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The Color of Truth: Race and the Assessment of Credibility

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Then you will know the truth, and the truth will set you free.[1]

The truth will make us free.
The truth will make us free,
The truth will make us free someday.
Oh deep in my heart, I do believe,
We shall overcome someday.[2]

INTRODUCTION

Everything we want to believe about truth and justice is that there is one truth, a color-blind truth, which, in the end, will lead to justice. On the other hand, anyone familiar with the American history must admit that the truth has not always set people free in this country. Are race-based assessments of credibility a thing of the past? "White lies" still refer to harmless, socially useful fibs, and "black lies" mean evil, irredeemable falsehoods. Are these idioms meaningless anachronisms? Just what color is the truth that will make us free today?

The verdict in the first Rodney King beating trial was a seminal event for many Americans. For some, the trial underlined the flagrancy of racial injustice; for others, it reopened racial justice issues they had thought—or had wished to think—were closed. I start with the Rodney King verdict not because it is a prototypic example of the problem I want to address, but because it is still such a prominent racial justice icon that a shorthand, so convenient for introductions, is possible. It was difficult for most of us to watch the videotape of police officers beating Rodney King, listen to their testimony, and understand how the first jury could have found Officers Powell, Koon, and Briseno credible. Were they believed because they were white, as was most of the jury? The Latina juror in the state case reported that she had been mocked for her desire to review the videotape, saying that "it's like they wanted to see what they wanted to see."[3]

There are at least two responses that believers in color-blind truth can make. First, they might explain that the problem was that Rodney King did not take the stand to provide a human version of the videotape's truth. That Powell and Koon were later convicted in the federal trial, in which King did testify, lends some support to

1. *John* 8:32.
2. WE SHALL OVERCOME, traditional folk song.
3. Joseph Kelner & Robert S. Kelner, *The Rodney King Verdict and Voir Dire*, 207 N.Y.L.J. 1003, 1006 (1992).

this theory. If correct, however, this theory simply moves the credibility issue one step back in time, for it leads to the question of why the state prosecutors chose to keep King off the stand.

A second swing from the color-blind corner might be that this case was not about credibility at all, but about a warped notion of just deserts: the jurors did not believe the police officers but acquitted them anyway. This response suggests that if there is a problem, I have focused on the wrong one; the real problem is actually one of animosity and jury nullification. As an empirical matter, I suspect this is half right,[4] but not the full story. There is some evidence that the jury at least thought the officers were acting lawfully, and certainly some trial observers claimed to have concluded, based on the evidence, that no unlawful brutality had occurred.[5] It is, of course, difficult to determine whether "good-faith," but racially influenced, determinations of credibility had been made, or whether fact finders had in "bad faith" disregarded credibility to act upon racial animosity or some other impermissible motive.

Although racially mediated determinations of credibility may interact with other racial motivations to produce an unjust verdict, and in some settings these several strands may be impossible to separate completely, this article nevertheless attempts to narrow the focus to race and credibility assessments. There are three reasons for doing so.

First, the issue of what influence race may properly have on credibility is a complicated one, and, unlike an absolute prohibition against racial *animosity*, an absolute prohibition of all considerations of race in credibility determinations may not be desirable, even in theory. Let me call on another (although, in my view, more problematic) racial justice icon, the O.J. Simpson case.[6] From the beginning, polls revealed that African Americans and white Americans viewed the likelihood of Simpson's guilt in radically different ways.[7] It seems clear that this difference relates to the mistrust with which African Americans view the accusations of a white police

4. One juror in a post trial interview said, "[H]e [King] deserved what he got." *Id.* at 1003.

5. *See, e.g.*, Roger Parloff, *Maybe the Jury Was Right*, AM. LAW., June 1992, at 7. Prior to defending his view that the jury was correct, Parloff rhetorically, but only rhetorically, asks, "Am I out of my mind? A fascist? A racist? (I'm White.)" *Id.*

6. People v. Simpson, No. BA097211 (L.A. County Super. Ct. Oct. 3, 1995).

7. *See, e.g.*, Seth Mydans, *In Simpson Case, an Issue for Everyone: Class and Race Concerns Beginning to Emerge as Dividing Factors*, N.Y. TIMES, July 22, 1994, at A16 (citing poll in which 62 percent of whites, but only 38 percent of Blacks, said that they believed that Simpson was "very likely or somewhat likely guilty").

officer.[8] Although we could easily condemn an acquittal of Simpson based on simple *animosity* toward white police officers, the appropriate stance toward a juror's heightened *skepticism* of a white police officer's accusations against a Black defendant is less self-evident. On the normative front, doubts about the appropriateness of an absolute ban of racial considerations are certainly strengthened by the fact that suspicion of bias turned out to be eminently warranted with respect to Officer Mark Fuhrman; on the positive front, the Supreme Court's own recent unself-conscious use of race in assessing the credibility of a habeas corpus petitioner's witness suggests the absence of an absolute rule.[9]

A second reason for treating the influence of race on credibility assessments as an analytically distinct issue lies in the fact that racially biased assessments of credibility may occur in the absence of overt—or even covert—racial animosity. If we wait for proof of racial animosity, we may be sidetracked. Even when animosity is present, we may not find evidence of it. Perhaps more important, as the Barry Lee Fairchild case[10] illustrates and as I will discuss at length in the body of this paper, race may inappropriately skew the credibility determinations of perfectly respectable judges who do not seem to manifest any animosity, racial or otherwise, toward African American litigants.

A third reason to divorce race and credibility assessments from more generalized discussions of racial justice and animosity lies in the present state of the law concerning prejudiced decision makers. To entirely remove racial animosity (or its modern counterpart, aversive racism) from the courtroom would require changes in the racial identities of decision makers. At least in the areas of voir dire[11] and peremptory challenge law,[12] however, the Supreme Court seems to have called a halt to such changes. It also has clearly signaled its

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8. *See, e.g.*, Janet Elder, *Trial Leaves Public Split on Racial Lines*, N.Y. TIMES, Oct. 2, 1995, at B9 (citing poll reporting that just 37 percent of African Americans have a high level of confidence in their local police and that 28 percent of African Americans expected to be treated more harshly than other persons in a hypothetical encounter with a police officer).

9. *See* Schlup v. Delo, 115 S. Ct. 851, 858 n.18 (1995) (referring to affiant's race); *see also* discussion *infra* Part I.B.4.c.ii.

10. *See infra* Part I.B.2.

11. *See* Ristaino v. Ross, 424 U.S. 589 (1976) (upholding trial court's refusal to allow voir dire of jury venire to ascertain racial bias in case involving Black defendant and white victim).

12. *See* Hernandez v. New York, 500 U.S. 352 (1991) (holding that prosecutor's basis for peremptory strikes was race neutral even though language proficiency was a factor in exercising the strikes); *see also* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993).

disinterest in systemic proofs of discriminatory outcomes.[13] If such larger projects are not presently feasible, smaller ones may be.

Thus, this article will address specifically the relationship between race and credibility in legal cases, while acknowledging that broader bias issues are often, though sometimes imperceptibly, intertwined in racially biased credibility determinations. Part I will survey race and credibility issues that have arisen in courts, with particular focus on two modern habeas corpus cases. Part II will summarize the legal rules that presently regulate racially influenced assessments of credibility; it may surprise some readers to realize that there is no established mechanism for challenging racially biased credibility determinations. Part III will propose some standards for determining when race is permissibly used in credibility determinations and some mechanisms for enforcing those standards. Although my sources and primary concern in this article are criminal cases, most of what follows has relevance to civil cases as well, albeit to a lesser extent.

I. UNDERSTANDING THE EFFECT OF RACE ON CREDIBILITY DETERMINATIONS

Another response that the wishfully color-blind might make to the race credibility issues raised in the Rodney King beating case and the O.J. Simpson murder trial is that they are anomalies. Because a doctrinal category for judging race and credibility claims has not been established, it is impossible to resolve this anomaly argument by counting reported cases that discuss such claims. Instead, this section disputes this possible contention through a brief and largely nondoctrinal review of the history of race and credibility determinations in this country. In addition, this section will provide an extended exploration of two modern egregious cases, supplemented by a discussion of the psychological dynamics of race and credibility determinations. For those readers not needing persuasion that race and credibility issues are worthy of attention, this section should function as a summary of the range of forms these issues have taken.

13. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1982) (holding that a statistical disparity in the imposition of the death penalty based on the race of the victim and defendant do not establish unconstitutional discrimination in the Fourteenth Amendment context).

A. *A Brief and Selective History of Race and Credibility in the Courts*

Prior to the Civil War, the color of truth was frequently mandated by statute.[14] In general, slaves could not testify against whites.[15] Although some northern states such as Massachusetts purported to treat testimony without reference to the race of the witness,[16] legal incompetence to testify based on race was not limited to the South. For example, even though very early case law in New York permitted slaves to testify against other Black persons and even against white persons,[17] the 1702 slave code prohibited slave testimony in any matter except in cases pertaining to conspiracies among slaves where the testimony would be used against another slave, a provision substantially reenacted in 1730.[18] Until the abolition of slavery in New York a century later, slaves could only serve as witnesses in criminal cases against other slaves.

Lest we become sidetracked by formal distinctions between disabilities based on slave status and those based on race, other statutory provisions, sometimes slightly less drastic, imposed a testimonial disability based on race itself. For example, a 1785 New York statute precluded all testimony by any Black person against any white person.[19] In Pennsylvania, from 1700 to 1780, free Black persons were prohibited from testifying in regular courts against whites.[20] Slaves were so disabled until 1847.[21] Beginning in 1702 and apparently lasting through the Civil War, Virginia limited the admissibility of testimony by African Americans to criminal cases in which the defendant was Black and civil cases in which all parties were Black.[22] By the early 1800s, such provisions were typical for slave states.[23] One 1831 South Carolina case even held that no Black

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14. *See, e.g.*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, 58, 119-20, 124, 133, 139, 142, 146, 205-06, 258, 299 (1978) (describing various state statutes concerning the participation of slaves and free African-Americans in civil and criminal proceedings).

15. For an extended discussion of slave evidentiary rules, see Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209 (1993).

16. *See* HIGGINBOTHAM, *supra* note 14, at 85.

17. *See id.* at 104, 112.

18. *See id.* at 133.

19. *See id.* at 139.

20. *See id.* at 282.

21. *See id.*

22. *See id.* at 58.

23. *See* Morris, *supra* note 15, at 1210.

person could testify in *any* civil suit, regardless of the race of the parties.[24]

In 1866 Congress enacted a statute which forbade deprivation under color of law of several specifically enumerated rights, including the rights to sue, to be parties, and to give evidence.[25] Although discriminatory treatment of the value of Black and white testimony therefore ended with Reconstruction, both law and lore document the persistence of race-based assessments of credibility throughout the Jim Crow era.

Perhaps the best known example of such color-suffused views of truth is Harper Lee's depiction of Alabama justice in the 1930s in her novel *To Kill a Mockingbird*.[26] The novel won unprecedented literary honors in 1960[27] and later became an Academy Award-winning movie starring Gregory Peck as the upstanding white lawyer, Atticus Finch.[28] The novel recounts the story of an African American, Tom Robinson, on trial for the rape of a white woman, Maybella Ewell.[29] Because there are no eyewitnesses, the case is largely his word against hers. The skillful defense lawyer elicits testimony from the defendant, from the alleged victim, and from the alleged victim's father. The testimony makes it clear what the outcome would be were this a color-blind proceeding.[30] On all the standard indicia of reliability, the defendant should be believed and acquitted. The complaining witness is nervous, hostile and evasive. She contradicts herself. She has a motive to lie. She is not a responsible person; she is either pathetically deprived or worthless trash, depending on the generosity of one's outlook.[31] The defendant is quite different. His demeanor is respectful and straightforward. He has no particular motive for committing the crime. He is a hard worker and has been involved only in a minor disorderly conduct case.[32] But what is conclusive to the child narrator is the objective evidence that contradicts

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24. *See* HIGGINBOTHAM, *supra* note 14, at 206.

25. *See* Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866). In 1874 the enumeration of protected rights was expanded to protect "any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States . . . ." 18 U.S.C. § 242 (1989).

26. HARPER LEE, TO KILL A MOCKINGBIRD (1960).

27. *See* Timothy Hoff, *Influences on Harper Lee: An Introduction to the Symposium*, 45 ALA. L. REV. 389-90 (1994).

28. The moral correctness of Finch has been hotly debated. *See* Claudia Johnson, *Without Tradition and Within Reason*, 45 ALA. L. REV. 483, 483-84 (1994) (reviewing controversy touched off by Monroe Freedman's criticisms of Finch as a role model for lawyers).

29. *See* LEE, *supra* note 26.

30. *See id.* at 187-210.

31. *See id.* at 191-200.

32. *See id.* at 202-210.

the complaining witness' account: the defendant could not have hit the purported victim and slung her to the floor in the manner she describes, for his right arm is shriveled and useless due to a childhood cotton gin accident.[33] What is obvious to the child is that Maybella Ewell is lying (in part to cover a beating by her father) and that Tom Robinson is guilty of no more than feeling sorry for Ewell. But what is obvious to the racially naive narrator is not obvious to the jury, which expeditiously convicts the defendant.[34]

A 1994 symposium in the *Alabama Law Review* devoted to *To Kill a Mockingbird*[35] attests to its continuing influence on the legal imagination. As the next section will demonstrate, there are good empirical reasons for this fascination, not all of them relics of a bygone era. Although the reported cases from the first hundred years after the Civil War rarely have such rich factual detail, they too depict a reliance on race as a proxy for credibility.

In *Brown v. Mississippi*,[36] a 1934 jury convicted three African American defendants of murder on the strength of uncorroborated confessions that the defendants later repudiated at trial. They testified that the police had obtained these confessions through torture (with one defendant hanged and then let down and all the defendants whipped until they confessed) and then compelled them to conform their confessions to the details specified by their interrogators.[37] No one denied the hanging or severe whippings, but a deputy involved declared that the torture was "[n]ot too much for a negro."[38] Indeed, confession law is replete with cases of Black defendants who were physically coerced into confessions[39] and whom juries convicted despite uncontradicted evidence of such coercion.

Chambers v. Florida[40] involved a police dragnet for the murder of a white man in which twenty-five to forty African American suspects were questioned; after five days of continuous questioning, four suspects confessed.[41] The suspects were found guilty after the

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33. *See id.* at 197-98.

34. *See id.* at 223. For a more recent account of Jim Crow justice that does not glorify the role of the white lawyer, *see* ERNEST GAINES, A LESSON BEFORE DYING (1993).

35. Symposium, *To Kill a Mockingbird*, 45 ALA. L. REV. 389 (1994).

36. 297 U.S. 278, 279-80 (1936).

37. *See id.* at 281-82.

38. *Id.* at 284.

39. Prior to *Brown v. Mississippi*, the Supreme Court reviewed the case of the Elaine, Arkansas, defendants, which also involved confessions obtained through brutal torture, but decided it on a more generic mob domination theory. *See Moore v. Dempsey*, 261 U.S. 86 (1923).

40. 309 U.S. 227 (1940).

41. *See id.* at 229-35.

jury determined their confessions to be voluntary.[42] Justice Black, while noting that the defendants in egregious abuse cases were virtually always "the poor, the ignorant, the numerically weak, the friendless, and the powerless,"[43] neglected to mention that *among* those who were poor and ignorant, and consequently suffered from such torture, Black defendants were apparently the least likely to be believed when they repudiated their confessions at trial, for it was only in those cases that the Court found *convictions* to review.[44]

Evidence of differing standards of credibility is not, however, limited to confession law. Many of the celebrated miscarriages of justice from this period involve racial prejudice, and a surprising number involve apparently biased determinations of credibility. The most widely recognized case, that of the Scottsboro Boys,[45] began with a credibility determination that was plausible, which is not to say that anything else about the trial was reasonable.[46] The two purported white rape victims testified to gang rape by nine Black defendants, a story in part corroborated by witnesses and bolstered by physical evidence of recent sexual intercourse. Moreover, one of the defendants under cross-examination accused the others of raping the two women.[47] When these convictions were reversed by the Supreme Court based on the denial of access to counsel,[48] Haywood Patterson was the first defendant to be retried.[49] This second case implicated the jury as well as the wider community, for one of the two alleged rape victims denied that she had ever been attacked by the defendants, denied witnessing an attack on her companion, admitted that the other woman had coached her testimony, and revealed that the other woman had coached the testimony of several white boys, threatening them with the specter of Mann Act prosecutions if they did not tell the story with which she had provided them.[50] One of the white boys confirmed this story, yet the white jury nevertheless convicted Patterson after deliberating only five

42. *See* MICHAEL RADELET ET AL., IN SPITE OF INNOCENCE 294 (1992).

43. *Chambers*, 309 U.S. at 238.

44. Unfortunately, not all such coerced confession cases made it into the Supreme Court Reports.

45. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969); RADELET ET AL., *supra* note 42, at 116-18.

46. The defendants were denied any meaningful access to counsel, and the trial was conducted under machine guns manned by the National Guard. *See* CARTER, *supra* note 45, at 22-23; RADELET ET AL., *supra* note 42, at 117-18. The jury was all white and all male. RADELET ET AL., *supra* note 42, at 117.

47. *See* RADELET ET AL., *supra* note 42, at 117.

48. *See* Powell v. Alabama, 287 U.S. 45 (1932).

49. *See* CARTER, *supra* note 45, at 203.

50. *See id.* at 204-34.

minutes.[51] When the trial judge ordered a new trial based on the weight of the evidence, a third jury again convicted.[52]

Eventually the Supreme Court reversed this round of convictions based on the illegality of the jury composition,[53] but many other cases involving obviously biased credibility determinations occurred that evaded Supreme Court review, including subsequent prosecutions of Norris and Patterson.[54] Edwin M. Borchard, in his 1932 classic *Convicting the Innocent*, scrupulously documented eight wrongful convictions of African American defendants.[55] Borchard's focus was not race, but his recitation of the facts makes it clear that four of these wrongful convictions resulted from a racially tinged inability to detect perjury,[56] and two more cases were obviously attributable to jury disregard for the testimony of truthful Black defense witnesses in favor of weak circumstantial evidence.[57]

A more recent book, *In Spite of Innocence*, by Michael Radelet, Hugo Bedau and Constance Putnam, catalogues wrongful *capital* convictions and includes additional cases in which racially skewed determinations of credibility appear to have contributed to wrongful convictions during the Jim Crow era.[58] One famous case recounted in the book, that of the Groveland Three, involved a rape charge fabricated by the alleged victim's husband to avoid suspicion by the alleged victim's parents that he had again beaten her.[59] Four young men were accused of kidnapping and raping the white woman and assaulting her husband. A lynch mob shot one man to death,[60] and a jury convicted the other three.[61] After the Supreme Court reversed

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51. *See id.* at 239-240.

52. *See* RICHARD KLUGER, SIMPLE JUSTICE 148-49 (1975).

53. *See* Norris v. Alabama, 294 U.S. 587 (1935).

54. Norris was reconvicted and sentenced to death. His sentence was commuted to life imprisonment, and forty-seven years after the first conviction, he was granted an unconditional pardon by the State of Alabama. Patterson was also reconvicted, but he was sentenced to life, escaped to Michigan, and successfully fought extradition to Alabama. *See* RADELET ET AL., *supra* note 42, at 118.

55. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932).

56. *See id.* at 33-45, 165-69, 304-08 (describing cases of J.B. Brown, Louise Butler and George Yelder, John Murchison, and Moses Walker).

57. *See id.* at 23-32 (describing cases of Payne Boyd and William Broughton).

58. *See* RADELET ET AL., *supra* note 42, at 118.

59. *See id.* at 107.

60. *See id.* at 103.

