would be equally naïve to think that malicious stereotypes and racism are most often expressed directly.

Moreover, although the court recognized the pernicious effect of racism in undermining the fairness of the system, it reinforced the notion that racism is primarily a problem of rare individual bad actors acting with animus, rather than the result of a system working exactly as it was designed (see Butler 2015). This focus on a case with unusual and clearly problematic facts echoes the jury selection cases discussed above (Steiker & Steiker 2019). This is not to say the court decided wrongly in *Peña-Rodriguez*, or in any other recent cases calling out explicit racism for what it is

[see *Foster v. Chatman* (2016)]. But this conception treats racism as akin to an old-fashioned disease, like measles or polio, that has been effectively eradicated but for a few bad actors who refuse to avail themselves to modern medicine.

## INITIATIVES TO LIMIT THE INFLUENCE OF IMPLICIT BIASES

Although much of the Supreme Court's attention to racial bias has focused on explicit racism, efforts to counter implicit bias have become more common in recent years. Research in social cognition has shown that even people who disavow racism and espouse egalitarian values harbor biases of which they are not consciously aware. Implicit processes involved in stereotyping and prejudice can affect how someone perceives a situation, but beneath the perceiver's conscious awareness (Hunt 2015).

How such implicit biases affect behavior is far from settled, and interventions to mitigate them have been largely unsuccessful (Lai et al. 2016). Nevertheless, efforts to educate court officials and jurors about the existence and effects of implicit bias have become increasingly popular. The ABA Implicit Bias Initiative provides a toolbox for users to explore implicit biases and approaches to mitigate them (Am. Bar Assoc. n.d.). The National Center for State Courts also piloted educational programs in three states between 2009 and 2012 but no longer provides the materials on its website, noting that they are "no longer current given the recent robust research in this area" (Natl. Cent. State Courts n.d.). The webpage links to reports and best-practice guides from a variety of institutions.

Recognizing the role of implicit bias may be useful in implementing thoughtful reforms. Debiasing interventions have not shown promise (Lai et al. 2016), but placing guardrails on decision-making processes to check the influence of legal actors' biases may be effective in promoting consistent treatment of defendants (see McCarter et al. 2017).

Moreover, educating criminal justice officials about their unconscious biases could make them more receptive to interventions that seek to demonstrate the ways in which racial bias other than explicit animus continues to infect the system. As Carbado & Roithmayr (2014) discuss, implicit bias may help explain instances of excessive force by police officers, as well as jurors' reluctance to hold those officers accountable.

A criticism of focusing on implicit bias, however, is that it maintains the system's focus on individual actors as perpetrators of discrimination, rather than on the systemic inequalities that produce and reinforce disparities (see Kahn 2017). A jurisdiction that implements a system of cash bail may do so because the decision makers perceive it to be efficient and necessary to ensure arrestees' compliance, indifferent to or unaware of its disproportionately adverse impact on racial minorities. Likewise, a prosecutor who believes that people with family members in the criminal justice system make less favorable jurors is not necessarily acting on an unconscious racial bias in striking such jurors, but the strategy will disparately impact potential jurors of color. Purging individual judges and lawyers of their unconscious biases—assuming this could even be done—might alleviate some of the disparities in how bail is set or jurors are selected, but it would do nothing to mitigate the ostensibly race-neutral decisions' racially disparate impact.

## PRISON ABOLITIONIST MOVEMENT

This section contrasts this partial inventory of incremental changes with an example of radical transformation, as a way of illuminating the boundaries faced by and inherent in incremental reform (Butler 2015). Prison abolitionists seek to eliminate the criminal processing system as we

know it. McLeod (2019, p. 1616) explains and documents how the abolitionist movement grounds itself in the critical discourse:

> Whereas reformist efforts aim to redress extreme abuse or dysfunction in the criminal process without further destabilizing existing legal and social systems. . .abolitionist measures recognize justice as attainable only through a more thorough transformation of our political, social, and economic lives. To realize justice in abolitionist terms thus entails a holistic engagement with the structural conditions that give rise to suffering, as well as the interpersonal dynamics involved in violence.

