

Using *Gregory* and Federal Death Penalty Law to Combat Racism in the Justice System



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Racism Has No Place in the Justice System ...or so we are told

The unmistakable principle underlying these precedents is that discrimination on the basis of race, “odious in all aspects, is especially pernicious in the administration of justice.” *Rose v. Mitchell*, 443 U. S. 545, 555 (1979) .

The jury is to be “a criminal defendant’s fundamental ‘protection of life and liberty against race or color prejudice.’ ” *McCleskey v. Kemp*, 481 U. S. 279, 310 (1987).

Permitting racial prejudice in the jury system damages “both the fact and the perception” of the jury’s role as “a vital check against the wrongful exercise of power by the State.” *Powers v. Ohio*, 499 U. S. 400, 411 (1991).

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But Courts Have Failed...

“[F]rom December 1981 through May of 2014, special sentencing proceedings in Washington State involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants after the impact of the other variables included in the model has been taken into account.”

State v. Gregory 427 P.3d 621 (Wash. 2018), at 633

(Quoting the *Beckett Report*)

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And Failed...

“[T]here are two types of black people: 1. Black folks and, 2. Niggers. [Tharpe, the defendant] who wasn’t in the ‘good’ black folks category in my book, should get the electric chair for what he did. [S]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn’t my reason. [A]fter studying the Bible, I have wondered if black people even have souls.”

Juror Barney Gattie in a post-trial affidavit, as quoted in
Tharpe v. Sellers, 538 U.S. ____ (2018)

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And Failed...

H. C. told the other jurors that he “believed the defendant was guilty because, in [H. C.’s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.” The jurors reported that H. C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, “ ‘I think he did it because he’s Mexican and Mexican men take whatever they want.’ ” According to the jurors, H. C. further explained that, in his experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” Finally, the jurors recounted that Juror H. C. said that he did not find petitioner’s alibi witness credible because, among other things, the witness was “ ‘an illegal.’ ” (In fact, the witness testified during trial that he was a legal resident of the United States.)

Comments of Juror H.C. during deliberations, as quoted in *Pena-Rodriguez v. Colorado*, 580 U.S. ____ (2017)

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And Failed to Prevent Racism From Infecting Juries

The foreman...told the other jurors that he used to live on or near an Indian Reservation, that “[w]hen Indians get alcohol, they all get drunk,” and that when they get drunk, they get violent. Juror K.C. said that when she then argued with the foreman that not all Native Americans get drunk, the foreman insisted, “Yes, they do.” Juror K.C. claimed that at that point a second juror chimed in to say that she had also lived on or near a reservation. While Juror K.C. could not hear the rest of this juror’s statement, it was “clear she was agreeing with the foreman’s statement about Indians.” Juror K.C. continued to argue with the foreman, going back and forth several times.

Comments of the jury foreman as quoted in *United States v. Benally*, 546 F. 3d 1230 (10th Cir. 2008); Cert. denied, *Benally v. United States*, 558 U.S. 1051 (2009)

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Death Qualification: Courts Can Spot Bias

“Witherspoon is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.”

Wainwright v. Witt, 469 U.S. 412 (1985), at pg. 423

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Even when that bias is Implicit:

“What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made ‘unmistakably clear’; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.”

Wainwright v. Witt, 469 U.S. 412 (1985), at pg. 424-426

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And even when bias does not appear in the record:

“The judgment as to whether a venireman is biased...is based on determinations of demeanor and credibility that are peculiarly within a trial judge’s province.”

Uttecht v. Brown, 551 U.S. 1 (2007), citing *Witt* at pg. 424-425

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Racism in the Jury Room Imperils Verdicts

“Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.

This departure from basic principle was exacerbated because it concerned race. ‘Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.’ *Rose v. Mitchell*, 443 U. S. 545,555 (1979). Relying on race to impose a criminal sanction ‘poisons public confidence’ in the judicial process.”

Majority Opinion of Chief Justice Roberts overturning a death sentence in *Buck v. Davis*, 580 U.S. ____ (2017)

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We might have a remedy...after the fact

“All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

The Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”

Pena-Rodriguez v. Colorado, 580 U.S. ____ (2017)

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When Courts Death Qualify Jurors but don’t “Racial Bias” Qualify Jurors

“It is now apparent that Washington's death penalty is administered in an arbitrary and racially biased manner. Given the evidence before us, we strike down Washington's death penalty as unconstitutional under article I, section 14. ”

State v. Gregory, 427 P3d 621 (2018), at pg. 633

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Proposed Courses of Action:

1. **Revise the *voir dire* process:** Require judges to devote time to “racial bias qualify” the jury
2. **Revise current jury instructions:** Identify clear expectations and consequences for prospective jurors before trial begins and at the close of trial before deliberations commence

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1. Revised *Voir Dire*:

Be as proactive in eradicating racial bias from the jury room as we are in eradicating reluctance to impose death

- Require courts to take an active role in “Racial Bias Qualifying” all criminal juries.
- Focused questioning by the judge and follow-up by the attorneys patterned on “Death Qualification” to ensure that jurors who harbor views, even implicitly, which would *prevent or impair* their ability to be impartial shall be excluded for cause. Surface and deal with explicit and implicit racial bias *before* it can infect a jury’s deliberations.

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2. Revised Jury Instructions: Clear Consequences, Fair Warning

Pre Trial Instruction:

“Prospective members of the jury: Racism has no place in our system of justice. I want you to clearly understand that you may not serve on this jury if you harbor views which cause you to be in any way prejudiced or biased based upon race. It is your duty consistent with your oath that you honestly reflect upon and truthfully disclose any potential bias or prejudice you may hold based upon race during the *voir dire* process.

Any prospective juror who fails to disclose such racial prejudice or bias and is thereafter selected to deliberate in this matter will be acting to subvert justice and will violate their oath and the direct order of this court.

Statements made by any juror during deliberations which exhibit racial prejudice or bias should be immediately brought to the attention of the court. Were you to fail to report such statements and/or allow them to in any way influence your deliberations in this matter, you would undermine the validity of any verdict you may render.

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2. Revised Jury Instructions: Clear Consequences, Fair Warning

Close of trial, before deliberations commence:

“As jurors, you have sworn an oath to fairly and impartially weigh the issues in this case based upon the evidence presented and the law as I have provided it to you in these instructions. You are reminded that no racial or other bias may play any part in your deliberations. Any juror who allows implicit or explicit racial or other bias to influence their deliberations acts to subvert justice and to violate their oath. Statements made by any juror during deliberations which exhibit racial bias or prejudice must immediately be brought to the attention of the court.”

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In the End

If impartiality and the ability to scrupulously follow the law are matters of such concern and care in selecting jurors willing to condemn a person to die,

And if those concerns are so vital that courts will excuse for cause any juror who has or appears to have even an impaired ability to vote for execution,

Then it is surely a matter of *fundamental* concern that jurors who harbor racial biases, or who questioning suggests may harbor racist views, not be permitted to sit in judgment of a defendant in any criminal case.