61. *See id.* at 109. The three defendants were convicted in the first trial despite a lack of medical evidence of the rape, inconsistent prior identifications from the complaining couple, mention of confessions but a failure to introduce any confessions into evidence (probably because only two of the defendants had confessed, both supplying incomplete confessions after being tortured) and the denials of all three defendants. *See id.* at 107-09. Nevertheless, the credibility determination at the first trial seems somewhat plausible, in part because the state's case was bolstered by

the convictions of the two defendants that had been sentenced to death,[62] the sheriff shot both on the way back to trial, purportedly to prevent the escape of the two men, who were handcuffed to each other.[63] One, Walter Lee Irvin, survived despite bullet wounds to the chest, neck and head and was subsequently tried.[64] Despite the prosecution's failure to produce any medical evidence that the woman had been raped by *anyone*, despite the inconsistencies of prior identifications, despite the lack of any confession (the remaining defendant had continuously insisted on his innocence, despite pretrial torture and interrogation during his hospitalization after being shot by the sheriff), despite new expert testimony that the casts of the defendant's shoes had been made with empty boots (i.e., they had been planted there) and despite excellent lawyering by Thurgood Marshall and Jack Greenberg, the all-white jury again convicted and sentenced the defendant to the electric chair.[65] The Supreme Court declined to review the conviction.[66] That the Governor of Florida eventually commuted the death sentence underscores the dubious nature of the jury's credibility judgment.[67]

In Spite of Innocence also recounts three sexual assault cases involving rape charges against a Black defendant from a white complaining witness where a color-blind view of the evidence presented at trial would have probably led the jury to conclude that the sexual encounter in question was consensual.[68] Two of these defendants were executed and one died in prison.[69] *In Spite of Innocence* and

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plaster casts of footprints and tire tracks matching the car of one defendant and the boots of another which the sheriff claimed to have made at the scene of the abduction. *See id.* at 108.

62. *See id.* at 109.

63. *See id.*

64. *See id.*

65. *See id.* at 111-12.

66. *See id.* at 112.

67. *See id.* at 113.

68. Jess Hollins' alleged victim's allegations came after her brother-in-law came upon the pair engaging in sex. Hollins testified that he and his alleged victim engaged in consensual sexual intercourse after they met at a dance, and defense witnesses testified that she frequented Black dance halls and that she had a reputation for promiscuity. *See id.* at 136-37. In the case of Roosevelt Collins, a woman who weighed thirty pounds more than Collins charged him with rape when white farmers came upon them in a field. Collins maintained that the woman had consented to sex. *See id.* at 137-38. Willie McGee was convicted in Mississippi after two and a half minutes of jury deliberations, despite the fact that the "victim's" husband and children were asleep in the next room during the time of the alleged attack and never heard any commotion. *See id.* at 332-33. Finally, in the case of William Henry Anderson, the alleged victim had not resisted, screamed or used an available pistol to resist. Later affidavits showed a history of a prior sexual relationship. *See id.* at 282. In two of these cases, there is extrajudicial evidence that the jury may not have believed the complaining witness, but found her consent irrelevant.

69. *See id.* at 137, 138, 333.

Convicting the Innocent provide at least nine additional pre-Civil Rights era cases of extraordinary credibility determinations probably influenced by race.[70]

In Spite of Innocence limits its survey to capital cases, about which far more factual information is usually available. It seems remiss, however, to leave the subject of wrongful convictions tainted by racially biased credibility determinations without at least mentioning the case of Rubin Carter, a Black boxer who was twice convicted of murdering three whites in Patterson, New Jersey, in 1966.[71] The evidence against "Hurricane" Carter was very weak, and Carter steadfastly maintained his own innocence.[72] The prosecutor furthered the case against Carter by arguing racial motivation, despite a lack of any supporting evidence.[73] Eventually, a federal writ of habeas corpus was granted, and there is presently little dispute that Carter was wrongfully convicted.[74] The amount of effort

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70. *See id.* at 288 (describing conviction of Payne Boyd for murder despite the testimony of 31 witnesses who said he was not Cleveland Boyd, who was known to be the real killer); BORCHARD, *supra* note 55, at 23-28 (same); RADELET ET AL., *supra* note 42, at 290 (describing conviction of J.B. Brown on disputed jailhouse confession reported by cellmates); BORCHARD, *supra* note 55, at 33-39 (same); RADELET AT AL., *supra* note 42, at 297 (describing conviction of the "Trenton Six"—Ralph Cooper, Collis English, Forrest McKinlay, McKenzie Johnson, James Thorpe and Horace Wilson—based on coerced and inconsistent confessions, despite solid alibis for all six defendants); *id.* at 294-95 (describing conviction of Leon Chambers in Mississippi in 1969 for killing a white police officer based on the testimony of one eyewitness, despite the testimony of two witnesses at trial that a second man, who had confessed but retracted his confession, had shot the officer); *id.* at 298 (describing conviction of Willies Crutcher, Jim Hudson, John Murchison and Cleo Staten for the murder of a white man, actually killed by his wife and nephew, based on conflicting and perjured testimony); BORCHARD, *supra* note 55, at 165-69 (offering a fuller account of the Crutcher, Hudson, Murchison and Staten case that makes the credibility determination more suspicious); RADELET ET AL., *supra* note 42, at 312-13 (describing the conviction of L.D. Harris solely on the basis of a confession coerced by physical abuse and threats and later declared involuntary by the Supreme Court); *id.* at 346 (describing conviction of David Sherman in Tennessee based on the uncorroborated statement of another defendant); *id.* at 351-52 (describing conviction of Earnest Wallace in 1916 of murder on the testimony of one eyewitness, despite the testimony of three eyewitnesses that the gunman was wearing a mask and despite the testimony of three alibi witnesses); *id.* at 352 (describing conviction of Joseph Weaver in Ohio in 1927 based on the testimony of a codefendant, despite alibi witness testimony); *id.* at 356 (describing conviction of Lem Woon, in Oregon in 1908, despite an alibi defense and the view of two state supreme court justices that the evidence was insufficient for conviction).

71. *See* Ira Berkow, *Justice Delayed Is Bitter Justice for Carter*, N.Y. TIMES, Jan. 24, 1993, § 8, at 2.

72. *See id.*

73. *See id.*

74. *See id.* (noting that the judge who released Carter observed that "the extensive record clearly demonstrates that [the] petitioners' convictions were predicated upon an appeal to racism rather than reason, and concealment rather than disclosure").

required to reverse his conviction was so enormous that it is not unreasonable to suspect that many other similar wrongful conviction cases are not reversed simply because of the effort required.

Another area where one can examine the influence of race on credibility determinations prior to the Civil Rights Era is prosecutorial misconduct cases. A 1956 ALR annotation on counsel's appeals to prejudice[75] reveals two different patterns of racially biased argumentation of credibility. The annotation includes ten cases in which prosecutors argued that African Americans were inherently less trustworthy as witnesses.[76] In another six cases, the prosecutor argued that testimony by Black witnesses should be disbelieved because Black people willingly lie for each other.[77] Two other cases involve a variation on the lying-for-each-other premise. In one, a Black special prosecutor argued that the jury should be especially ready to convict because he was prosecuting another Black person.[78] In another case, the prosecutor argued that the defendant was not even able to get a "Negro in that great concourse of Negroes" to testify for him.[79] Yet another case involved a Chinese American defendant, against whom the prosecutor argued both that Chinese witnesses were inherently less truthful and that they were likely to lie for each other.[80] A more radical way of looking at credibility determinations in the century between the Reconstruction and the end of the fight to maintain legal segregation is to consider lynching itself as a form, albeit the most abhorrent form, of racially biased adjudications of credibility. Certainly lynching supplanted trial determinations of credibility.[81] Indeed, lynching may be seen as the

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75. C.R. McCorkle, Annotation, *Counsel's Appeal in Criminal Cases to Racial, National, or Religious Prejudice as Ground for Mistrial, New Trial, or Reversal*, 45 A.L.R.2D 303 (1956).

76. *See id.* at 335-64 (discussing James v. State, 92 So. 909 (Ala. 1922); Jones v. State, 109 So. 189 (Ala. 1926); Allen v. State, 112 So. 177 (Ala. 1927); State v. Lee, 40 So. 914 (La. 1906); Hardaway v. State, 54 So. 833 (Miss. 1911); Moseley v. State, 73 So. 791 (Miss. 1916); State v. Evans, 98 S.E. 788 (N.C. 1919); Arnold v. State, 256 S.W. 919 (Tex. Crim. App. 1923); Hilson v. State, 258 S.W. 826 (Tex. Crim. App. 1924); Littlejohn v. State, 273 S.W. 864 (Tex. Crim. App. 1925)).

77. *See id.* at 333-66 (discussing Tannehill v. State, 48 So. 662 (Ala. 1909); Perdue v. State, 86 So. 158 (Ala. 1920); State v. Howard, 45 So. 260 (La. 1907); Johnson v. State, 127 S.W. 559 (Tex. Crim. App. 1910); Jordan v. State, 137 S.W. 133 (Tex. Crim. App. 1911)).

78. *See id.* at 359 (discussing Camp v. State, 239 P.2d 1036 (Okla. 1952)).

79. *See id.* at 350 (discussing Hampton v. State, 40 So. 545 (Miss. 1906)).

80. *See id.* at 367 (discussing People v. Louie Foo, 44 P. 453 (Cal. 1896)).

81. Of course, many lynchings were carried out for purposes other than punishment for a suspected crime—such as to terrorize and to intimidate. However, I refer here to lynchings that purported to punish criminal activity. *See generally* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996).

post-Reconstruction equivalent of absolute bars to testimony by Black persons in criminal cases with racial overtones. What the suspected Black perpetrator, his friends, relatives, or neighbors might have to say on the defendant's behalf was, effectively, incompetent evidence. Given the phenomenal prevalence of lynching of African Americans—by one conservative estimate, nearly *3500* lynchings between 1882 and 1968,[82] and by another estimate, *5000* from 1859 to 1962[83]—I am driven to the conclusion that the most egregious uses of race in the assessment of credibility were extraordinarily common. Even the reader who does not accept this analysis must concede that the willingness to engage in lynching suggests a disparagement of the value of African American voices, a disparagement that *must* have been at play in contemporaneous courtroom determinations of credibility, albeit in a less dramatic fashion.

Finally, the legal aftermath of lynchings and other Black victim/white perpetrator crimes provides another set of cases in which race appears to have affected credibility determinations. The traditional refusal of white juries to convict white defendants accused of crimes of violence against African American victims is notorious: credible accusations backed by powerful physical evidence, countered only by obviously false denials, routinely led to acquittals.[84] Of course, this problem can be characterized as one of jury nullification rather than one of credibility.[85] In cases where the victims were involved in civil rights activities or the crime was racially motivated, jury nullification is probably more likely; in other cases, given the secrecy of jury deliberations, it is impossible to know which explanation is more accurate.

What shall we do with this history? I certainly do not consider myself a commentator who "proceed[s] as if there existed no dramatic discontinuities in the history of American race relations, as if there existed little difference between the laws, practices and sentiments prevalent during the eras of slavery and de jure segregation and those prevalent today . . . ."[86] Certainly the legal structures and, I think, the psychological structures that constrain race and credibility decisions are in some respects different from what they were fifty or even thirty years ago. The foregoing section is meant to show that

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82. *See* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 at 4-5 (1980).

83. *See* RALPH GINZBURG, 100 YEARS OF LYNCHING 253 (2d ed. 1988).

84. *See, e.g.*, MICHAEL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 8-9 (1987) ("[Lynchers] had little to fear from those who administered the southern legal system.").

85. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY 61-62 (1994).

86. *See* RANDALL KENNEDY, RACE, LAW AND CRIME (forthcoming 1997).

and how "the burden of history weighs upon us" in the matter of race and credibility determinations.[87]

B. *Modern Race and Credibility Cases*

We need the history of race and credibility determinations in part because the modern cases—those decided in the last twenty-five years[88]—seldom wear their hearts on their digest headnotes. Without history, the acquittals of Koon, Powell, Wind and Briseno simply reflect the vagaries of jury determinations. Without history, the Simpson acquittal is just the story of a wealthy man with expensive lawyers trouncing advanced scientific evidence.

In view of this history, however, it is extremely likely that these cases as well as several of the highly publicized cases of convicted-then-exonerated Black defendants have involved errant and probably biased credibility determinations. Two of these cases are worth a quick review here for the very different shapes of the credibility issues that they raise.

1. Two High Profile Cases

a. *William Jackson*

William Jackson spent five years in prison for two rapes he did not commit.[89] Two white women testified that they were certain Jackson was their assailant, although it later developed that there was only a rough resemblance between Jackson and the true perpetrator.[90] Several Black alibi witnesses testified for the defense, but an all-white jury convicted Jackson, who was exonerated after five years imprisonment.[91] This case raises several race and credibility issues. First, was the jury too quick to dismiss the testimony of the Black alibi witnesses? If so, why? Was it because they doubted the inherent truthfulness of Black witnesses, or because they thought these Black witnesses were likely to lie for another Black person? A second kind of race and credibility question lurks in the Jackson case: *should* the jury have discounted the eyewitness testimony

87. *See id.*

88. I am arbitrarily choosing 1970 as the dividing line for these cases, largely because the most violent resistance to the end of de jure segregation had ended by this time. Although the cases do shift over time, I do not see any point of marked discontinuity.

89. *See 60 Minutes: Open and Shut Case*, (CBS television broadcast, Feb. 27, 1983).

90. *See id.*

91. *See id.*

because of its cross-racial nature?[92] A Black jury might have been more likely to do so. Would that have been proper? None of these questions imply a backdrop of racial animosity, nor was there evidence that such animosity motivated Jackson's jury. Ironically, in some of the modern cases, the charge of biased determinations of credibility may sound *more* convincing than in the older cases, largely because lower levels of overt racial antagonism render a prominent alternative explanation—jury lawlessness—less likely.

b. *Clarence Brandley*

The Clarence Brandley case was quite different, for an extraordinary amount of racial antagonism infused that case from start to finish. Brandley's rape-strangulation murder conviction is the subject of a book aptly titled *White Lies*.[93] The story is so extreme that it would be deemed ridiculous were it fiction. Brandley was charged with the murder of a sixteen-year-old white girl because, as the investigating officer said (using a racial epithet), he was the only Black man who had the opportunity to commit the crime.[94] The sheriff's department failed to investigate three other men who had an opportunity to commit the murder despite physical evidence that suggested Brandley could not have been the killer[95] and despite volunteered information that implicated one of the other men.[96] Brandley was convicted by the second jury[97] who apparently disbelieved Brandley in favor of the state's white witnesses, despite rampant inconsistencies and unexplained losses of evidence, including the vaginal swabs that could have confirmed Brandley's innocence.[98] The jury's conduct, however, was the least extraordinary aspect of the Brandley case. As a conservative reviewing judge later found:

> [T]he color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution against him, and was an impermissible factor

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92. *See generally* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984) (reviewing laboratory findings that white subjects consistently displayed a significantly impaired other-race recognition ability, and that some Black and Asian subjects displayed this impairment as well).

93. NICK DAVIES, WHITE LIES (1991).

94. *See id.* at 23.

95. *See id.* at 103-04.

96. *See id.* at 157-60.

97. The first jury hung because of one holdout juror, who described racially inflammatory remarks made by other jury members. *See id.* at 137-43.

98. *See id.* at 91-92.

> which significantly influenced the investigation, trial and post-trial proceedings. The tone of the courtroom, as fostered by the District Attorney's office, the judge and the District Clerk's office, was white against Black . . . . The authorities wholly ignored any evidence, or leads to evidence, which might prove inconsistent with their premature conclusion that Brandley had committed the crime . . . . In the thirty years this court has presided over matters in the judicial system, no case has presented a more shocking scenario of the effects of racial prejudice, perjured testimony, witness intimidation, an investigation the outcome of which was predetermined, and public officials who for whatever motives lost sight of what is right and just.[99]

It is possible to interpret the jury's verdict as simply an extension of this bad-faith prosecution. Davies' book suggests that this explanation is not correct, or at least not complete; his interviews of white people in the town (and of the juror who hung the first jury) reveal citizens who had been convinced, albeit unreasonably, of Brandley's guilt.

In Spite of Innocence[100] reports on a number of modern wrongful capital convictions that appear to reflect racially biased credibility determinations.[101] The book describes seven modern cases (in addition to the Brandley case) that involve Black defendants convicted in the face of highly dubious evidence.[102]

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99. *Id.* at 371-72.

100. RADELET ET AL., *supra* note 42.

101. One difference from the earlier cases that might strike the reader is that there are no longer any cases described where a jury deems apparently consensual interracial consensual sex to be rape. Little can be drawn from this difference, however, because for almost all of this period, the Supreme Court prohibited capital convictions based solely on a rape conviction. *See* Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death sentence for rape is grossly disproportionate and is therefore forbidden by the Eighth Amendment).

102. Anthony Brown was convicted in Florida in 1983 despite the fact that the evidence against him was a co-defendant's testimony which the co-defendant later recanted. *See* RADELET ET AL., *supra* note 42, at 289. Joseph Brown was convicted in Florida in 1974 on the basis of testimony of a person who claimed to have had a minor role in the crime and who had been implicated by Brown when Brown turned himself in on a robbery and implicated the prosecution's witness as his partner. *See id.* at 290. Anthony Peek was convicted of murder in Florida in 1978 based solely on the presence of his fingerprints on the victim's car despite his testimony that he had discovered the abandoned car the day after the crime and had opened the door to look inside and despite testimony of alibi witnesses that he was asleep at the home where he lived at the time of the murder. *See id.* at 337. Allan Thrower was convicted in Ohio in 1973 of murder in the ambush death of a police officer based solely on eyewitness testimony of the officer's partner (later admitted to be false) despite

The problem with focusing on these cases is that we have very little insight into the thought processes of the jurors. Would the jury have believed any police officer, regardless of race? Do jurors believe all eyewitness testimony, however weak or contradictory? The information available on most of the wrongful convictions reported by Radelet, Bedau and Putnam is often sketchy. Even in the higher profile cases, where other detailed information is available, jurors generally leave no record of their deliberations.

One source of insight into the decision-making process is the arguments on race and credibility that advocates direct to the jurors, to which I shall turn at the end of this section. Another source of insight is the decisions of judges, who often leave more of a record than do juries. When judges serve as the original fact finders, as they do in bench trials, they usually give us no more insight into their reasoning than do jurors. Judges also serve, however, as reviewers of the newly discovered, wrongfully withheld, or incompetently overlooked evidence said to justify the granting of a new trial. In that role, a written opinion is often required, and more insight into the decision-making process is consequently available. It is to two such cases that I shall now turn.

It has taken me a long time get to these two cases, which are really the heart of the article. So often it seems that the public—and the civil side of the legal profession—have such revulsion for capital cases that procedural wrongs in capital cases, unless coupled by *unassailable* proof of innocence, do not excite much interest. Neither of these cases has unassailable proof of innocence. In Barry Lee Fairchild's cases, there will always be doubt and his death in the face of that unresolved doubt. In Ricky Drayton's case, it seems quite likely that he had some involvement in the death with which he was charged, but also, increasingly as time goes on, an equal likelihood that his involvement did not rise to the level of murder. I hope the reader will keep in mind the foregoing cases of established innocence as she reads Fairchild's and Drayton's stories, and give those stories the fair hearing they deserve.

Thrower's denials and testimony from alibi witnesses who claimed that Thrower was in Detroit at the time of the killing. *See id.* at 348-49. Ray Giddens was convicted of murder after an all white jury deliberated 15 minutes, based on the testimony of a man who claimed to have accompanied him to the murder scene, despite the fact that the testimony was deemed by an appellate court to be "replete with conflicts." *See id.* at 30. Sammies Garrett was convicted of the murder of his white lover despite her prior talk of suicide, the presence of an uncontested suicide note and only circumstantial evidence implicating Garrett. *See id.* at 306. Tony Cooks was convicted in California in 1981 of the murder of a white man based on the testimony of a witness who claimed she could later recognize him, although she had viewed him from an apartment window 177 feet away, and the testimony of the victim's wife, whose first identification of Cooks was uncertain even though his picture was the only one in the photo array that matched the description she had given police. *See id.* at 190-92.

2. Barry Lee Fairchild

a. *The Facts*

On February 26, 1983, an Arkansas state trooper chased a car belonging to Marjorie Mason.[103] When the chase ended, two unidentified Black men ran from the car.[104] The next morning, Mason's body was found near an abandoned farmhouse; she had been raped and shot in the head.[105] A week later, Barry Lee Fairchild, a young Black man with an IQ between 60 and 80,[106] was arrested and shortly thereafter questioned concerning the Mason killing.[107] He confessed involvement in the crime, along with the involvement of an acquaintance, Harold Green, whom he accused of unexpectedly shooting Mason;[108] Green was never charged. In the course of his confession Fairchild identified an abduction site and admitted to stealing the victim's watch, which he said he then sold to his sister.[109]

From his first meeting with his appointed trial counsel in 1983, Fairchild maintained that his confession to the murder of Mason was coerced.[110] Fairchild moved to suppress his confession, alleging that Sheriff Tommy Robinson and his chief assistant, Major Larry Dill, repeatedly kicked him in the stomach, hit him in the chest and on the arm with a shotgun, and threatened to kill him.[111] Videotapes of Fairchild's confessions show him with a bandage around his head and swollen eyes, but Sheriff Robinson and his deputies denied beating Fairchild and claimed that the injuries were due to the attack of a police dog during his arrest.[112] The sheriff and his deputies also represented that Fairchild had been the prime suspect at the time of his arrest[113] and withheld the names of other suspects that had been

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103. *See* Fairchild v. State, 681 S.W.2d 380, 381-82 (Ark. 1984).