McLeod presents compelling evidence of how broadly diverse and intentionally decentralized coalitions in Chicago have demanded and created changes that are based on abolitionist principles.

For example, abolitionists in Chicago have intentionally developed alternative ways of addressing "forms of less public interpersonal harm" (McLeod 2019, p. 1629). These approaches seek to prevent violence and to respond without involving the criminal courts. The abolitionist movement aims to redefine criminal behavior itself, noting that the vast majority of criminal prosecutions in the United States are for low-level, often trivial offenses that disproportionately target people of color (McLeod 2019; see also Kohler-Hausmann 2014, Natapoff 2018).

McLeod provides a second example of this transformative approach that demonstrates the scale and depth of the abolitionist project. The members of this movement worked primarily outside the legal system to bring accountability for the infamous Chicago police torture cases (see Gross et al. 2017).

> Survivors' public testimony of torture offered an overwhelming record of the harms perpetrated by Chicago police. Survivors, organizers, and lawyers ultimately submitted the Chicago torture cases to international bodies. . .This comprehensive accounting, outside the confines imposed by restrictive rules of evidence in domestic criminal and civil courts, constituted an important initial part of the process of contemplating what justice for the Chicago police torture should entail. We Charge Genocide demanded a different conceptualization of the injustice of police conduct and possible redress. (McLeod 2019, pp. 1624–25)

This movement relies upon

> a critical analytic method [that] requires a significant departure from liberal approaches to police reform that tend to reproduce episodic narrations of police brutality that fail to conceptualize gratuitous, sometimes spectacular performances of gendered racist policing as part of a general historical continuity of power relations that structure U.S. state institutions and the social-economic formations. (Rodríguez 2019, p. 1604)

It is not hard to identify the ways in which this approach differs from the others. Rather than adjusting extant structures to remediate race effects, the abolitionists devise and implement a new structure. Recall, of course, that incremental legal reforms can sometimes lead to meaningful change (Carbado & Roithmayr 2014, Meares 2015). For example, reforms requiring race-informed, evidence-based bail practices, or those imposing rules on jury selection that call out racism and the known legacy of racism in that context, may lead in this direction. To succeed, however, they must reflect mindfulness of the context in which they operate.

## CONCLUSION

This review collects recent court decisions, research, and proposals to limit the influence of race in criminal trials. Specifically, we focus on measures designed to mitigate racial bias during pretrial

decision making, jury selection, and jury deliberations. Of these, Washington's new rule for jury selection offers the most promising model for confronting race in criminal trials. It treats racism as the product of both individual actors' decision making and the residue of long-standing legal structures. It recognizes that even in the absence of discriminatory intent, racism is perpetuated through the appearance of discrimination.

Other reforms presented in the review are less likely to have a significant impact, because they are either narrow in scope or focused on discrimination by individual decision makers. Nonetheless, calling out racism in any form is important. Providing race-conscious training of judges and defense counsel for bail reform, recognizing an exception to the no-impeachment rule for expressions of racism in deliberations, and correcting the most extreme examples of racial discrimination in jury selection all advance Justice Sotomayor's advice of teaching and "speaking openly and candidly on the subject of race" [*Schuette v. Coalition to Defend Affirmative Action* (2014), p. 381].

This review is by no means intended to be exhaustive but instead is intended to highlight examples of measures to counter bias. It notes the limited potential for "highly unusual, properly identified and corrected, and unlikely to be repeated" legal decisions or obtuse measures to curb implicit bias to mitigate the ways in which racial bias taints the process. Those efforts stand too far removed from the reality of a broken system and instead serve to perpetuate business as usual. Nevertheless, we acknowledge that although the other incremental changes remain bounded by the system in which they are deployed, in some instances reforms might succeed when they address the structural bases of racial inequities. Of course, each of these reforms falls far short of the radical transformation abolitionists deem essential.

## DISCLOSURE STATEMENT

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