104. *See id.* at 382.

105. *See id.*

106. *See* Fairchild v. Lockhart, 744 F. Supp. 1429, 1434-35 (E.D. Ark. 1989), *aff'd*, 900 F.2d 1292 (8th Cir. 1990).

107. *See Fairchild*, 681 S.W.2d at 382.

108. *See* Lynne Duke, *In Arkansas, a Death Row Struggle and Doubt*, WASH. POST, Jan. 9, 1994, at A1, A22.

109. *See id.*

110. *See* Fairchild v. Lockhart, 857 F.2d 1204, 1207 (8th Cir. 1988).

111. *See id.*

112. *See* Duke, *supra* note 108, at A22.

113. *See id.* As it later turned out, the sheriff's office also withheld evidence suggesting that Mason was abducted far from the site which Fairchild's confession identified as the abduction site and investigative notes that two of Mason's coworkers recalled her wearing a shiny metallic watch on the day of the crime, not the Black-banded watch Fairchild admitted taking and selling to his sister. I will not

interrogated concerning the Mason murder, leaving Fairchild's allegations of police brutality without support. The motion to suppress the confession was denied, and Fairchild's statements were introduced into evidence.[114] The jury convicted Fairchild of taking part in the kidnapping, rape and murder of Mason, and sentenced him to death.[115]

The Arkansas Supreme Court affirmed Fairchild's conviction,[116] and a state court denied post-conviction relief.[117] Fairchild filed two petitions for a writ of habeas corpus, both of which were denied.[118] After the dismissal of his third petition in August of 1990,[119] Fairchild's attorneys fortuitously learned of an FBI probe of police brutality in the Pulaski County Sheriff's Department. The report revealed that Fairchild's brother, Robert Fairchild, had also been picked up and subjected to a coercive interrogation in an effort to get him to confess to the Mason murder. News of this report was carried in the Little Rock press, and other Black men who had been similarly treated by the sheriff and his deputies came forward.[120] Upon this new evidence, the Eighth Circuit stayed Fairchild's execution and remanded the case for an evidentiary hearing.[121]

The district court ordered access to the Pulaski County sheriff's files,[122] and it became clear that Fairchild had not been the prime suspect as the sheriff's testimony had portrayed him, but rather one in a group of fourteen Black men who made up a suspect list.[123] Eventually, the thirteen other men were found.[124]

At the evidentiary hearing, Fairchild's attorneys—Julius Chambers, Richard Burr and Steven Hawkins of the NAACP Legal Defense Fund—presented a story of egregious police brutality.[125]

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review all of that evidence here but instead will focus on the coerced confession claim.

114. *See Fairchild*, 857 F.2d at 1205-06.

115. *See* Duke, *supra* note 108, at A22.

116. *See* Fairchild v. State, 681 S.W.2d 380 (Ark. 1984), *cert. denied*, 471 U.S. 1111. (1985).

117. *See* Fairchild v. State, 690 S.W.2d 355 (Ark. 1985).

118. *See* Fairchild v. Lockhart, 675 F. Supp. 469 (E.D. Ark. 1987), *aff'd*, 857 F.2d 1204 (8th Cir. 1988), *cert. denied*, 488 U.S. 1050 (1989); Fairchild v. Lockhart, 744 F. Supp. 1429 (E.D. Ark. 1989), *aff'd*, 900 F.2d 1292 (8th Cir. 1990).

119. *See* Fairchild v. Lockhart, 979 F.2d 636, 638 (8th Cir. 1992).

120. *See* Jim Nichols, *More Claim Beatings by Lawmen over Mason*, ARK. GAZETTE, Sept. 2, 1990, at A3.

121. *See* Fairchild v. Lockhart, 912 F.2d 269 (8th Cir. 1990).

122. *See* Phoebe Wall Howard, *Fairchild's Lawyer to Get Murder Files*, ARK. GAZETTE, Sept. 7, 1990, at B1.

123. *See* Toyota Hill, *At Least 14 Black Males on Mason List*, ARK. GAZETTE, Sept. 8, 1990, at B1.

124. *See id.*

125. *See* Phoebe Wall Howard, *Fairchild Hearing for New Trial Begins*, ARK. GAZETTE, Sept. 8, 1990, at A1.

Thirteen other suspects testified to the coercion to which they had been subjected by the Pulaski County Sheriff's Department in the course of the Mason murder investigation.[126] Each testified that he had been picked up and accused of involvement in the Mason murder.[127] Eleven of the men were verbally threatened.[128] Of the two who were not verbally threatened, Donald Lewis was slapped, choked and punched in the stomach,[129] and Ezekiel Williams was slapped and stomped upon.[130] Of those who were verbally threatened, one, Nolan McCoy, was also threatened with a gun.[131] Five more were verbally threatened, threatened with guns *and* physically abused: Randy Mitchell was beaten with clubs and fists through a telephone book;[132] Frank Webb was hit with two telephone books;[133] John Walker was hit with a blackjack through a telephone book;[134] Robert Fairchild, the brother of Barry Lee Fairchild, was hit in the head with a nightstick and kicked;[135] and Frank King testified that the sheriff had come into the room in which King was being interrogated and said to his deputies, "You all ain't hit him yet?" after which King was slapped so hard that he was forced out of his chair.[136] Four of the suspects testified that they were pressed to admit abducting and raping Mason only and to blame a friend for the shooting, just as Fairchild had done in his confession.[137] In addition to the thirteen Mason case suspects, two suspects from contemporaneous cases testified to brutal treatment by the Pulaski County Sheriff's office.[138] Racial slurs were prominent in the course of these interrogations.[139]

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126. *See* Findings of Fact and Conclusions of Law, Fairchild v. Lockhart, Civil No. PB-C-85-282 (E.D. Ark. June 4, 1991) (reviewing testimony of the thirteen witnesses) [hereinafter Written Findings].

127. *See id.*

128. *See id.*

129. *See id.* at 128.

130. *See id.* at 355-56.

131. *See id.* at 156.

132. *See id.* at 184.

133. *See id.* at 204.

134. *See id.* at 247.

135. *See id.* at 44-45.

136. *See id.* at 270.

137. Randy Mitchell testified that the deputies wanted him to confess to a subordinate role in the killing, with Nolan McCoy as the triggerman. *See id.* at 185. Nolan McCoy testified that he and Mitchell were similarly teamed up as a suspect pair. *See id.* at 157. Frankie Webb and McCoy were also linked as suspects, with Webb as the triggerman. *See id.* at 205. Frank King and Michael Jackson were also matched. *See id.* at 270.

138. Robert Johnson was, by his account, arrested in the mistaken belief that he was Michael Johnson, a suspect in the case. *See id.* at 310. He testified that he was kicked in the groin, causing stitches to be broken open from a recent circumcision operation. *See id.* at 317. Earl Hightower testified to being accused on another case,

A number of factors buttressed the truthfulness of this testimony. First, each of the thirteen witnesses was confirmed to have been considered as a suspect in the Mason murder case.[140] For nine of the thirteen men, this confirmation came from the state's own records.[141] For the other four men, their status as suspects was corroborated by strong and undisputed circumstantial evidence.[142] Second, shortly after their interrogations, seven of the men reported to friends and relatives what had happened to them, and in each case, as testified to by one or more witnesses to those contemporaneous accounts, the details in those accounts matched the details recounted by the suspects in their own testimony.[143] Third, for five of the severely abused suspects, other persons observed physical manifestations of the abuse.[144] With respect to the two victims of police brutality who had been suspects in other contemporaneous cases, evidence of their injuries was documented by medical personnel.[145]

Finally, in a number of cases, there were eyewitness accounts to the abuse that corroborated the victim's accounts. Ronald Henderson testified that he heard someone being beaten, who finally said, "O.K., I'll talk to you."[146] Randy Mitchell testified that he had said those words and was at the Criminal Investigation Division at the

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being hit in the head with a phone book and being punched in the face, after which he was hospitalized. *See id.* at 370-71.

139. *See, e.g., id.* at 128 ("N—, you're going to talk"); *id.* at 154 ("You black b—, go back in the house"); *id.* at 204 ("N—, we know that you killed that nurse").

140. *See id.*

141. Five of the men were given Miranda warnings that informed each that he was a "suspect in a capital murder," three more had hair samples taken from them for the purpose of comparison to hair fragments found at the crime scene, and one was referred to in a state crime lab memo as a suspect. *See id.*

142. One man was brought to the Criminal Investigation Division of the sheriff's office on March 2 while two other suspects were still there. Another was questioned due to his association with another established suspect. A third had his apartment searched on March 4. When the search yielded clothing similar to that worn by the men seen running from Mason's car, he and the fourth witness were taken to the Criminal Investigation Division for questioning. *See id.*

143. *See id.*

144. One witness observed that Randy Mitchell's face was "puffed up" and that his eyes were swollen and red, *id.* at 155, 202, and another reported that his face was "very swollen and puffy," that he had "little knots" on his head, and that he was "withdrawn for a while." *See id.* at 192. Another witness reported that when Robert Fairchild returned from the sheriff's department, he was extremely upset and clothed in a jail jumpsuit because he had "BM'd" and "wetted" in his clothes. *See id.* at 98-99. John Walker's face was described as puffy and bruised. *See id.* at 251. Yet another witness recalled that Frank King had been crying when he returned from the sheriff's office and was so upset that it took him considerable time to calm down. *See id.* at 284. Michael Johnson was observed to have had tears in his eyes when he first recounted his abuse.

145. *See id.* at 322-27.

146. *See id.* at 241.

same time as Henderson. Thelma Bradford testified that she was in an interview on March 2nd and could hear Robert Fairchild being abused, with officers saying, "f— him in his a—."[147] Ezekiel Williams, Willie Washington, and Robert Fairchild were at the Criminal Investigation Division at overlapping times. Williams heard someone moaning in a room nearby.[148] Washington testified that Robert Fairchild was presented to demonstrate the fate that awaited Washington if he were uncooperative.[149] Washington also overheard Williams complaining about abuse.[150] John Walker, Leon Williams, Frank King and Michael Johnson were at the Criminal Investigation Department at the same time. Walker overheard the frightened voices and cries of King and Johnson.[151] Johnson heard the beating and protests of King and later saw tears running down King's cheeks. Williams heard Walker being struck and crying out and, at about the same time, heard similar sounds from two other people. Most surprising, Frank Gibson, a former deputy sheriff, testified that he had participated in the abuse of Robert Fairchild.[152]

In response to this barrage of evidence of police brutality in connection with the Mason murder investigation, the state presented the testimony of twelve officers who had been identified as the persons abusing Fairchild and the other suspects. With respect to most of the charged misconduct, the officers testified that they remembered nothing about their contact with the suspects.[153] Where their own records documented contact with the suspect, the officers did not deny contact, but simply denied any recollection of that contact.[154] All of the officers denied engaging in threatening or abusive behavior, and most denied witnessing or hearing of such behavior by other officers.

Judge Garnett Thomas Eisele presided at the district court hearing. At the conclusion of this testimony, Judge Eisele entered extraordinarily extensive findings of fact, 133 pages of which were made orally from the bench,[155] supplemented by 413 pages of written findings.[156] Judge Eisele found that only two of the fourteen suspects, Randy Mitchell and Frank King, were abused by police officers in

147. *See id.* at 86.
148. *See id.* at 357.
149. *See id.* at 103-04.
150. *See id.* at 104.
151. *See id.* at 248.
152. *See id.* at 252.
153. *See id.* at 67-68.
154. *See id.*
155. *See* Findings of Fact and Conclusions of Law, Fairchild v. Lockhart, Civil No. PB-C-85-282 (E.D. Ark. Feb. 6, 1991) [hereinafter Oral Findings].
156. *See* Written Findings.

the course of the Mason murder investigation, and found that the abuse in those two cases was not as severe as alleged.[157] With respect to Robert Fairchild's allegations, Judge Eisele declared himself "a hung jury,"[158] while wholly discrediting the other ten allegations of abuse.[159] He then concluded that there was a lack of evidence of the kind of pattern of *systematic* abuse that might confirm that Barry Fairchild's confession was coerced and reaffirmed his view that the confession was voluntary.[160]

b. *The Legal Claim*

This opinion is deeply disturbing when viewed through the lens of established equal protection doctrine. Assuming for the moment, as I shall expand upon in Part III, that equal protection law applies to credibility determinations, it seems quite likely that the judge engaged in unconstitutional race discrimination.

In *Arlington Heights v. Metropolitan Housing Corp.*, the Supreme Court articulated a list of factors that may constitute prima facie evidence of racially discriminatory intent, including, but not limited to: a pattern of racially disparate impact, an historical sequence of events which sheds light upon the decision maker's purposes, deviations from normal procedures, and contemporary statements by the decision maker.[161] All of these factors are present in this case.

i. *Disparate Impact*

Essentially, the district court's determination of whether or not Fairchild's confession was voluntary came down to a choice between the testimony of thirty Black witnesses (plus one white witness, a former deputy sheriff) and the testimony of fourteen white witnesses. At the remand hearing, thirty Black witnesses testified that officers of the Pulaski County Sheriff's Department verbally and physically brutalized Black suspects during a murder investigation.[162] Fourteen white officers, in turn, denied these charges.[163]

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157. *See id.* at 199-203, 292-96.

158. *See id.* at 65, 79.

159. *See id.* at 150 (Donald Lewis); *id.* at 181 (Nolan McCoy); *id.* at 220 (Frankie Webb); *id.* at 227-28 (Charles Pennington); *id.* at 240 (Michael Martindale); *id.* at 244-45 (Ronald Henderson); *id.* at 259-69 (John Edward Walker); *id.* at 349-51 (Robert Johnson); *id.* at 360-61 (Ezekiel Williams); *id.* at 372-74 (Earl Hightower).

160. *See id.* at 412-13.

161. 429 U.S. 252, 266-68 (1976).

162. *See* Oral Findings; Written Findings.

The court found none of the Black petitioner's primary witnesses to be entirely credible.[164]

Disparate impact is apparent, however, not only in the judge's ultimate conclusions, but also in his methods. The court made no attempt to compare the entirety of each Black witness' testimony with the entirety of each related witness' testimony. Instead, the court discredited the entire testimony of several of Fairchild's Black witnesses by seizing upon instances of discrepancies between a witness' testimony and his prehearing affidavit or another witness' testimony about the same subject.[165] Of course, in the emotionally charged circumstances presented by this case, some differences in perceptions and memories might be expected, and testimony that *perfectly* conformed might well be doubted.

More important than the correctness or incorrectness of this wholesale disparagement based on minor inconsistencies is the sharp contrast between the court's treatment of the minor inconsistencies in the Black witnesses' testimony and its treatment of the irreconcilable differences and blatant falsehoods present in the testimony of white witnesses. For example, Sheriff Robinson testified in the August 1990 hearing that Robert Fairchild was never brought in as a suspect, but at the remand hearing in 1991, faced with substantial contradictory evidence, Robinson suddenly recalled that Robert Fairchild was the prime suspect. Major Dill, who was accused of multiple incidents of misconduct, denied ever interrogating any suspect, a denial that was contradicted by Sheriff Robinson and called into question by Sergeant Beadle. Nevertheless, the court questioned the credibility of neither Robinson nor Dill. Most dramatic, the judge chose to believe the vague and generalized testimony of all of the state's witnesses that they did not abuse Barry Fairchild, despite their numerous memory lapses and despite the judge's own implicit findings that at least some of the officers had lied in their denials of abusing some of Fairchild's witnesses.[166] Such evidence of disparate impact borders on the "stark pattern" evidence

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163. *See* Oral Findings; Written Findings. Detective Frank Clark, who is Black, also testified for the state on a very limited point. He testified that he did not remember being involved in the arrest of Nolan McCoy but would have remembered the arrest had any racial epithets been used. *See* Written Findings at 176.

164. *See* Oral Findings; *See* Written Findings.

165. *See, e.g., id.* at 178 (comparing hearing testimony and affidavit of Nolan McCoy and concluding that "[t]he oath obviously meant nothing to Mr. McCoy.").

166. Most of these witnesses claimed under oath that they had no recollection of ever meeting, arresting, or interrogating Fairchild's witnesses. Their recollections had to be refreshed by reference to the department's files. Notwithstanding the judge's findings that some abuses had occurred, these white witnesses were unanimous in their assertions that they had never threatened or abused anyone during the investigation of this murder. *See id.*

sufficient to prove racial discrimination standing alone,[167] but several other aspects of the case contribute further to a prima facie showing that the district court, in assessing the witnesses' credibility, discriminated against Fairchild's witnesses on the basis of their race.

ii. *The Historical Sequence of Events*

The issue of race tainted the investigation, prosecution and habeas corpus review of Fairchild's case from the outset. First, it must be noted that this case involved a Black defendant charged with the rape and murder of a white woman, which is particularly *likely* to skew the impartiality of the judicial process, as many observers, including members of the Supreme Court, have noted.[168] Second, in this case that greater likelihood had been realized, for it included judicial findings that white police officers verbally and physically abused Black suspects in a misguided attempt to secure a conviction. As the Chief Judge of the Eighth Circuit noted, "the evidence also *unmistakably* shows a current of racism in the Sheriff's Department of 1983."[169] These abuses were compounded by the state's efforts to dispose of this case quickly and to proceed with the execution in an effort to conceal the state's numerous incidents of misconduct. Moreover, the political aspects of this case were particularly charged, as Sheriff Robinson, against whom the allegations of misconduct were made, became Congressman Robinson and then ran for Governor in the Republican gubernatorial primary.[170]

iii. *Deviations from Normal Procedures*

Arlington Heights also lists deviations from normal procedures as probative of intentional racial discrimination.[171] Such departures are clearly present in this case. Other than the district court judge's repeated application of different standards in assessing the credibility of Black witnesses and white witnesses, it is impossible to identify any consistent method in his findings of fact. Instead of assessing all of the new evidence and testimony in accordance with the Eighth Circuit's order to determine whether or not Fairchild's confession was coerced, the judge *first* determined that the confession

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167. *See Arlington Heights*, 429 U.S. at 266.

168. *See* Georgia v. McCollum, 505 U.S. 42, 49 (1992); McCleskey v. Kemp, 481 U.S. 279, 332 (1987) (Brennan, J., dissenting).

169. *See* Fairchild v. Lockhart, 979 F.2d 636, 643 (8th Cir. 1992) (Arnold, C.J., concurring).

170. *See* Cary Bradburn, *TR Says He's Leader for '90s*, ARK. GAZETTE, Oct. 15, 1990, at A1.

171. 429 U.S. at 267.

was not coerced and *then* avoided reconsideration of this conclusion by discrediting all thirty of the Black witnesses. The truth of this assertion is abundantly clear from the record, because the judge relegated his assessment of the *new* evidence and testimony to a document separate from and subsequent to the document in which he presented his findings regarding Fairchild's allegations that his confession was coerced.[172]

An examination of the means by which the judge then disposed of Fairchild's Black witnesses reveals numerous other deviations from ordinary procedures. Not only did the judge apply a far more rigorous standard in assessing the credibility of Fairchild's Black witnesses than in assessing the state's white witnesses, he even applied different and conflicting standards in discrediting the testimony of the various Black witnesses. For example, at some points the judge relied upon the fact that the abuse suffered by some witnesses differed in its details from the abuse suffered by other witnesses in order to discredit all of the witnesses' testimony; at other times, the judge pointed to similarities in the testimony of Fairchild's witnesses to imply that the witnesses were involved in a conspiracy to testify falsely. Ultimately, he found that all witnesses questioned during the Mason murder investigation who alleged that they had been beaten in the same manner and by the same officers as Fairchild were simply lying.[173]

Although this shifting methodology did not permit the judge to conclude that no abuse occurred, it did facilitate his rationalization that Fairchild had shown no *pattern* of coercion. He found that two witnesses may have been abused, but that they were not abused *in connection with the investigation of the Mason murder* because they were also being questioned in connection with other cases. Judge Eisele's finding that two witnesses *were* abused in connection with the Mason murder investigation did not shake his conviction that there was no systematic coercion, for he relied on the fact that these two individuals were not abused in exactly the same manner as Fairchild alleged he had been abused.

The judge found that six men, in order to conform their stories to Fairchild's accounts of his own abuse, had fabricated testimony that Sheriff Robinson and his deputies had put guns to their heads. The judge made this finding despite the lack of any evidence of a conspiracy and without even *considering* the testimony of prior consistent statements made by those who alleged that police officers had put guns to their heads. The judge also managed to find some of the brutality allegations made by two of the men to be true—while

172. *See* Written Findings.
173. *See id.*

discrediting their allegations that guns were used to threaten them. Why? Perhaps because the gun-play testimony would have supported Fairchild's own account of his coercion and abuse. Similarly, the judge found that the accounts of abuse with a telephone book, abuse also recounted by Fairchild, were the product of a deliberate attempt to conform testimony to the account by a former deputy sheriff of such abuse—despite the fact there was no evidence that the witnesses had exposure to the deputy's account and despite the fact that one of the witnesses had been in Texas at the time the article containing the former deputy's allegations had been published.

Other unusual procedures included a reference to the judge's personal research on drug abuse to impeach a witness and the pursuit of an irrelevant distinction between witnesses who were arrested and those who went voluntarily into custody. The judge also failed to make any conclusion concerning whether Robert Fairchild, Barry's brother, had been abused. Finally, Judge Eisele also failed to come to a conclusion as to the identity of the officers who participated in the abuse he *did* find. In fact, the judge did not seem to consider whether his finding that some officers had participated in abuse against some suspects had any bearing upon the credibility of the officers' denials of other alleged abuse.

iv. *Contemporaneous Statements*

Throughout the habeas proceeding, Judge Eisele made specific comments and statements which reflected his condescending and biased attitude towards Fairchild's Black witnesses. Particularly pertinent to Fairchild's charge of racial discrimination is the fact that Judge Eisele made completely unwarranted note of the race or ethnicity of several of Fairchild's witnesses. Of one he wrote, "Mr. Henderson is a 30 year old Black man";[174] of another, Ezekiel Williams, he commented, "He was born in Trinidad and speaks with an accent."[175]

The judge referred to some of Fairchild's other witnesses in a mocking, condescending manner. Of Randy Mitchell he said, "Because of his fragile personality and poor and distorted memory, it is likely that much of Mr. Mitchell's testimony in this area is inaccurate or exaggerated,"[176] and that "he appeared to be high strung, impressionable and possessed of a faulty memory. He was abused and mistreated but not to the extent—in manner or duration—to

174. *Id.* at 240.
175. *Id.* at 351.
176. *Id.* at 200.

which he testified."[177] Similarly, of John Walker the judge wrote: "[A]lthough Mr. Walker is not a fragile personality like Mr. Randy Mitchell, there is some parallel between the testimony of these two witnesses, perhaps because the reliability of their testimony is affected by their respective addictions to drugs and alcohol during the crucial time period."[178] Moreover, Judge Eisele also tended to make irrelevant asides regarding the witnesses' general character. For example, in discrediting Robert Johnson's testimony (supplemented by photographic and medical evidence) that officers had kneed him in the groin following his arrest, Judge Eisele remarked that Johnson "is a large man who appears to be hot headed"[179]—as though this could somehow justify the abuse in question. Similarly, beyond his finding that Robert Fairchild "may have been threatened or choked,"[180] Judge Eisele twice took the time to directly quote Fairchild's misstatement that he took a "lie detester [sic]" test while he was in the Sheriff's Office.[181]

Judge Eisele's description of John Walker reveals his penchant for believing that Fairchild's Black witnesses were involved in some sort of conspiracy, as when he remarked of Mr. Walker: "[He is] somewhat of a salesman. He has a pleasant demeanor and manner of talking. But he will go beyond the truth. He and his 'supporting' witnesses had a clear objective of aiding petitioner in this high-profile case."[182] Although Judge Eisele made this assertion repeatedly in his findings of fact and often used it to dismiss testimony that did not accord with his own preconceptions, the assertion was never supported by a single piece of evidence. With the possible exception of Robert Fairchild, Barry Fairchild's brother, none of these witnesses had any apparent motive to lie. The statute of limitations barred any claims for damages. In the absence of evidence of such a motive, this inference is both unusual and resonates with a racist belief; Black citizens are more likely to lie for each other due simply to their shared race.

All of these comments are reflective of Judge Eisele's tendency to treat Fairchild's Black witnesses in a condescending and biased manner that differed markedly from his treatment of the state's white witnesses, who had obvious motives to lie.

Has the reader had enough? Would this not be a prima facie case of discrimination in any other context? Of course, it remains

177. *Id.* at 203.
178. *Id.* at 265.
179. *Id.* at 350.
180. *Id.* at 65.
181. *Id.* at 42, 43.
182. *Id.* at 265.

possible that Judge Eisele could have explained his disparate treatment on nonracial grounds, but he was never asked to do so. Fairchild's attorneys appealed, arguing that the district court judge's fact-finding process was fundamentally defective in three ways, including the use of different standards to determine the credibility of the state's witnesses, but the Eighth Circuit did not bite. It simply deferred to the district court's determination without addressing the specific arguments raised by Fairchild.[183] Tact had not worked. The attorneys then petitioned for rehearing, suggesting rehearing en banc. This time they argued that the errors below warranted the attention of the full court, because, in other contexts, the district court's errors would be viewed as evidence of race discrimination. Making an analogy to *Batson v. Kentucky*, they argued that the panel did not, but should have, considered whether the findings were influenced by race. The petition was denied.[184]

It was at this point that my own small role in this case began. Steven Hawkins, one of the attorneys on the case, called me and asked if I would be interested in working on parts of the petition for certiorari. Along with two students, Joseph Kennedy and Linda Slamon, I drafted three potential questions for the petition for certiorari. One of these became part of the petition, but the other two, including an argument that the Court should grant certiorari to decide whether a habeas corpus judge should be required to articulate legitimate, nondiscriminatory reasons for his findings when the habeas petitioner has established a prima facie case of racial discrimination in his assessment of witnesses' credibility, did not. It was the judgment of the attorneys of record—a decision that I do not question, not envying them in their choices—that the Supreme Court might be more likely to grant certiorari (and, ultimately, relief) if the facts supporting this race question were part of the petition, but the question was not. The Supreme Court did not grant certiorari.

The end of the story is mostly tragic but also strange. Fairchild, who until this point (and contrary to his attorneys' urgings) had abjured an *Enmund* claim[185] that he could not be executed without evidence that he had himself been aware of the risk that the victim would be killed, changed his mind. He filed another habeas corpus petition, again to the same district court judge, and was granted

183. *See* Fairchild v. Lockhart, 979 F.2d 636 (8th Cir. 1992).

184. *See* Fairchild v. Lockhart, Nos. 90-2438EAPB & 91-2532EAPB, 1992 U.S. App. LEXIS 33831 (8th Cir. Dec. 30, 1992) (reh'g and reh'g en banc denied).

185. *See* Enmund v. Florida, 458 U.S. 782, 798 (1982) (holding that the Eighth Amendment's prohibition against cruel and unusual punishment prevents imposing the death penalty without a jury finding that the defendant acted with "an intention of participating in or facilitating a murder").

relief.[186] The judge found that *Enmund* barred his execution,[187] but the Eighth Circuit reversed[188] and Barry Lee Fairchild was executed by the State of Arkansas on August 31, 1995.[189]

3. Leroy Joseph "Ricky" Drayton

a. *The Facts*

Ricky Drayton's story (or at least the race and credibility part of it) is shorter, and as different from Barry Fairchild's as Clarence Brandley's story is different from that of William Jackson. Discrimination, even by judges, comes in more than one form. Judge Eisele was a federal judge with no apparent history of racial discrimination.[190] Moreover, his subsequent actions in declaring that the state could not execute Fairchild suggest a *lack* of *animosity* toward Fairchild. In contrast, the race and credibility issues in Ricky Drayton's post-conviction proceedings are more old-fashioned.

Drayton, a Black man, was accused of the armed robbery, kidnapping and murder of Rhonda Smith, a white convenience store clerk who died of a single gunshot wound to the head and whose body was found near an abandoned coal trestle.[191] There was no evidence of sexual assault. The state argued that Ms. Smith's death had been the result of an armed robbery with an execution-style gunshot to the head.[192]

Drayton was tried twice.[193] At both trials the state relied primarily upon Drayton's statement, the testimony of an acquaintance of Drayton's, Anthony Washington, and forensic evidence.[194]

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186. *See* Fairchild v. Norris, 869 F. Supp. 672 (E.D. Ark. 1993).

187. *See id.*

188. *See* Fairchild v. Norris, 21 F.3d 799 (8th Cir. 1994).

189. *See Arkansas Executes Man Who Argued He Was Retarded*, N.Y. TIMES, Sept. 1, 1995, at A16.

190. As Fairchild's attorneys, we looked for evidence of Judge Eisele's racial discrimination in published opinions and newspaper articles but found nothing.

191. *See* State v. Drayton, 361 S.E.2d 329, 331-32 (S.C. 1987).

192. *See* Memorandum of Law in Support of Motion for an Evidentiary Hearing and in Opposition to Respondent's Motion for Summary Judgment, appendix at 999-1000, 1096-97, Drayton v. Evatt, Civ. Action No. 3:94-1608-OAJ, (D.S.C. filed May 23, 1994) [hereinafter Motion for Evidentiary Hearing].

193. Drayton's first conviction was reversed based on the trial court's failure to instruct the jury that it must find beyond a reasonable doubt that Drayton's statement was freely and voluntarily given before it could consider the statement in deliberations. *See* State v. Drayton, 337 S.E.2d 216 (S.C. 1985).

194. *See* Motion for Evidentiary Hearing, appendix. There were also statements by witnesses who had seen the victim leave the convenience store, but these statements did not suggest the use of force or a weapon. *See id.* at 679-717.

Drayton maintained in both his statements that the shooting was an accident.[195] Washington, the state's immunized witness, reported that Drayton told him the killing was an accident.[196] Nevertheless, this claim could not have been credible to the jury because Drayton's trial counsel did nothing to investigate or argue the theory, and the state put on a forensic expert who testified that the shooting could not have occurred in the way Drayton claimed it had.

Drayton had told his counsel at the second trial, William Runyon, that he and Ms. Smith had been romantically involved,[197] but Runyon ignored this information just as he ignored the possibility that forensic evidence might demonstrate that the state's claim of an execution-style shooting was false.[198] This double failure to investigate had appalling consequences. At a minimum, evidence of a prior relationship could have negated the charges of kidnapping and robbery, which the state argued were aggravating factors that justified imposition of the death penalty. Moreover, such evidence of the prior relationship, when combined with forensic evidence that the killing could have occurred accidentally, might well have led a jury to believe the story Drayton told police and to exonerate him of murder.

Instead, Drayton was convicted.[199] At the sentencing phase, trial counsel again took no steps to challenge the state's case in aggravation, nor did he present readily available mitigating evidence about his client's mental state at the time of the offense or about his adaptability to prison. The jury then sentenced Drayton to death.[200] After the South Carolina Supreme Court affirmed his conviction,[201] Drayton's new lawyers sought relief in state post-conviction proceedings, claiming that Drayton's attorney had failed to provide him with effective assistance of counsel at both the guilt and sentencing phases of his trial.[202]

At the state post-conviction relief hearing, Drayton presented as witnesses a number of friends, peers, and acquaintances, all of whom were Black.[203] Although these witnesses testified to many different events and perceptions, three consistent points, all central to Drayton's ineffective assistance of counsel claims, emerged from

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195. *See id.* at 1155-56, 1561.

196. *See id.* at 2174-75.

197. *See id.* at 1442-43, 1478.

198. Such forensic evidence has now been adduced, as well as the evidence of a prior relationship discussed below.

199. *See Drayton*, 361 S.E.2d at 331.

200. *See id.*

201. *See id.*

202. *See* Motion for Evidentiary Hearing, appendix at 1671-85.

203. *See* Motion for Evidentiary Hearing.

their testimony. First, Drayton knew Rhonda Smith, the victim; second, Drayton was a chronic alcoholic; and third, Drayton was intoxicated on the night of the offense.

Six African American witnesses testified that Drayton knew and had an ongoing relationship with Rhonda Smith. They supplied detailed and interlocking stories of this relationship. C'Ella Holmes, for example, testified that she had known Ricky Drayton for seven or eight years.[204] According to Holmes, in either November or December of 1983 Drayton brought Smith to the house of a Jackie Cooper.[205] Holmes met Smith again on Drayton's birthday at a store near the convenience store where Smith worked, at which time Drayton referred to Smith as his "bunny."[206]

Another witness, Jacquelyn Cooper, testified that she saw Drayton on a frequent basis. In fact, she described their relationship as being like "a brother and sister."[207] Drayton spoke to her about Smith.[208] Once, when Cooper and Drayton rode their bikes together to the convenience store at which Smith worked, Drayton mentioned to Cooper that the woman in the store was the one about whom he had been speaking.[209] About a week later, Drayton brought Smith over to Cooper's house,[210] and Smith eventually came to Cooper's house a total of two or three times.[211] On one occasion, Smith brought her baby to Cooper's house and told Cooper that she and Drayton were engaged and that Drayton was the father of her baby.[212] Drayton, however, told Cooper that Smith was a "connection to get drugs."[213]

William Arthur Holmes recounted the first time that Drayton met Smith, an account that is consistent with what Drayton had told his trial counsel, Runyon, when describing his first encounter with Smith. According to Holmes, Smith had come to Bonds Avenue to buy a nickel bag of reefer.[214] Drayton sold the marijuana, but "it wasn't like the normal sell and go, this was like conversation that took place within that time."[215] Soon, Smith was coming to buy marijuana from Drayton, and eventually she began to stop by to see

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204. *See* Motion for Evidentiary Hearing, appendix at 1187.
205. *See id.* at 1189.
206. *See id.* at 1189-90.
207. *See id.* at 1199.
208. *See id.* at 1201.
209. *See id.*
210. *See id.*
211. *See id.* at 1202.
212. *See id.* at 1205.
213. *See id.*
214. *See id.* at 1217.
215. *See id.*

him socially.[216] Holmes also testified that he had registered a room in the local Howard Johnson's for Drayton and Smith because Drayton did not have any identification.[217] Holmes remembered that Drayton had a black address book containing a telephone number of the convenience store that he kept in a blue safety box which an insurance salesperson gave to him.[218] According to Holmes, this book was usually kept at Drayton's mother's house.[219]

Other witnesses further substantiated Drayton's relationship with Smith. Petrannella Drayton, Drayton's sister, was available to testify that on several occasions, she would call Smith for her brother, because Drayton believed that it was best if another woman asked for Smith.[220] Petrannella Drayton would find Smith's telephone number in a black book that Ricky Drayton kept in a locked box at his mother's apartment.[221] She remembered making these calls for her brother in January and February of 1984.[222] She also remembered calling for Smith at least twice.[223] When she called, she would ask for either Rhonda or "Ron."[224]

Sylvester Drayton, Ricky Drayton's brother, also recalled that Ricky Drayton introduced him to Smith at the convenience store some time after the Christmas holidays.[225] Sylvester Drayton also testified that he saw Smith several times on Bonds Avenue, which at the time was considered a "reefer area," and that when she came there, she asked for Ricky Drayton.[226] Like some of the other witnesses, Sylvester Drayton recalled that his brother kept telephone numbers in a black address book that he kept in a strong box at his mother's house.[227]

Elijah "Buffalo" Grant, a close friend of Ricky Drayton, remembered that Drayton used to bring Smith to the Bonds Avenue area to "show her off."[228] He first met Smith at the Murray Hill Apartments

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216. *See id.* at 1217, 1219.
217. *See id.* at 1218-19.
218. *See id.* at 1221.
219. *See id.*
220. *See id.* at 1268-69.
221. *See id.* at 1278.
222. *See id.* at 1278, 1281.
223. *See id.* at 1303.
224. *See id.* at 1290.
225. *See id.*
226. *See id.*
227. *See id.* at 1301.
228. *See id.* at 1339.

on Bonds Avenue in the early part of 1984.[229] On another occasion, Grant went with Ricky Drayton to the convenience store.[230]

Conversely, the state presented only one witness who could possibly have had—or who claimed to have—any first-hand knowledge of the relationship between Ricky Drayton and Rhonda Smith. That witness, Sandra Merritt, who is white, testified that she was a friend of Smith and that she did not believe Smith knew Drayton.[231] Although she claimed that Smith shared everything with her, it was brought out during cross-examination that Merritt was unaware of Smith's suicide attempt.[232]

Drayton's white trial counsel, William Runyon, also testified for the state. Runyon admitted that Drayton had told him before trial that he had known Smith; he recalled that Drayton had told him that Smith had come into his neighborhood to buy marijuana, that he had helped her avoid being ripped off, and that thereafter they were friendly.[233] Runyon also recalled that Drayton had told him he had seen Smith at a party.[234] Moreover, files that Runyon received from Drayton's counsel at the first trial contained interviews with six witnesses who had seen Drayton and Smith at the convenience store, none of whom indicated that she seemed distressed, nervous or fearful; two of these witnesses said that Smith and Drayton appeared to be friends.[235] Also in Runyon's trial file were statements from two coworkers declaring that Smith was a very safety-conscious person who would not have opened the door to a stranger.[236] Both of the coworkers concluded that Smith must have been killed by someone she knew and with whom she felt comfortable.[237] Only two of these eight witnesses were called by the state, and none were called by the defense.

Runyon admitted that despite Drayton's claim that he knew Smith and despite the eyewitnesses' perceptions, he performed no investigation into the issue of a prior relationship.[238] He offered

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229. *See id.* at 1339, 1341-42.

230. *See id.* at 1339. In addition to the testimony presented, Drayton also obtained affidavits from Jerry Dixon and Charlton Green describing the romantic relationship between Drayton and Smith.

231. *See id.* at 1421-22.

232. *See id.* at 1422, 1427-28.

233. *See id.* at 1442-43, 1478.

234. *See id.* at 1444.

235. *See id.*

236. *See id.* at appendix exhibits 5, 6.

237. *See id.* Also in the trial file was an FBI report that identified Drayton's fingerprints on a Budweiser can found in the employee's restroom, which could only be entered through a locked cashier's area. If Smith had not known Drayton, one would expect her to have sent him to the public restroom.

238. *See id.* at 1478-79.

several explanations for not pursuing this matter. First, Runyon stated that he thought the evidence showed that Smith left the convenience store with someone she knew and trusted and that he therefore did not want to prove that Drayton knew Smith.[239] Instead, he said, he had adopted the theory that "he didn't do it and make them prove it."[240] Runyon claimed that he had placed almost exclusive reliance on suppressing the confession but offered no reason why he did not pursue alternative theories, such as the relationship between Smith and Drayton, which would not have been inconsistent with suppression claims.[241] He acknowledged that the state could have tried Drayton even if the confession had been suppressed on the basis of the testimony of Anthony Washington, the prosecution witness, and admitted that he really did not have a defense "in the sense that we could place him somewhere else."[242] Runyon also said that he thought it would have been difficult to find witnesses to the original drug transaction that had occurred two years earlier but admitted that he had decided on his line of strategy even before Drayton told him of his relationship with Smith.[243]

On the second and third questions, those of Drayton's alcoholism and his intoxication on the night of Smith's death, C'Ella Holmes testified that she had seen Drayton on that night, which was Drayton's birthday, with beer in the back seat of his car and that she had seen him drunk on several occasions.[244] Jacquelyn Cooper testified that Drayton was very intoxicated on his birthday.[245] William Holmes, one of Drayton's closest friends, testified that Drayton typically drank a case of beer a day and had drunk so heavily on his birthday that he staggered when he walked.[246] Petranella Drayton, Ricky Drayton's sister, said that Drayton would consistently drink when he finished working for the day, that she drank a case of beer with Drayton on the day of the offense, and that she saw him intoxicated that night.[247] Ricky Drayton's brother Sylvester testified to his brother's drug and alcohol abuse and stated that he drank with his brother on his birthday.[248] Finally, a clinical pharmacist, Dr. John Voris, testified concerning the extent and effects of Drayton's long prior history of alcohol and drug abuse based upon his interview

239. *See id.* at 1443, 1481.
240. *See id.* at 1448.
241. *See id.* at 1438, 1446, 1449-50, 1471-74.
242. *See id.* at 1448-49.
243. *See id.* at 1442, 1445.
244. *See id.* at 1190-91.
245. *See id.* at 1203.
246. *See id.* at 1215, 1224.
247. *See id.* at 1268, 1270-71.
248. *See id.* at 1286-87, 1294.

with Drayton and the affidavits and testimony presented at the post-conviction relief hearing.[249] The state offered no evidence on this matter.

The state post-conviction judge, Walter J. Bristow, responded to this evidence of ineffective assistance of counsel in a drastic way: he found the claims of a prior relationship, the claims of Drayton's chronic alcoholism, and the claim of Drayton's intoxication on the night of the offense all to be untrue. It was then easy for Judge Bristow to conclude that Drayton was not denied the effective assistance of counsel by Runyon's failure to pursue matters which did not exist. Examining Judge Bristow's decision under the framework of *Arlington Heights* leaves virtually no room for doubt that race skewed his credibility determinations.

b. *The Legal Claim*

i. *Disparate Impact*

Judge Bristow rejected *every part of every Black witness' testimony.* He also rejected expert testimony that was predicated on the accuracy of African Americans' testimony concerning Drayton's alcoholism, intoxication, and prior relationship with Rhonda Smith. In contrast, he accepted *all of the testimony of the state's white witnesses.* He painstakingly criticized the testimony of Black witnesses but declined to extend the same scrutiny to the testimony of white witnesses. Thus, the record in this case shows a grossly disparate impact against the Black claimant and his Black witnesses.

Six African American witnesses testified to Drayton's ongoing relationship with the victim, and Drayton's white trial counsel testified that Drayton said before trial that he knew Smith. Although Judge Bristow acknowledged trial counsel's testimony of this pretrial statement to be true,[250] he nevertheless completely rejected all of the testimony of Drayton's Black witnesses that such a relationship in fact existed with the abrupt generalization: "I do not find this testimony to be *credible.*"[251]

As in the Fairchild case, not only the results, but the methods as well, of the judge's credibility assessments are racially disparate.

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249. *See id.* at 1361.

250. *See id.* at 2085.

251. *Id.* at 2091. In the proceedings in state court, the state went so far as to accuse post-conviction counsel of knowingly offering false evidence and suborning perjury by placing Black witnesses on the stand to testify regarding the relationship between Drayton and Smith. In the face of this unusual attack, Drayton's counsel subsequently produced polygraphs of witnesses that further bolstered their truthfulness.

Judge Bristow discredited the Black witnesses' testimony in a variety of ways, noting, for example, some witnesses' failure to remember exact dates and to recall some physical features of the victim. These criticisms did not take into account the five-year time lapse between the events and the testimony and stood in sharp contrast to Judge Bristow's treatment of the state's white witnesses' similarly vague and generalized testimony.

Although Sandra Merritt, a white prosecution witness, testified that she and Rhonda Smith talked about everything, cross-examination revealed that she was unaware of important and personal aspects of the victim's life.[252] That these discrepancies might cast doubt on either the truthfulness or the accuracy of her assertions concerning the absence of a relationship between Smith and Drayton (i.e., that the testimony of a *white* witness concerning the existence of an interracial relationship might be wrong) did not seem to occur to Judge Bristow.

The post-conviction judge was also surprisingly gullible in accepting, at face value, trial counsel's explanation for his failure to investigate the relationship of which his client had informed him. Evidence of a relationship between Drayton and Smith would have cast doubt on the aggravating circumstances of kidnapping and armed robbery. Furthermore, such evidence was consistent with the state's evidence presented at trial and would in no way have conflicted with the defense that Drayton's trial counsel claimed to have been pursuing. Nevertheless, Drayton's counsel's patently illogical explanation for his failure was never probed; Judge Bristow appears not to have considered the possibility that the counsel's own predispositions led him to reject prematurely the possibility of a relationship between the Black defendant and the white victim, despite the fact that the existence of such a relationship would have been enormously helpful to Drayton's case.

Judge Bristow was no more evenhanded in his evaluation of the testimony presented by Drayton concerning his intoxication and alcoholism. Four Black witnesses testified to Drayton's long-term alcohol abuse and five Black witnesses testified to his drinking on the day or night of the offense.[253] Judge Bristow rejected all testimony of Drayton's alcohol abuse and intoxication on the night of the offense,[254] despite Drayton's own statement (admitted over his objection at trial) that he had been drinking at a party earlier in the evening and had consumed one or more beers at the convenience

252. *See supra* note 232 and accompanying text.
253. *See supra* notes 244 to 248 and accompanying text.
254. *See* Motion for Evidentiary Hearing, appendix at 2097.

store[255] and despite the fact that testimony of Drayton's alcoholism and intoxication was unrefuted. Judge Bristow simply summarily dismissed these claims.[256]

Thus, Judge Bristow discredited the testimony of every one of Drayton's six Black witnesses. He also summarily dismissed expert testimony that relied on accounts given by the Black defendant and his Black witnesses.[257] Moreover, Judge Bristow failed to scrutinize the testimony of the state's white witness concerning the existence of a prior relationship and gave great deference to the white trial counsel's for not investigating and presenting evidence favorable to Drayton. In contrast, his order clearly implies that every one of Drayton's Black witnesses lied about every single event to which they testified. Such evidence of disparate impact, while perhaps not rising to the level of the "stark pattern" evidence that, *standing* alone is sufficient to prove intentional racial discrimination,[258] nevertheless is strong evidence of racial discrimination.[259] This case provides two additional reasons to infer intentional racial discrimination: deviations from normal procedure and the historical sequence of events.

ii. *Deviations from Normal Procedures*

Arlington Heights lists deviations from normal procedures as another factor probative of intentional discrimination.[260] Judge Bristow's credibility determinations present not one, but at least *three* such departures from ordinary practice. First, as discussed above, in resolving conflicting testimony on the issue of the existence of a prior relationship, Judge Bristow applied different standards to Drayton's Black witnesses than he applied to the state's white witnesses.

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255. *See id.* at 1149. Drayton's statement is in part corroborated by the FBI's report that identified Drayton's fingerprints on a beer can found at the convenience store.

256. *See id.* at 2097.

257. In addition to the expert testimony concerning Drayton's history of alcoholism and his intoxication on the night of the offense, Drayton also presented three experts who testified concerning his adaptability to prison. These experts were white, but their testimony relied on interviews with and evaluations of Drayton. *See id.* at 2097. The state presented one white witness who testified to minimal conduct violations that had occurred during Drayton's earlier incarceration and work release. Judge Bristow focused on the minor conduct violations, presented by the state's non-expert white witness, and disregarded the value of the testimony of Drayton's expert witnesses. *See id.* at 2074-78.

258. *See Arlington Heights*, 429 U.S. at 266.

259. *See id.* at 266.

260. *See id.* at 267.

Second, on the issues of Drayton's history of alcoholism and his intoxication on the night of the offense, Judge Bristow disbelieved testimony from close friends and experts and relied instead upon the *absence* of testimony concerning Drayton's alcohol and drug abuse in the two previous trials to discredit those witnesses.[261] This procedure for weighing evidence was extremely unusual for two reasons. Most strikingly, there was no contradiction between the trial testimony and the post-conviction testimony. That is, none of the witnesses whose testimony the judge relied upon actually stated that Drayton did *not* have a problem with alcohol; they simply did not state that he did.[262] Moreover, even if these "omissions" permitted some very weak inference that the trial witnesses were unaware of a drug or alcohol problem, the trial testimony came from obviously inferior sources. The trial witnesses relied upon by Judge Bristow had only casual contact or somewhat formal relationships with Drayton and were therefore not intimately acquainted with his personal habits. In contrast, those who testified to Drayton's problems with alcohol at the post-conviction relief hearing were neighbors, relatives, and friends—persons whom one would ordinarily expect to have far better information about a person's problematic use of alcohol and drugs.

A third deviation from ordinary procedures lies in the fact that Judge Bristow disbelieved every one of Drayton's Black witnesses and yet failed to articulate a compelling motive for this wholesale lying. The final order's failure to address this issue suggests that Judge Bristow may have believed an argument occasionally made explicitly by prosecutors but rightly condemned by courts:[263] that African Americans are likely to be lying when they testify for each other.

iii. *The Historical Sequence of Events*

If the disparate impact and the deviations from ordinary procedures leave any doubt that Judge Bristow's credibility determinations were influenced by race, the history of his legislative career and private life eliminate that doubt. Judge Bristow's legislative career evinces long-standing and consistent support for

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261. *See* Motion for Evidentiary Hearing, appendix at 2095-97.

262. In Drayton's two trials, several witnesses said they had seen him drinking. One witness said that she had not seen Drayton drunk. *See id.* at 1918-19. The other witnesses were not specifically questioned about his drinking habits. That counsel failed to pursue inquiry into his client's alcohol and drug abuse, however, hardly proves that there was none.

263. *See infra* Part III.A.1.b.

blatantly racially discriminatory public policies.[264] In 1960, Judge Bristow was a supporter of a resolution that commended the eighteen United States Senators from the South on "their courageous stand in opposing the proposed Civil rights Legislation pending in the United States Senate" and described federal civil rights legislation as an "iniquitous program."[265]

In 1964, Judge Bristow attempted to kill, by raising a point of order, consideration of a bill to authorize the purchase of adjoining property at South Carolina State College, a predominately Black institution, to pay off notes on the college.[266] He also argued in favor of a later attempt to kill the bill.[267] In contrast to his lack of support for traditionally Black institutions, Judge Bristow supported institutions that cherished the Confederacy; in 1957 he supported a bill to authorize the South Carolina Archives Commission to acquire a site and erect an archives building to house the archives and confederate relics of the state.[268] In 1967, he supported a resolution in favor of a paid state holiday on January 19th, Robert E. Lee's birthday.[269]

Judge Bristow served on the South Carolina Senate Penitentiary Committee from 1961 to 1975, serving as chair of the committee from 1965 to 1975;[270] until 1972 South Carolina law prohibited integration of prisoners on work farms or chain gangs.[271] He also served on the Education Committee from 1965 until he retired as a state senator,[272] a period during which the Committee took a number of actions to thwart school desegregation. For example, in 1965, Judge Bristow proposed a bill that would have granted certain students permission to attend school districts in which they did not live.[273] In 1971, Bristow proposed an amendment to the South Carolina Constitution that would have permitted the use of public funds to aid resident students attending sectarian schools of higher education.[274] The

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264. *See* infra notes 265 to 277 and accompanying text.

265. 93rd General Assembly, 2d Sess., 1960 J. SENATE S.C. at 568.

266. *See* Applicant's Motion to Alter or Amend the Judgment, No. 88-CP-10-2441, appendix at 1753 (Charleston County Ct. Common Pleas June 10, 1991).

267. *See id.*

268. *See* H. 1053, 92nd General Assembly, 1st Sess., 1957 J. HOUSE REPRESENTATIVES S.C. 104.

269. *See* S.48, J. SENATE 95 (Jan. 17, 1967).

270. *See* Applicant's Motion to Alter or Amend Judgment, appendix at 1750.

271. *See* Act of June 23, 1972, No. 1433, sec. 55, 1972 GENERAL AND PERMANENT LAWS OF S.C. 2629 (overturning requirement that prison chain gangs be separated by race).

272. *See* Applicant's Motion to Alter or Amend the Judgment, appendix at 1750.

273. *See* S. 127, J. SENATE S.C. 366 (Feb. 16, 1965); *id.* at 1045 (May 12, 1965).

274. *See* S. 295, J. SENATE S.C. 868 (Mar. 17, 1971); *id.* at 923 (Mar. 25, 1971).

Education Committee did not introduce any anti-discrimination legislation until 1970.[275]

Judge Bristow's private memberships continue to evince a preference for segregation. He is and has been a member of several racially discriminatory white clubs, including the Forest Lake Country Club, the Cotillion Club, and the Palmetto Club.

None of these facts were disputed by Judge Bristow when he denied Drayton's motion to recuse himself. At that time Drayton also alleged that in 1962 Judge Bristow supported legislation which would have required that all human blood used for blood transfusions be labeled according to the race of the donor, and made it a misdemeanor, in the absence of an emergency, to fail to notify recipients of blood that they were receiving blood from a person of another race.[276] Judge Bristow denied this allegation and asserted that he had opposed and filibustered legislation concerning blood transfusion identification. This denial was something less than the full truth. Although Judge Bristow may have opposed legislation that would have *criminalized* failure to notify blood transfusion recipients of the race of the donor, he nevertheless proposed a bill that would have *required* the classification and labeling of blood by race.[277]

Given Judge Bristow's personal history, it is difficult to retain any doubt that his credibility determination in the Drayton case was racially biased. Since Bristow's rejection of Drayton's post-conviction review claim, Drayton's attorneys—of whom I have become one—have filed a petition for habeas corpus in federal district court[278] and a motion for an evidentiary hearing on the petition.[279] Unlike the Fairchild case, where there was no established doctrinal peg on which to hang a claim of biased adjudication of credibility, the credibility determination in the Drayton case, because it occurred in state court, had a statutory structure for raising this issue.

Under the version of 28 U.S.C. § 2254(d) which governed at the time Drayton's petition was filed, the findings of a state court trier of

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275. *See* Applicant's Motion to Alter or Amend the Judgment, memorandum at 1750.

276. *See id.*

277. Bristow's bill read: "All human blood hereafter collected in the State of South Carolina for transfusions shall be clearly labeled so as to indicate the race of the donor by number as follows:(1) Caucasian;(2) Negroes;(3) Mongoloid; (4) Races other than Caucasian, Negroid, or Mongoloid." H. 1080, J. SENATE S.C. 911, 941-42 (Mar. 28, 1962).

278. Petition for Writ of Habeas Corpus by a Person in State Custody, Drayton v. Evatt, Civ. Action No. 3:94-1608-OAJ (D.S.C. filed May 23, 1994).

279. Applicant's Motion for an Evidentiary Hearing, Drayton v. Evatt, Civ. Action No. 3:94-1608-OAJ (D.S.C. filed May 23, 1994).

fact are presumed to be correct in a federal habeas corpus proceeding, if and only if the state court has, after a full and fair hearing, reliably found the relevant facts.[280] Where the state hearing was not "full and fair," however, a federal hearing on the controverted factual questions is mandatory.[281] Moreover, "[t]he claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question" and provides a particularly compelling justification for extending federal habeas corpus review.[282] We have argued that Drayton's state court hearing was rendered egregiously unfair by the post-conviction judge's racial discrimination against Black witnesses and by the judge's refusal to recuse himself in the face of strong evidence of his bias and that the statute (as well as the U.S. Constitution) therefore required a new evidentiary hearing.[283]

The magistrate assigned to the case, Robert Carr, issued a report and recommendation concluding that Drayton's petition for habeas corpus relief, as well as his motion for an evidentiary hearing, should be denied.[284] Carr's report never discussed any of the reasons Drayton claimed he was entitled to an evidentiary hearing on his constitutional claim, including the allegation that the state fact finder was racially biased.[285] Instead, the report proceeded to dispose of each of Drayton's substantive claims by declaring that Judge Bristow's findings of fact "are binding on this court,"[286] completely ignoring the allegations that the hearing had been rendered unfair by virtue of racial bias.

We have objected to the report and recommendation, and there the case stands.

4. Other Modern Examples

The Drayton and Fairchild cases are more helpful to race and credibility issues than are the high profile/subsequent exoneration cases because their details make the inference of a racially influenced credibility determination stronger. But even taken together, the

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280. *See* Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1105, *repealed by* Act of Apr. 24, 1996, Pub. L. No. 104-132, 110 Stat. 1218. *See infra* Part II.C.1 for a brief discussion of the implications of the recent revisions in the federal habeas statute for claims alleging racially biased credibility determinations.

281. *See* Sumner v. Mata, 449 U.S. 539, 550 (1981).

282. *See* Rose v. Mitchell, 443 U.S. 545, 563 (1979).

283. *See* Motion for Evidentiary Hearing.

284. *See* Report and Recommendation, Drayton v. Evatt, Civ. Action No. 3:94-1608-OAJ (D.S.C. filed May 23, 1994).

285. *See id.*

286. *See id.*

exoneration cases and the two habeas cases just reviewed cannot tell us much about the frequency with which such issues arise. One might be confident from these cases that there are others out there, but how many are there? I cannot make an estimate, but several other sources suggest that racially biased credibility determinations are not rare.

a. *Prosecutorial Misconduct Cases*

Prosecutorial misconduct cases are one such source. In at least six modern cases, prosecutors have argued that a witness' race[287] or ethnicity[288] made him less likely to be truthful. Most egregiously, one prosecutor "told the jury, in effect, that the testimony of the defendant should not be believed because the defendant was from Haiti where if you told the authorities the truth, you were dead."[289] In another four cases, prosecutors argued that a defense witness was more likely to be lying because he was testifying for another person of his race.[290] In the most extended such argument, the prosecutor argued that all of the defendant's alibi witnesses were his "black brothers and sisters," asked rhetorically how often one saw African Americans greeting each other with "hey brother, hi, ya sister," and then asked the jurors to consider what bias would be inherent in the fact that the defendant's witnesses were Black.[291] In four cases, a prosecutor argued that an African American prosecution witness' testimony was more credible because he or she was testifying against another African American.[292] In one case a white alibi wit-

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287. *See* Withers v. United States, 602 F.2d 124, 125 (6th Cir. 1979) (reviewing case in which prosecutor argued "Not one White witness has been produced in this case that contradicts [the White prosecution] witness' testimony."); Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987), *cert. denied*, 488 U.S. 934 (1988) (reviewing case in which prosecutor, among other racial comments, characterized the testimony of an African American witness as "shucking and jiving on the stand"); People v. Richardson, 516 N.E.2d 924, 926 (1977) (reviewing case in which prosecutor referred to Black defendant and his Black witnesses as "street people" and said "they lie every day").

288. *See* George v. State, 539 So.2d 21 (Fla. App. Ct. 1989); Stanton v. State, 349 So.2d 761, 764 n. 1 (Fl. Dist. App. 1977) (reviewing case in which prosecutor asked defendant, "Isn't it true in gypsy practice that it is okay to lie and cheat and steal if you can get away with it?"); State v. Kamel, 466 N.E.2d 869, 866 (Ohio 1984) (reviewing case in which prosecutor argued that defense witnesses were unreliable by reason of their foreign birth in the Mideast).

289. *See George*, 539 So.2d at 21.

290. *See* State v. Thompson, 654 P.2d 453 (Kan. 1982); *Richardson*, 363 N.E.2d at 926; People v. Kong, 517 N.Y.S.2d 71, 72 (App. Div. 1987); *Kamel*, 466 N.E.2d at 866 (reviewing case in which prosecutor argued that defense witnesses, natives of Syria, were unduly biased because they were the defendant's "countryman").

291. *See Thompson*, 654 P.2d at 457.

ness' testimony for the Black defendant was argued to be less credible because, as a white woman living with a Black man, she had faced social disapproval and would therefore be more willing to lie.[293]

In a number of other cases, supposed racial propensities were called on to bolster the credibility of white witnesses. Four prosecutors argued that a white rape complainant should be believed when she denied consent because, to use one prosecutor's phrase, "the average white woman abhors anything of [a sexual] nature that had to do with a Black man."[294] In another case, the prosecutor argued that the white male witness must be telling the truth about his accusations, because his story included admitting to sexual intercourse with a Black woman, and "[i]f he is going to lie about anything else, he wouldn't admit having intercourse with a black woman."[295] In yet another case, a prosecutor, in order to impeach the veracity of the defendant's claim that at the time of his arrest he believed plainclothed police officers were muggers, repeatedly argued that the African American defendant could not have believed that *white* men were muggers.[296]

Thus far I have considered cases where prosecutors argued that the race of a witness was in some way connected to his or her willingness to tell the truth. But credibility has components of accuracy as well as honesty. It is relatively uncommon for a prosecutor to directly portray a person as less intelligent because of his or her race.[297]

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292. *See* McFarland v. Smith, 611 F.2d 414, 416 (2d Cir. 1979); People v. Bramlett, 569 N.E.2d 1139, 1145 (Ill. App. Ct.), *lv. app. denied*, 580 N.E.2d 121 (Ill. 1991); People v. Ali, 551 N.Y.S.2d 54, 55 (App. Div.), *lv. app. denied*, 559 N.E.2d 683 (N.Y. 1990); People v. Green, 453 N.Y.S.2d 228, 229 (App. Div. 1982).

293. *See* State v. Terry, 582 S.W.2d 337, 339 (Mo. Ct. App. 1979).

294. Miller v. North Carolina, 583 F.2d 701, 704 (4th Cir. 1978). *See also* Reynolds v. State, 580 So.2d 254, 256 (Fla. Dist. Ct. App. 1991) (reviewing case in which prosecutor commented that an "articulate" and "attractive" white woman would not have consented to sex with Black defendant); State v. Thomas, 777 P.2d 445 (Utah 1989) (reviewing case involving similar argument by prosecutor); State v. Bautista, 514 P.2d 530, 532-533 (Utah 1973) (same); *see also* Commonwealth v. Morgan, 401 A.2d 1182, (Pa. Super. Ct. 1979) (argument that white girl would not have patronized Black bar).

295. *See* People v. Richardson, 363 N.E.2d 924, 926 (Ill. App. Ct. 1977).

296. People v. Thomas, 514 N.Y.S.2d 91, 92-93 (App. Div. 1987). *See also* People v. Traylor, 487 N.E.2d 1040, 1042 (Ill. App. Ct. 1985) (argument by prosecution that police officers' behavior could be explained by the fact that they were white police officers in a Black neighborhood).

297. *But see* People v. Turner, 367 N.E.2d 1365, 1366 (Ill. App. Ct. 1977) ("Sorry, if I used such big words with [the African American eyewitness] like 'spectator' to 'Blacky tromp Whitey.' Those are awfully big words I know . . . ."); Smith v. State, 516 N.E.2d 1955, 1064 (Ind. 1987) (prosecutor, amid other racial remarks, described a Black co-defendant as "stuck by his own stupidity"); United States *ex rel.* Haines v. McKendrick, 481 F.2d 152, 154-55 (2d Cir. 1973) (prosecutor made remarks about

However, a variety of other racially demeaning remarks, such as racial epithets,[298] animal imagery,[299] and the practice of referring to a minority race witness by her first name,[300] may also serve to call up racial stereotypes about intelligence.

For several reasons the reported cases underestimate the prevalence of prosecutorial arguments that link race and credibility. First, the number of appeals that raise any form of inflammatory argument claim cannot be accurately ascertained because of the common practice of affirming criminal convictions without opinions. Second, in a number of inflammatory argument cases, the court's opinion refers in generic terms to racial comments or inflammatory remarks without describing them; sometimes it is only the happenstance of a dissent that informs the reader as to the content of the comments.[301] Third, courts do not always reverse even blatant cases of prosecutorial abuse and almost never reverse more subtle race-biased arguments,[302] thereby diminishing the incentive to litigate less extreme misconduct. Moreover, prosecutorial arguments are only half of the story. Defense counsel also may ask questions and make arguments premised on racially influenced views of

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"colored people," including that they did not know and could not do things that are "commonplace for the ordinary person").

298. The use of such epithets is not entirely a thing of the past. *See* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1754 (1993).

299. The Rodney King beating trial included many such images, including "Hulk-like strength," "bear-like yell," "wounded animal," and "Gorillas in the Mist." *See Reporter's Notebook: Baton is 'Star' in Police-Beating Trial*, N.Y. TIMES, April 6, 1992 at A14. For another egregious recent example, see State v. Blanks, 479 N.W.2d 601 (Iowa Ct. App. 1991) (prosecutor, in case involving alleged assault by Black defendant of white female victim, referred to movie that mentioned gorillas in its title and in which young white woman stood alone against African hunters who eventually murdered her). *See generally* Johnson, *supra* note 298, at 1753-54 (reviewing other cases of animal and subhuman imagery).

300. In Hamilton v. Alabama, 376 U.S. 650 (1964) (per curiam) (reviewing case based on facts reported in Bell v. Maryland, 378 U.S. 226, 248 n.4 (1964) (Douglas, J., concurring)), the Supreme Court reversed the judgment of contempt imposed on a Black witness who refused to answer when a lawyer insisted on calling her by her first name. Such cases still occur. The Rodney King beating case provides an example of a witness using a Black adult's first name. One of my clients was referred to by the prosecutor in the course of an extremely inflammatory summation as "Pedro." *See* Brief for Defendant-Appellant at 16, People v. Arroyo, 431 N.E.2d 271 (N.Y. App. Div. Jan. 22, 1981). *See also* State v. Torres, 554 P.2d 1069, 1071 (Wash. Ct. App. 1976) (noting that prosecutor repeatedly referred to defendants as Mexicans or Mexican Americans while referring to the complaining witness with title "Ms." or "Mrs.").

301. Compare the majority view in *Soap v. Carter*, 632 F.2d 872, 876, (10th Cir. 1980), characterizing appellant's brief as one that "emphasize[d], out of all proportion, a minor incident," with the dissent's description of a prosecutor's argument that when Indians drink, they often cannot handle it, and that Indians, as "a class of people," do not live in a decent way . . . without violence," *id.* at 878 (Seymour J., dissenting).

302. *See infra* notes 375-76 and accompanying text.

credibility, but because prosecutors may not appeal acquittals, there is usually no record of defense counsel's misconduct.

The underlying question is not, however, the prevalence of this specific form of attorney misconduct, but rather the influence of race on credibility determinations. Reported cases involving prosecutorial race and credibility arguments are therefore useful both for extrapolating the frequency with which jurors have been prompted to think about credibility in racial terms and for inferring something about the predispositions of jurors to do so. A prosecutor is unlikely to make an argument that he or she does not think will resonate with jurors' own thinking processes; it is no accident that we do not see cases urging jurors to discount the witnesses' testimony because they are "Americans." The persistence of these arguments suggests that at least a number of prosecutors believe jurors will find them persuasive.

b. *Juror Accounts*

There is very little direct evidence concerning the frequency with which jurors consider race in assessing credibility. This is in part due to the prevailing rules against juror impeachment of verdicts.[303] Courts that do permit impeachment based on racial bias occasionally hear stories of overt discussion of race and credibility. Thus, in one reversed burglary prosecution, the jury foreman said, "You can't tell one black from another," and a second juror argued that the jury should take the word of the white victims over that of the Black defendant.[304] In a 1995 civil case that subsequently was reversed, jurors made a variety of appallingly racially biased remarks, including references to one Black witness as being like a chimpanzee.[305] Cases where courts refuse to consider such testimony are more common, but occasionally they too generate reports of remarks relating to race and credibility.[306] Moreover, on occasion jurors complain to the judge during the course of deliberations about the

303. *See infra* note 363 and accompanying text.

304. Tobias v. Smith, 468 F. Supp. 1287, 1289 (W.D.N.Y. 1979).

305. *See* Powell v. Allstate Ins. Co., 652 So. 2d 354, 335 n.2 (Fla. 1995). My gratitude goes to Professor Judith Resnick for alerting me to this case.

306. *See, e.g.*, Smith v. Brewer, 444 F. Supp. 484, 488 (S.D. Iowa 1978), *aff'd*, 577 F.2d 466 (8th Cir. 1978), *cert. denied*, 439 U.S. 967 (1978) (reviewing case in which juror strutted like a minstrel and mimicked Black dialect where defendant and his attorney were Black). Jurors sometimes report similar behavior by other jurors to the media. *See supra* note 2 and accompanying text.

biased conduct of fellow jurors; here too, improper race and credibility arguments are sometimes involved.[307]

All courts are in agreement, however, that the *unstated* biases of a juror may not be used to impeach a verdict,[308] so most of the information about internal juror reasoning about race and credibility must come from nonlegal sources. I will turn to those sources in a moment but first pause to describe two Supreme Court opinions that clearly include race and credibility inferences. The first case involves a race and accuracy inference, the second a race and truthfulness inference.

c. *Supreme Court References*

i. Manson v. Brathwaite

In *Manson v. Brathwaite*,[309] the defendant was charged with the sale of narcotics.[310] His conviction depended upon the identification testimony of an undercover officer, an identification that the defendant argued was the product of an unnecessarily suggestive identification procedure.[311] The undercover officer, who did not know the seller, left the sale and drove to headquarters, where he described the seller to another officer as " 'a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones and of heavy build.' "[312] The other officer, without further information, suspected Brathwaite, obtained a photo of Brathwaite and left it for the undercover officer to view. With no other photos to choose from, the undercover officer identified Brathwaite as the seller, an identification that he repeated at trial and in which he expressed complete confidence.[313]

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307. *See, e.g.*, United States v. Heller, 785 F.2d 1524 (11th Cir. 1986) (reviewing case in which juror made racial and religious slurs and comments on the number of Jewish witnesses testifying for Jewish defendants).

308. *See, e.g.*, Carson v. Polley, 689 F.2d 562, 581 (5th Cir. 1982) (holding that letter revealing juror's speculation about motivations of plaintiff's attorney did not present any extrinsic material placed before the jury); *cf. Tobias*, 468 F. Supp. at 1291 (holding that juror's affidavit of prejudicial statements made to other jurors should be reviewed, because it raised question of whether jury's verdict was tainted by improper extrinsic influences); *Powell*, 652 So. 2d at 357 (holding that only inquiry into objective acts committed by or in the presence of the jury or a juror is permissible).

309. 432 U.S. 98 (1977).

310. *See id.* at 101-102.

311. *See id.* at 103.

312. *See id.* at 101.

313. *See id.* at 102.

The Second Circuit eventually reversed Brathwaite's conviction on the grounds that the photo identification should have been suppressed as unnecessarily suggestive.[314] That court opined that a risk of irreparable misidentification was present, referring, among other things, to the poor lighting of the incident, the officer's motive to make arrests, and the fact that his description "could have applied to hundreds of Hartford black males."[315] The Supreme Court reversed the Second Circuit, agreeing that the identification proceeding was unnecessarily suggestive,[316] but disagreeing as to the risk of irreparable misidentification.[317] The Court found that a number of factors enhanced the reliability of the identification, including the fact that "[the undercover officer] himself was a Negro, and was unlikely to perceive only general features of 'hundreds of Hartford black males.' "[318]

The Court did not discuss this assertion. In context, it appears that the Court was claiming that the Black officer was more likely, because of his race, to make an accurate identification. The baseline comparison, however, is unclear. Is it all other identifications? White identifications of Black perpetrators? Black identifications of white perpetrators? Identifications of Black perpetrators where the descriptions are sparse? The Court's reasoning is particularly murky because of its prior treatment of an earlier case, *Stovall v. Denno*.[319] *Stovall* concerned an extremely suggestive hospital room show-up,[320] but the Court did not discuss or draw any inferences from the fact that the victim was white and the accused was Black.[321]

ii. Schlup v. Delo

The second relevant Supreme Court case was decided in 1995. In *Schlup v. Delo*,[322] a habeas petitioner alleged that constitutional error at his trial deprived the jury of critical evidence that would have established his innocence.[323] Schlup, a white inmate, had been

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314. *See* Brathwaite v. Manson, 527 F.2d 363 (2d Cir. 1975).

315. *Id.* at 371-72.

316. *See Manson*, 432 U.S. at 109.

317. *See id.* at 116.

318. *Id.* at 115.

319. 388 U.S. 293 (1967).

320. *See id.* at 295.

321. The ambiguity of the Court's reasoning in *Manson* is underlined by the syllabus describing the undercover officer as "Negro," *id.* at 98, suggesting the relevance of that fact, but not referring to race in its description of the holding.

322. 115 S. Ct. 851 (1995).

323. *See id.* at 854.

convicted of participating in the murder of a Black inmate.[324] Most of the opinion in *Schlup* focused on the proper standard for reviewing successive habeas petitions when the petitioner alleges both factual innocence and constitutional error. In the course of the opinion, however, the Supreme Court referred to some of the evidence Schlup offered to show that he was innocent. The Court stated that Schlup attempted to supplement the record with "several" detailed affidavits attesting to his innocence and then described two of these affidavits.[325] With respect to the first affidavit, it is clear from the Court's description of the inmate and from the parts of the affidavit it chose to excerpt that the Court viewed the witness' race as relevant to his credibility:

> For example, Lamont Griffin Bey, a black inmate, submitted an affidavit in which he stated, "The first thing I saw of the fight was Rodney [sic] Stewart throw liquid in Arthur Dade's face, and O'Neal stab him .... I knew Lloyd Schlup at that time, but we were not friends. Lloyd Schlup was not present at the scene of the fight." Griffin Bey also stated, "When this happened, there was a lot of racial tension in the prison .... I would not stick my neck out normally, but I am willing to testify because I know Lloyd Schlup is innocent."[326]

Although it is clear that Bey's race affected his credibility in the Court's eyes, the process of reasoning through which the Court allowed race to affect its credibility determination is not clear. Ordinarily, absent an attack on the veracity of a witness, no evidence to bolster the witness' credibility is admissible.[327] Because Bey's affidavit was submitted and rejected by the district court,[328] no prior attack on credibility had been made.

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324. *See id.* at 854-56.

325. *Id.* at 858 n.18.

326. *Id.* [citations to record omitted]. The Court followed this quote with a description of the second inmate's statement: "Similarly, inmate Donell White swore an affidavit in which he stated, 'Three white guys were coming the opposite way.' " *Id.* I would speculate that although the second inmate's words do not make an overt reference to cross-racial exculpatory testimony, the Court's description of the second inmate's affidavit as being similar, along with the "three white guys" quote, is intended to imply that Donell White is also Black and that he has the same racially enhanced reliability.

327. *See* MCCORMICK ON EVIDENCE, § 49 at 115 (Edward W. Cleary ed., 3d ed. 1984) (stating "[I]n the absence of an attack upon credibility no sustaining evidence is allowed."); JACK B. WEINSTEIN ET AL., EVIDENCE 607[08]; United States v. Arroyo-Angulo, 580 F.2d 1137, 1146 (2d Cir. 1978).

328. *See Schlup*, 115 S. Ct. at 858 n.18.

Perhaps this is a rule peculiar to race. If so, then what is the scope of this rule? The Court may be implying that any time a Black person testifies for a white person, that testimony is more likely to be true. If so, then more likely than what? More likely than if a Black person testifies for a Black person? More likely than if a white person testifies for a white person? Perhaps the inference is narrower: when a Black prisoner testifies for a white prisoner, that testimony is more likely to be true. If so, again, more likely than what? Maybe the Court is only implying that when a Black prisoner testifies for a white prisoner *and* there is racial tension in the prison, that testimony is more likely to be true. Then again, perhaps the Court means to imply that cross-racial helpfulness enhances credibility any time there are racial tensions.

In both *Manson* and *Schlup*, the permissible credibility inferences are clearly racial, but the nature of those inferences are unclear. Together, the two cases appear to signal that not all credibility inferences based on race are prohibited but do nothing to show what might be prohibited. The two cases also suggest that race and credibility inferences arise out of reflex, even for the highly trained. The statements of the majority in *Schlup*, which are not questioned in the dissent, are extraordinary statements from a Court that is increasingly committed to a path of color-blindness in racial issues. What would explain an assumption which is neither self-conscious nor carefully nuanced, that race is relevant in this context?

C. *The Psychological Dynamics of Race and Credibility Assessments*

By what process does a fact finder evaluate the worth of testimony offered by a witness? When the Supreme Court first analyzed the credibility of anonymous informants, it created a two-pronged test: both the informant's "veracity" and the informant's "basis of knowledge" had to be demonstrated before a magistrate could justifiably issue a warrant based on the informant's allegations.[329] Although the Court has since adopted a totality of the circumstances approach to determine the credibility of informants,[330] this approach, too, recognizes the dual nature of credibility assessments; it differs only in permitting a deficiency in one aspect of the assessment to be compensated for by a strong showing as to the other. Indeed, disregarding variations in phrasing, it is hard to imagine a legitimate credibility determination that would not consider both the likely

329. Aguilar v. Texas, 378 U.S. 108, 114 (1964).
330. *See* Illinois v. Gates, 462 U.S. 213 (1983).

accuracy of the witness' perceptions and the truthfulness of the witness' reporting.

Unfortunately, on both the accuracy and the truthfulness fronts, psychological research suggests that fact finders face substantial obstacles. Putting aside for the moment the ways that racial stereotypes may hinder credibility assessments, ordinary assumptions about reliability and truthfulness are often mistaken. For example, as data from eyewitness identifications make abundantly clear, both the subjects of laboratory experiments and real jurors give enormous weight to eyewitness identifications, despite the fact that, as compared to physical or even circumstantial evidence, they are not very reliable.[331] Even in comparing the accuracy of eyewitness identifications, jurors and mock jurors tend to assume several facts that are contradicted by the data. For example, most people believe that stress increases the reliability of an identification (e.g., "I will never forget that face!"), when in fact stress actually detracts from reliability.[332] Most people also believe that confidence in an identification is highly correlated with accuracy, but confidence is in fact more likely to reflect personality factors or situational "encouragement" than accuracy.[333] Many people believe that cross-racial identifications are less likely to be reliable if the person making the identification is racially biased, but racial bias does not seem to affect the rate of cross-racial identification errors.[334] Nor is legal experience likely to correct such misapprehensions, as evidenced by forensic psychologists' criticism of the Supreme Court's list of factors that courts should use to judge the reliability of identifications.[335]

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331. *See* Felice J. Levine & June Louin Tapp, *Eyewitness Identification: Problems and Pitfalls*, *in* THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL ANALYSIS 99 (Vladimir J. Konecni & Ebbe B. Ebbesen eds., 1982); Elizabeth Loftus, *Reconstructing Memory: The Incredible Eyewitness*, PSYCHOL. TODAY, Dec. 1974, at 116, 117.

332. *See* David B. Fishman & Elizabeth F. Loftus, *Expert Psychological Testimony on Eyewitness Identification*, 4 LAW & PSYCHOL. REV. 87, 92 (1978) (reviewing research and concluding that "in general, extreme stress in an identification situation results in less reliable testimony").

333. *See, e.g.*, C.A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification Confidence*, *in* ADULT EYEWITNESS TESTIMONY 348 (David F. Ross et al. eds., 1994).

334. *See* John C. Brigham & Paul Barkowitz, *Do "They All Look Alike?" The Effect of Race, Sex, Experience, and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED SOCIAL PSYCHOL. 306, 309 (1978); Paul J. Lavrakis et al., *A Perspective on the Recognition of Other-Race Faces*, 20 PERCEPTION & PSYCHOPHYSICS 475, 480 (1976).

335. *See, e.g.*, Gerald F. Uelmen, *Testing the Assumption of* Neil v. Biggers*: An Experiment in Eyewitness Identification*, 16 CRIM. L. BULL. 358 (1980). With respect to the accuracy of recollections, eyewitness identifications are the most heavily studied phenomena. However, new research suggests that other sincere but inaccurate accounts of the past, so-called "false memories," may similarly distort factfinding on issues other than identification. Researchers have identified a number of qualities

The literature on the truthfulness prong of credibility determinations is more sparse but no more encouraging. Fact finders often appear to follow the wrong cues on truthfulness as well as on accuracy. Some studies have shown that when observers are asked to differentiate truthful reports from lies, they do not do much better than chance.[336] Although psychologists have discovered several behavioral measures that correlate with lying, observers often attend exclusively to mannerisms (e.g., restlessness, pauses in speech) which are actually quite poor predictors of truthfulness when the subject is highly motivated to succeed at lying. Pitch, the muscles used to produce a smile, the number of times the word "I" was used, and the number of illustrating asides are all better predictors of truthfulness—and were all ignored by subjects attempting to judge truthfulness.[337] Nor is experience the answer; law enforcement personnel are no better at detecting falsehoods than are lay people.[338]

How does racial bias fit into this unreliable process? Surprisingly, the available research can only answer this question by inference. Most of the literature that directly addresses race and credibility is aimed at a very different issue; how the white therapist can become credible and trustworthy to the minority client.[339] The answer to the question posed in the literature—display sensitivity to cultural differences—is not helpful in discovering racially biased

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that are diagnostic of false memories, including a comparison of the number of sensory characteristics (more common in real memory descriptions) with the number of verbal hedges and references to thought processes and personal pronouns (more common in false memories). However, training in these factors does not seem to much improve the rate of identifying false memories. Elizabeth Loftus et al., *Misguided Memories: Sincere Distortions of Reality, in* CREDIBILITY ASSESSMENT 155 (John C. Yuille ed., 1989).

336. *See, e.g.*, Paul Ekman & Wallace V. Friesen, *Detecting Deception from the Body or Face*, 29 J. OF PERSONALITY AND SOCIAL PSYCHOL. 288, 292 (1974) (finding that sample of test participants who had not been shown film by which to familiarize themselves with speaker's mannerisms were accurate in assessing truth of speaker's statements only 43 to 51 percent of the time).

337. *See* Paul Ekman, *Why Lies Fail and What Behaviors Betray a Lie, in* CREDIBILITY ASSESSMENT, *supra* note 335, at 71.

338. *See* Ray Bull, *Can Training Enhance the Detection of Deception? in* CREDIBILITY ASSESSMENT, *supra* note 335, at 83.

339. *See, e.g.*, Larry E. Davis & Joe Gelsomino, *An Assessment of Practitioner Cross-Racial Treatment Experiences*, 39 SOCIAL WORK 116 (1994); Chalmer E. Thompson et al., *Counselor Content Orientation, Counselor Race, and Black Women's Cultural Mistrust and Self-Disclosures*, 41 J. COUNSELING PSYCHOL. 155 (1994); Priscilla Wade & Bianca Bernstein, *Cultural Sensitivity Training and Counselor's Race: Effects on Black Female Clients' Perceptions and Attrition*, 38 J. COUNSELING PSYCHOL. 9 (1991); C. Edward Watkins, Jr. et al., *Cultural Mistrust and Its Effects on Expectational Variables in Black Client-White Counselor Relationships*, 36 J. COUNSELING PSYCHOL. 447 (1989); *see also* Lerita M. Coleman, *Black Students' Reactions to Feedback Conveyed by White and Black Teachers*, 21 J. APPLIED SOCIAL PSYCHOL. 460 (1991).

credibility assessments.[340] The nature and varied forms of American racism, however, suggest a variety of ways in which credibility determinations may be swayed by race.

Psychologists who study race continue to refine their theories of how race influences thought processes. The taxonomies they employ vary, but for purposes of thinking about race and credibility, the labels are less important than a general sense of the variety of ways in which people respond to race. For some white subjects, persons of other races evoke strong feelings of hatred, disgust and anger; some psychologists call such persons "dominative racists."[341] For others, the primary emotion concerning race is the desire to avoid contact with persons of color; some researchers refer to such persons as "aversive racists."[342] Yet another group harbors stereotyped views that influence their thinking processes without emotions of either anger or avoidance.[343] Stereotypic biases may occur automatically or without conscious awareness, even in persons who would disavow racist beliefs. Moreover, it appears that such persons process stereotype-consistent evidence more extensively than they do stereotype-inconsistent evidence.[344]

Whether each of these groups should be labeled "racist" is subject to argument,[345] but clearly each poses a threat to the reliability of credibility determinations. For the classic dominative racist, animosity may overwhelm the credibility issue. Thus, in *To Kill a Mockingbird*, Atticus explains the jury's decision as follows: "There's something in our world that makes men lose their heads—they couldn't be fair if they tried. In our courts, when it's a white man's word against a black man's word, the white man always

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340. A matter of somewhat greater relevance is why this is the primary aspect of race and credibility that has been investigated, a matter which I leave to the reader's speculation.

341. *See* JAMES M. JONES, PREJUDICE AND RACISM 121-24 (1972); JOEL KOVEL, WHITE RACISM 54-55 (1970); *see also* Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 687 (1985).

342. *See* Jones, *supra* note 341, at 121-24; Kovel, *supra* note 341, at 54-55; Pettigrew, *supra* note 341, at 687.

343. *See generally* Galen Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCHOL. 726 (1988); Patricia Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1986) (presenting evidence that stereotypes illicit high and low prejudicial responses in general).

344. *See* Bodenhausen, *supra* note 343; Devine, *supra* note 343.

345. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (arguing that the category of stereotyping by low-prejudice subjects should not be called racist.).

wins."[346] From the perspective of the dominative racist, credibility is beside the point: it is the outcome that matters.

The situation of the aversive racist is more complicated. She has no racially motivated desire to inflict harm upon the Black defendant. The aversive racist's aversion to and desire for distance from a Black witness may, however, prevent her from being able to identify with the Black witness. Perhaps she is more ready to believe "they" lie for each other. This may be the most likely explanation for Judge Bristow's decision in Ricky Drayton's case,[347] although racial animosity is also a real possibility.

Even if the fact finder is neither a dominative nor an aversive racist, race may still influence her credibility determinations. There are many stereotypes of racial minorities, but two are particularly important in credibility determinations. To the extent that the accuracy of a recollection is at issue, perceptions of intelligence are important, and to the extent that veracity is disputed, perceptions of honesty are important. With respect to both of these factors, stereotypes of African Americans would imply lesser credibility. Racial minorities, particularly African Americans, are seen as less intelligent than the majority.[348] Racial minorities, again African Americans in particular, are also stereotyped as less honest and more criminal than the majority.[349] In the words of an early legal commentator, "The negro, as a general rule, is mendacious. . . ."[350] Many who would be appalled by the expression of racial stereotypes are familiar with them, and, laboratory studies suggest, are subconsciously influenced by them.[351] Perhaps this subconscious influence is the best

346. LEE, *supra* note 26, at 223.

347. *See supra* Part I.B.3.

348. *See, e.g.*, JAN PIETERSE, WHITE ON BLACK: IMAGES OF AFRICA AND BLACKS IN WESTERN POPULAR CULTURE 152-156 (1992); T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Race*, 63 U. COLO. L. REV. 325 , 332 n. 20 (citing 1990 National Opinion Research Center of University of Chicago poll); Harold Sigall & Richard Page, *Current Stereotypes: A Little Fading, A Little Faking*, 18 J. PERSONALITY & SOC. PSYCHOL. 247, 252 (1971).

349. *See* Sigall & Page, *supra* note 348, at 252. *See generally*, Aleinikoff, *supra* note 348 (observing contemporary examples of racial prejudice); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1618-51 (1985) (reviewing literature documenting racial bias and prejudice).

350. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 233 (1858) (quoting STEPHEN, WEST INDIAN SLAVERY 177 (n.d.)).

351. *See, e.g.*, Devine, *supra* note 343, at 15 (finding that even "low-prejudice" persons possess racial stereotypes and exhibit "stereotype-congruent or prejudice-like responses" unless intentionally inhibiting such responses); Shari L. Kirkland et al., *Further Evidence of the Deleterious Effects of Overheard Derogatory Ethnic Labels: Derogation Beyond the Target*, 13 PERSONALITY & SOC. PSYCHOL. BULL. 216, 219-25 (1987)

way of understanding Judge Eisele's decision in Barry Lee Fairchild's case,[352] or, more precisely, at least the best way of understanding Judge Eisele's decision absent any rebuttal of the prima facie case of racial discrimination.[353] In fact, perhaps subconscious influence is the best way of understanding how *any* fact finder might be influenced by race in a credibility determination, good intentions to the contrary.

Racial stereotypes might also "affect" credibility determinations in a content-specific way. To the extent that a witness—of any race—testifies to behavior that conforms to a racial stereotype of the purported actor, such conformity may enhance that witness' credibility. Stereotypes about proclivities toward violence and sexual behavior seem especially likely to form this kind of racially biased "corroboration" of a witness' testimony.

Finally, race may affect credibility determinations in a manner that involves neither animosity nor stereotyping. It is well documented that women's speech patterns are typically more indirect, more qualified, and less assertive than are men's.[354] At least one researcher has observed that indirect speech patterns are typical of African American speech as well.[355] To the extent that fact finders find forceful speech more credible, they may more frequently wrongly devalue the testimony of African American witnesses. Evidence concerning such devaluing, however, is quite spotty compared to evidence concerning other ways in which race is likely to influence credibility determinations.

II. CONTROLS ON RACIALLY INFLUENCED CREDIBILITY DETERMINATIONS

As Part I has demonstrated, race influences credibility determinations in a number of ways, some of which are obviously harmful to the search for truth and justice and some of which are arguably permissible. As we have also seen, the influence of race upon credibility determinations occurs at more than one stage in the criminal process. There is no overarching rule that describes which inferences about race and credibility are legal, nor is there one mechanism for redressing illegal uses of race in credibility

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(finding that "subjects seemed to be outwardly appalled by the [derogatory ethnic label] and yet were encouraged by it to engage in [racially biased] behavior").

352. *See* discussion *supra* Part I.B.2.

353. For a discussion of a prima facie case of racial discriminatory credibility assessment as applied to the Fairchild case, see *supra* Part I.B.2.b.

354. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 271-86 (1993).

355. *See* Thurmon Garner, *Cooperative Communication Strategies: Observations in a Black Community*, 14 J. BLACK STUDIES 233, 234-44 (1983).

determinations. This section considers mechanisms that could address racially influenced credibility determinations at each of three points in the criminal process and the extent to which those mechanisms have clear and enforced rules about such determinations.

A. *Legal Devices for Reviewing Race-Based Credibility Screening by Advocates*

1. Defense Attorneys

A defense attorney may choose not to investigate leads because he or she discredits them for racially influenced reasons. The Drayton case presents a clear example of an attorney limiting the jury's credibility prerogatives by his investigative choices.[356] Racial bias may also influence a defense attorney's decision whether or not to put a witness—including her client—on the stand by affecting the attorney's own assessment of the truth of the witness' story or because of the attorney's assessment of the jury's likely reaction to the witness.

The obvious procedural vehicle for attacking such racially influenced assessments by the defense attorney is to argue that counsel's actions deprived the defendant of the effective assistance of counsel to which the Sixth Amendment entitles him or her. In order to prevail on an ineffective assistance of counsel claim, however, the defendant must first show that counsel's performance was deficient.[357] This requires that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."[358] It is only assistance "within the range of competence demanded of attorneys in criminal cases" that must be provided,[359] and a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' "[360] The circumstances under which a strategy might be deemed unsound have not been elaborated upon; the Supreme Court has explicitly refused to establish a checklist for the evaluation of counsel's conduct.[361]

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356. *See supra* Part I.B.3.
357. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).
358. *See id.*
359. *Id.* (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).
360. *Id.* at 689 (citing Michel v. Louisiana, 350 U.S. 91, 101 (1955)).
361. *See id.* at 688-89.

Which, if any, racially influenced assessments of credibility by an attorney would not be presumed to be sound trial strategy would seem to depend both upon the actions of other attorneys and upon the specific circumstances of the case.[362] It is clear, however, that failure to investigate may be determined to be a reasonable strategic choice, even under circumstances where investigation would create no risk to the defense.[363] Moreover, even if a reviewing court were to find that the attorney's judgment could not be seen as sound trial strategy, the defendant must also show prejudice, defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[364] This standard has been notoriously difficult to meet.

2. Prosecutors

Prosecutors, too, might screen the credibility of witnesses in a racially biased way. To the extent that racial bias influences their decisions to prosecute, such practices are probably unreviewable.[365] Prosecutors are also under a duty to disclose evidence that is favorable where that evidence is material either to guilt or punishment.[366] A prosecutor's failure to disclose such evidence to the defense necessitates the reversal of the defendant's conviction,[367] whether or not the failure is due to the prosecutor's assessment that the evidence is not credible.

Thus, with respect to racially influenced decisions by attorneys to preclude jury determinations of credibility, the explanation matters for defense counsel but does not matter for the prosecutor. For a convicted defendant to mount a successful challenge on either grounds, however, he or she has to have knowledge of the racially

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362. *See, e.g.*, Kornegay v. State, 329 S.E.2d 601 (Ga. App. 1985). In *Kornegay*, defense counsel had used racial epithets in front of the jury to describe African American defendants charged with the rape of a white woman. *Id.* at 603. Defense counsel also told the jury that he had said to the defendants "Y'all n*****s 40 or 50 years ago you would be lynched for something like this . . . ." *Id.* The court reversed the defendants convictions, but only by a five-to-four vote. *See id.* at 601.

363. *See* Dobbs v. Kemp, 790 F.2d 1499, 1513-14 (11th Cir. 1986).

364. *Id.*

365. *See* Wayte v. United States, 470 U.S. 598, 608 (1985) (holding that selective prosecution claims must show both discriminatory effect and discriminatory purpose and noting that "prosecutorial discretion is broad" and "courts [are] properly hesitant to examine the decision whether to prosecute").

366. *See* Brady v. Maryland, 373 U.S. 83 (1963). Material evidence is defined as evidence that, had it been disclosed to the defense, would create a reasonable probability that the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667 (1985).

367. *See id.*

biased decision and be able to show that had the decision been otherwise, there is a reasonable probability that the outcome of the proceeding would have been different. Establishing such reasonable probability in turn would depend upon the reviewing court's assessment of the credibility of the witnesses whose testimony was precluded. I have found no cases applying these standards to racially influenced credibility determinations.

B. *Legal Devices for Regulating Racially Influenced Assessments of Credibility at the Guilt Adjudication Stage*

If we could assume the actions of counsel had not resulted in racially biased screening of witnesses, we would next need to ask whether race improperly influenced the credibility determination of the fact finder at trial, either judge or jury. Four legal structures might conceivably exert some control over biased decision making at the guilt adjudication stage: constraints on voir dire, prohibitions against inflammatory arguments, impeachments of convictions for juror misconduct, and reviews of the sufficiency of evidence supporting a conviction.

1. Voir Dire

It is fair to assume that if a juror were asked whether he or she would be less likely to believe an African than a white person, and the juror answered affirmatively, that the juror would be dismissed for cause. But how often would this happen? As I have discussed elsewhere at greater length, voir dire is largely ineffective for rooting out racial bias.[368] In part, voir dire is ineffective because it is unavailable; even in white victim/Black defendant crimes there is no constitutional right to raise even a single question concerning racial prejudice.[369] Moreover, even when courts do permit questions concerning racial prejudice, they generally limit counsel to one or two questions on the issue. Furthermore, voir dire is sometimes directed at the entire venire panel rather individual jurors. Attorneys who

368. *See generally* Johnson, *supra* note 349; Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Johnson, *supra* note 12; Johnson, note 298.

369. *See* Ristaino v. Ross, 424 U.S. 589 (1976); *cf.* Turner v Murray, 476 U.S. 26 (1986) (holding that only in interracial capital cases is the accused entitled to question potential jurors on the issue of race bias and that even then, the trial judge retains discretion as to the form and number of questions on the subject). Moreover, few state courts have found such a right under state statutes or state constitutions. *See* Johnson, *supra* note 349, at 1673-74 (reviewing relevant cases).

have been allowed to conduct extended voir dire, however, report that jurors will usually only reveal bias after they have been asked numerous specific questions.[370] Finally, even if specific questions are asked, jurors might not reveal their biases; fear of social disapproval will in many cases inhibit candid responses among the consciously racist, and lack of self-awareness will tend to inhibit others.

2. Inflammatory Arguments

Advocates are prohibited, at least in theory, from exacerbating the worst kinds of juror predisposition toward racially skewed credibility determinations. Racially inflammatory questions and arguments are generally impermissible, either because they violate the relevance constraints on admissible evidence or because they violate the Due Process Clause.[371] Modern courts have universally concluded that arguments that one race is more credible than another[372] and arguments that members of one race are likely to lie for one another[373] are racially inflammatory and therefore impermissible. Courts have also deemed impermissible arguments that an accusation is especially credible because the accuser, like the defendant, is Black.[374] Not all cases in which prosecutors have made such arguments result in reversals,[375] however, because courts may view an inflammatory remark as "isolated" or "not thematic" and therefore insufficient to violate due process.[376] Moreover, comments that to my

370. *See* Johnson, *supra* note 349, at 1674-75 (reviewing literature).

371. *See supra* Part II.B.2.

372. *See* Withers v. United States, 602 F.2d 124 (6th Cir. 1979) (holding that U.S. Attorney's comment that "Not one white witness has been produced in this case that contradicts [the white prosecution witness'] position in this case" violated African-American defendant's right to equal protection); People v. Richardson, 363 N.E.2d 924 (Ill. App. Ct. 1977) (holding that prosecutor's comments contrasting the credibility of Black witnesses with "our society" deprived defendant of a fair trial); State v. Kamel, 466 N.E.2d 860, 866 (Ohio 1984) (finding that prosecutor's claim that defense witnesses of Middle Eastern descent were unreliable was "unwarranted and inappropriate").

373. *See* Richardson, 363 N.E.2d at 926 (holding that prosecutor's claim that Black witnesses would lie to protect "one of their own" deprived defendant of a fair trial); Kamel, 466 N.E.2d at 866 (finding that prosecutor's claim that defense witnesses of Middle Eastern descent lied for the Syrian-born defendants because they were the defendants' "countryman" was "unwarranted and inappropriate").

374. *See* McFarland v. Smith, 611 F.2d 414, 418 (2d Cir. 1979).

375. *See generally* Johnson, *supra* note 298, at 1776-90 (cataloging reasons courts have not reversed convictions where racially inflammatory arguments have been made).

376. *See, e.g.*, People v. Bramlett, 569 N.E.2d 1139, 1145-47 (Ill. App. Ct. 1991) (holding that defendant was not denied a fair trial where prosecutor had commented during cross-examination and closing argument that incriminating testimony of ar-

mind clearly imply that white people are more likely to tell the truth are sometimes deemed nonracial. For example, the Seventh Circuit recently declared that referring to a Black witness "shucking and jiving" on the stand was not necessarily a racial comment concerning credibility.[377] In another case where a prosecutor asked the jury, "Who are you going to believe in this case? *It is absolutely black and white*," the court found no racial overtones despite the fact that the prosecutor's witness was white and the defense witness was Black.[378]

Finally, uncertainty about which uses of race in credibility determinations are forbidden and which are not have further hampered regulation of biased arguments about credibility. Some courts have viewed as appropriate arguments that a white rape victim's credibility is enhanced because white women are not likely to consent to sex with Black men.[379] One court held permissible a prosecutor's statement that *he* had difficulty telling African Americans apart in order to explain the prosecution witness' doubts regarding the identity of one of the defendants.[380]

3. Juror Misconduct

It might seem that the problem with a claim of biased jury adjudication of credibility is that it is too speculative. As demonstrated in Part I, the most convincing cases of biased adjudications of credibility come from habeas cases where judicial opinions supply some of the decision maker's reasoning.[381] A claim of jury bias *need* not be speculative or even inferential, however, for sometimes jurors will come forward with information about the role that race played in jury deliberations. In one case where a juror reported that overt arguments about race and credibility were made in the jury room, the reviewing federal court reversed the convictions, viewing racial prejudice as an improper influence under Rule 606(b).[382] Most state and federal courts, however, will not allow evidence of racial bias to

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resting officer should be believed because both officer and defendant were Black); People v. Ali, 551 N.Y.S.2d 54, 55 (App. Div. 1990) (holding that defendant was not deprived of a fair trial by prosecutor's references during direct examination and summation to race of police officers and informant).

377. Smith v. Farley, 59 F.3d 659, 663 (7th Cir. 1995).

378. People v. O'Quinn, 537 N.Y.S.2d 626, 626 (App. Div. 1989).

379. *See* State v. Thomas, 777 P.2d 445, 448 (Utah 1989); Miller v. North Carolina, 583 F.2d 701, 704-05 (4th Cir. 1978); State v. Bautista, 514 P.2d 530, 532 (Utah 1973).

380. *See* Patterson v. Commonwealth, 555 S.W.2d 607, 610 (Ky. Ct. App. 1977).

381. *See supra* Part I.B.1.b.

382. *See* Tobias v. Smith, 468 F. Supp. 1287, 1290-91 (W.D.N.Y. 1979).

impeach a verdict.[383] Although some commentators have been supportive of the contrary minority position,[384] this position seems unlikely to spread. In the federal courts, the Supreme Court's adoption of a highly restrictive view of the "outside influence exception" to Federal Rule of Evidence Rule 606's prohibition against juror impeachment of verdicts in *Tanner v. United States*[385] probably precludes impeachment through evidence of racially biased deliberations. On the other hand, if jurors complain *during* deliberations about improper remarks by other jurors, a mistrial may be declared.[386] The rule against impeachment of verdicts does not apply in this situation because no verdict has yet been rendered. Sadly, even in cases where inflammatory material with egregiously racial content has been placed before deliberating jurors and reported before a verdict was reached, the trial court may choose not to have a hearing on the impact of that material, and the conviction will nevertheless be upheld upon appeal.[387]

Of course, even if the rules regarding juror misconduct were different, one can think of several reasons why it would not be likely to affect many cases. First, individuals are often loath to report their own misconduct; second, the rules concerning what constitutes misconduct are not clear; and third, biased assessments of credibility seem to occur most often without much discussion, given the formal norm of equality.

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383. *See, e.g.*, Shillcutt v. Gagnon, 827 F.2d 1155, 1158 (7th Cir. 1987); Martinez v. Food City, Inc., 658 F.2d 369, 372-73 (5th Cir. 1981); State v. Finney, 337 N.W.2d 167, 169 (S.D. 1983); Dunkins v. State, 838 S.W.2d 898, 900-02 (Tex. Crim. App. 1992).

384. *See generally* Victor Gold, *Juror Competency to Testify That Verdict Was the Product of Racial Bias*, 9 ST. JOHN'S J. LEGAL COMMENTARY 125 (arguing that Federal Rule of Evidence 606(b) should not exclude jurors from testifying that racial bias tainted deliberations); Robert E. Schumacker, Note, *Racial Slurs by Jurors as Grounds for Impeaching a Jury's Verdict,* State v. Shillcut 1985 WIS. L. REV. 1481 (1985) (describing a three-part test developed in two Wisconsin cases prior to *Shillcut* to determine when evidence of juror statements evincing racial prejudice is grounds for impeaching a jury's verdict).

385. 483 U.S. 107 (1987). In *Tanner*, the Court held that a district court was correct in refusing to hold a hearing in which jurors could testify concerning the intoxication and drug abuse of other jury members, *id.* at 127, based on the finding that such information did not constitute an "outside influence," *id.* at 122. *See also* Hance v. Zant, 114 S. Ct. 1392 (1994) (Blackmun, J., dissenting) (opposing denial of certiorari in case where evidence suggested that trial and sentencing were infected with racism).

386. *See, e.g.*, United States v. Heller, 785 F.2d 1524, 1527-28 (11th Cir. 1986) (reversing conviction where trial court failed to declare mistrial in the face of racial and religious slurs).

387. *See, e.g.*, Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), *cert. denied,* 485 U.S. 919, 920 (1988) (Marshall, J., dissenting) (trial judge did not hold hearing when juror presented bailiff with a drawing of a stick figure on the gallows, with the words "Hang the n*****s" written under it).

4. Proof of Guilt Beyond a Reasonable Doubt

Absent "tattling" (and often despite tattling, as discussed above),[388] jurors may act upon egregiously biased credibility determinations with virtual impunity. Although the Due Process Clause requires proof beyond a reasonable doubt of every element of the crime charged,[389] when assessing whether the evidence was sufficient to warrant a conviction under this standard, courts have reasoned that all questions of the *credibility* of witnesses must be resolved in favor of the prosecution.[390] Viewed from this perspective, arguments that a jury wrongly assessed credibility based on race would not implicate the requirement of proof beyond a reasonable doubt. While many reviewing courts have an "interests of justice" jurisdiction through which they can do more than determine legal insufficiency,[391] courts are reluctant to reweigh conflicting testimony even when they have the jurisdiction to do so. Moreover, reversals that involve such reweighing of evidence generally result in remands for new trials rather than in the dismissal of charges (as would be required by a finding of legally insufficient proof).[392] I am unaware of any case in which the need to reweigh evidence was attributed to biased credibility determinations by the jury.[393]

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388. *See supra* Part II.B.3.

389. *See In re* Winship, 397 U.S. 358 (1970).

390. *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979).

391. *See, e.g.*, Tibbs v. Florida, 457 U.S. 31, 42 (1982) (referring to appellate court's ability to act as a "thirteenth juror" by reversing convictions based on disagreement with jury's resolution of conflicting testimony). In New York, the first tier appellate court, the Appellate Division, has jurisdiction to review both questions of law and questions of fact, but the New York Court of Appeals, the state's highest court, for the most part has only the power to review questions of law. ROBERT MACCRATE ET AL., APPELLATE JUSTICE IN NEW YORK 46, 48-49 (1982).

392. *See Tibbs*, 457 U.S. at 42.

393. Trial judges also often have the power to reverse verdicts in the "interests of justice." They may be somewhat more likely to do so because they have personally viewed the witnesses. Some of these reversals may involve the judge's conscious consideration of a jury's racially biased assessments of credibility. *See* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE, 191-92 (1992) (describing case in which Black judge reversed based on dubious white cross-racial identifications, but appellate court reinstated verdict); RICHARD KLUGER, SIMPLE JUSTICE 148-49 (1975) (describing trial judge's reversal of conviction in second Scottsboro trial, because the judge found the evidence weighed clearly on the side of the defense after one of the two alleged rape victims had recanted her testimony).

C. *Legal Devices for Controlling the Influence of Race on Credibility Assessments in the Post-Conviction Process*

1. State Post-Conviction Proceedings

If race has influenced credibility assessments in state post-conviction proceedings (as it appears to have in *Drayton*),[394] the language of the old habeas statute seemed to provide a mechanism for challenging that biased assessment. Before 1996, the habeas statute presumed the findings of a state court trier of fact to be correct if the state court, after a "full and fair hearing" had reliably found the relevant facts.[395] If the state hearing was not full and fair, a federal hearing on the contested factual questions was mandatory.[396] The habeas statute therefore commanded a new hearing in any case where judicial impartiality was lacking.[397] Now that the habeas statute has been revised, section 2254(e) describes the deference that must be given state court findings. Although there is no explicit reference to a full and fair hearing, federal courts still have the power to hold evidentiary hearings, and *Townsend v. Sain*[398] would appear to still govern the circumstances in which they should do so. *Townsend* requires that a hearing be held in a number of circumstances, one of which is when the state fact-finding procedure was not adequate to provide a full and fair hearing.[399]

Moreover, in the context of another issue involving race discrimination, the Supreme Court has declared that "a claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question" and provides a particularly compelling justification for federal habeas corpus review.[400] Thus, under either the new or old habeas statute it appears that if a habeas petitioner could establish racial discrimination in the assessment of a witness' credibility, the petitioner would be entitled to a wholly new determination by the federal court. Despite this structure, because of the frequency with which courts defer to the credibility of other fact finders, some

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394. *See supra* Part I.B.3.b.

395. Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1105, *repealed by* Act of Apr. 24, 1996, Pub. L. No. 104-132, 110 Stat. 1218.

396. *See* Sumner v. Mata, 449 U.S. 539 (1981).

397. *See* Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1105, *repealed by* Act of Apr. 24, 1996, Pub. L. No. 104-132, 110 Stat. 1218.; *see also* Vecchio v. Illinois Dept. of Corrections, 8 F.3d 509, 514 (1993) ("Suggestions of judicial impropriety always receive our highest attention because they undermine respect for law.").

398. 372 U.S. 293 (1963).

399. *See id.* at 312.

400. *See* Rose v. Mitchell, 443 U.S. 545, 548 (1979).

federal courts might reflexively defer to credibility findings[401] as the magistrate in *Drayton* did.[402]

2. Federal Habeas Corpus

There is no structure in place to review a federal judge's factual determinations[403] for racially biased credibility determinations. Moreover, with regard to racially influenced assessments of credibility in both state and federal courts, as with all other racially influenced assessments of credibility, the legal system lacks standards for judging what inferences or assumptions are forbidden.

Racially biased[404] credibility assessments contradict norms about equality and threaten the ascertainment of truth, yet racially biased credibility determinations persist. They persist for at least three reasons. First, the cognitive structures of many decision makers predispose them to believe that race influences both the ability and propensity to tell the truth.[405] At least in the short run, the law is powerless to change such predispositions.

The second and third reasons, however, are directly attributable to the law. No court has attempted to describe, at least in any comprehensive way, which racial influences on credibility determinations are forbidden. Because the Supreme Court itself has in contemporary cases at least twice drawn inferences about reliability from race,[406] other decision makers may infer permission to do so as well. The Court did not explain its reasoning in either case, so there are no guidelines as to where that permission ends.[407] More-

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401. A federal court may not redetermine the credibility of witnesses whose demeanor was observed by the state trier of fact, but not by the federal court, and thereby conclude that the findings were not "fairly supported by the record" as provided by § 2254(d)(8) of the old federal habeas statute. Marshall v. Lonberger, 459 U.S. 422 (1983). A habeas claim alleging a biased fact finder, however, would be based on § 2254(d)(6) of the old statute, which requires that the hearing was "full, fair and adequate," rather than on § 2254(d)(8). Such a claim would not ask the federal court to assess the credibility of witnesses it has not seen, but would instead ask the court to hold a hearing, after which it could ascertain the credibility of the witnesses who testify at the hearing.

402. *See supra* Part I.B.3.

403. In federal cases, a federal judge makes the initial post-conviction findings. In state cases, a federal judge would make factual findings only after concluding that the conditions of § 2254(d) had not been met.

404. Here I postpone, for a moment, the question of which racially *influenced* determinations are racially *biased*.

405. *See supra* Part I.C.

406. *See supra* Part I.B.4.c (discussing Schlup v. Delo, 115 S. Ct. 851 (1995); Manson v. Brathwaite, 432 U.S. 98 (1977)).

407. In this respect, I think the legal treatment of race and credibility issues resembles the legal treatment of race and detention issues. Because the Supreme Court

over, there is neither a comprehensive mechanism nor an effective pastiche of mechanisms to enforce whatever prohibitions against racially biased assessments of credibility might be inferred from general equal protection law. Both of these judicial contributions to the persistence of racially skewed credibility determinations can be diminished, if not eliminated. What is needed is a clear description of which race-based credibility inferences are forbidden and a mechanism for enforcing the resulting prohibitions.

III. PREVENTING RACIALLY BIASED CREDIBILITY DETERMINATIONS

A. *Substantive Restrictions on the Credibility Inferences That May Be Drawn from Race*

The most important constraint on the use of race in credibility determinations is the Equal Protection Clause.[408] Although the Equal Protection Clause applies only to governmental action, each of the decisions discussed thus far, including the jury verdicts, constitute governmental action. The state cannot insulate itself from equal protection mandates by delegating discrimination to private individuals. Actions taken by private individuals will be attributed to the state when individuals perform traditional governmental functions[409] or when the state participates in private discrimination in important ways.[410] Certainly the adjudication of criminal liability is a public function "traditionally reserved exclusively to the State."[411] "[S]ignificant involvement" of the state, and even a "symbiotic relationship"[412] between the jury and the state, is present by virtue of the fact that the state calls together the jury, instructs it

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has stated that race is a legitimate factor in detention decisions relating to immigration violations, but has not explained its reasoning, some lower courts have felt free to allow the use of race in other contexts, such as drug courier profiles and racial incongruity cases. *See generally* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

408. Although the so-called "relevance rules" of evidence also place some restraints on the evidence that may be introduced, *see, e.g.*, FED. R. EVID. 403-415, when race is involved the requirements of the Equal Protection Clause requirements will be stricter than the limitations of the relevance rules. Evidentiary prohibitions against inflammatory arguments and against evidence with substantially more prejudicial effect than probative value, *see, e.g.*, FED. R. EVID. 403, may often overlap with equal protection constraints. In particular, evidentiary prohibitions may regulate the manner in which testimony must be presented or phrased.

409. *See* Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944).

410. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

411. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

412. *Id.*; Moose Lodge v. Irvis, 407 U.S. 163 (1972).

as to its task, and relies upon its conclusions to determine whether or not criminal penalties may be imposed upon the defendant.[413] Given that the Supreme Court has recently determined that *defense counsel* are state actors when they select a jury,[414] it is difficult to imagine how the Court would find that jurors are not state actors when they decide the outcome of a case. Thus, guilt determinations—and, as a part of those determinations, credibility assessments—must be subject to equal protection constraints.

Assuming all of these credibility assessments are subject to equal protection analysis, the question then arises as to the proper level of scrutiny. If the classification that influences the credibility assessment is based upon race or national origin, and the purpose of the classification is not remedial in nature,[415] then the classification is subject to "strict scrutiny"[416] and must be "precisely tailored to serve a compelling governmental interest."[417] This is so whether the racial classification is explicit or facially neutral, as long as it is traceable to a racially discriminatory purpose.[418] If the classification is not racial, then the criteria for determining the issue (credibility, in this case) need only bear "some fair relationship to a legitimate public purpose."[419]

We have seen a wide variety of race and credibility inferences, most of which clearly involve racial classifications, and a few of which do not. The permissibility of such inferences under the Equal Protection Clause depends both upon the way in which race is used and on the justifications that are offered for that use. Because of the range and number of racial inferences that have been employed, I will first consider inferences that bear on a witness' truthfulness, and then turn to those that bear upon the witness' accuracy.

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413. Because the Sixth Amendment prevents a state from trying criminal offenses without a jury (unless the defendant waives the right to a jury), the state is wholly dependent on the actions of the jurors for the enforcement of its criminal laws.

414. *See* Georgia v. McCollum, 112 S. Ct. 2348 (1992). I mean this only as a positive observation and not as an endorsement of *McCollum*. Several aspects of *McCollum* are extremely disturbing. *See* Sheri Lynn Johnson, *supra* note 12, at 43-51.

415. I add this qualifier to avoid citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), or *Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097 (1995), to support my argument, which I cannot yet bring myself to do.

416. Plyler v. Doe, 457 U.S. 202, 217 (1982).

417. *Id.*

418. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

419. *Plyler*, 457 U.S. at 216.

1. Inferences from Race to Truthfulness

a. *Witness-Specific Racial Motivations*

At one extreme of the range of racially influenced inferences about truthfulness are those that, while alluding to race, do not involve generalizations about the characteristics, behavior, or appropriate treatment of a racial or ethnic group. The influence of race in such situations is specific to the individual witness and assumed from facts specific to that witness. For example, considering all the facts now known, inferring that Detective Fuhrman's testimony in the O.J. Simpson case is less credible because of his racial bias is not a racial classification. That is, the inference that his testimony against an African American is less reliable than his testimony against a European American is not based upon Fuhrman's race or even the interaction of his race with O.J. Simpson's race, but upon his own statements and conduct. Similarly, a witness asked why she did not immediately report a crime might answer that it was because the only people she had contact with immediately after the crime were white (or Black[420]) and that she was afraid to report anything to people of that race.

It is important to note that a prosecutor's argument that a witness' actions could be explained by the race of the persons around her, absent testimony from the witness that race-based fear did in fact influence her actions, *does* involve a racial generalization, as would a juror's inference that a white police officer is likely to be biased against a Black defendant, absent testimony suggesting that the officer in question was so biased.[421] In contrast, arguments and inferences about racial motivation that are truly witness-specific do not involve racial generalizations and therefore do not invoke strict scrutiny. This is not to say that such testimony or argument might not be objectionable on the basis of the inflammatory manner in which it was phrased[422] but only that an inference from witness-

420. *See* Commonwealth v. Washington, 549 N.E.2d 446 (Mass. App. Ct.), *lv. app. denied*, 552 N.E.2d 863 (1990) (reviewing case in which victim testified that she did not immediately report her rape because she had only come in contact with African-Americans and that she was frightened of Black persons).

421. For a discussion of how such arguments fare under strict scrutiny, see *supra* Part III.A.1.

422. *See, e.g.*, Washington, 549 N.E.2d at 448 (Brown, J., concurring) (finding "most objectionable the manner in which the prosecutor framed his questions" about the race of the defense witnesses, but voting to affirm conviction because of defense counsel's failure to object).

specific racial motivation evidence does not violate the Equal Protection Clause.[423]

b. *Racial Characteristics*

At the other extreme of the range of racially influenced credibility assessments are assertions relating to supposed racial or ethnic characteristics. Obvious examples from the cases described above include arguments that white witnesses should be believed over Black witnesses, that Haitians lie because it is dangerous to tell the truth in Haiti, that people from the Middle East tend to be dishonest, and that Gypsies think lying is acceptable.[424] Only slightly more subtle is the characterization of an African American as "shucking and jiving on the stand."[425] All inferences from a supposed racial or ethnic characteristic of honesty or dishonesty invoke strict scrutiny, and I cannot imagine an argument that such blatantly stereotyped decision making would survive strict scrutiny. Although the government may have a compelling interest in convicting the guilty, the use of racial generalizations about honesty is not narrowly tailored, or indeed, tailored at all, to that interest.

c. *Racial Propensity*

Arguments that bolster or impeach the credibility of a witness by calling on supposed racial propensity to act or not act as the witness has testified are similarly extreme and also must fail under a strict scrutiny standard. To take the most frequently reported example, any argument or inference that a rape complainant's denial of consent is enhanced by the "fact" that white women do not want to have sex with Black men[426] involves a racial classification. Inferences that Black women are less likely to be telling the truth when they deny consent because of "looser morals" are another

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423. *Cf.* Jody Armour, *Race Ipsa Locquitur: of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (arguing that evidence of race-based justifications of the *reasonableness* of criminal defendants claiming self-defense should not be accepted, because to do so violates the Equal Protection Clause).

424. *See supra* notes 289-90 and accompanying text.

425. Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987), *cert. denied*, 488 U.S. 934 (1988).

426. *See* State v. Bautista, 514 F.2d 530, 532-33 (Utah 1973) (holding that prosecutor was within permissible discretion in arguing that the complainant, "the daughter of a dentist and a religious person," would not go out with someone of a different race); *see also supra* note 294 and accompanying text.

example.[427] Similarly, inferences that testimony is likely to be truthful because it comports with the supposed propensity of African Americans to engage in violence[428] or not truthful because it accuses a white person of crimes believed to be more typical of Black persons[429] are racial generalizations that invoke strict scrutiny.[430] Again, it is clear that such inferences cannot survive strict scrutiny; any use of race to predict guilt in an *individual* case would be vastly over-inclusive as well as vastly under-inclusive, and hence not narrowly tailored.

d. *Intraracial Alibis or Other Exonerating Testimony*

Inferences that a witness is more likely to be lying because the witness is testifying for a person of the same race also involve a race-based generalization. It might be argued that no racial classification is involved because symmetrical burdens are imposed on each group, but such an "equal application" theory has long since been disavowed as a general principle.[431] Most recently, in the peremptory challenge setting, the Court has refused to permit the inference that Black jurors would be more likely to be biased for a Black defendant;[432] such reasoning would seem to control *credibility*

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427. *See* GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 201-19 (1989) (finding that jurors are less likely to believe Black women who allege rape than they are to believe white women who allege rape); W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 179-80 (1981) (reputing that 63 percent of a sample taken from a Southern county believed that that Black women had lower morals than white women).

428. *See* Rhoden v. State, 274 So. 2d 630, 635 (Ala. Crim. App. 1973) (prosecutor told jury that if they believed the complaining witness, they would have to believe that defendant "took it, he got him a White woman").

429. *See* People v. Thomas, 514 N.Y.S.2d 91, 92-93 (App. Div. 1987) (reviewing case in which prosecutor argued that the African American defendant could not have believed that *white* undercover police officers were muggers).

430. Some propensity arguments are not linked to credibility, but more crudely assert that the defendant is guilty because people of his race are likely to do such crimes. *See, e.g.*, Shillcut v. Gagnon, 827 F.2d 1155, 1156 (7th Cir. 1987) (describing testimony that juror said, "Let's be logical. He's a Black and he sees a seventeen year old White girl—I know the type."); Johnson, *supra* note 298, at 1751-53 (1993) (discussing imagery that relates to violence and criminality). These arguments and inferences also violate the Equal Protection Clause, but are outside the scope of this article.

431. *See* McLaughlin v. Florida, 379 U.S. 184, 191 (1964) (holding that equal application does not end judicial inquiry into racial classification).

432. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely . . . on the assumption that black jurors as a group will be unable to impartially to consider the State's case against a black defendant."); *cf. id.* at 137-38 (Rehnquist, J. dissenting) (arguing

inferences of bias based on shared race as well. A racial classification is present in both cases, and in neither case is an assumption of greater likelihood of bias narrowly tailored.[433]

Just as *Batson* allows a prosecutor to justify a peremptory challenge with a showing that a *particular* Black juror was biased for the defendant, one can imagine a situation in which a witness could be shown to have a motive to lie for the defendant. This motive could even be racial; the prosecutor might have elicited testimony from the witness that she had said she would lie for any person of her race charged with a crime or would lie for the defendant because the defendant was a member of her race.[434] Such testimony, however, is probably largely in the realm of imagination, except perhaps for members of hate groups.

e. *Intraracial Accusations or Other Inculpatory Testimony*

What about arguments or inferences that the credibility of an accusation is enhanced by the shared race of the accused and the accuser? Although the parallel to *Batson* is not as close, these too violate the Equal Protection Clause. As with racial similarity and exculpatory testimony, a racial classification is present. What could support the underlying generalization? It would appear that it depends upon two assumptions. One must first assume that members of racial minorities are loathe to cause trouble for each other, or at least loathe to bring criminal accusations against each other. What is the evidence that this is so? Certainly most accusations by racial minorities are against other racial minorities, as witnessed by the far greater rates of reported intraracial crime (both by racial minorities and the racial majority) than of interracial crime. I suppose that does not demonstrate, however, that there is not some reluctance to make an intraracial accusation, but only that the reluctance, if present, is sometimes overcome. But even assuming such reluctance exists, one must also assume that in the case of intraracial accusations, it would be the *accuracy* of the accusation (rather than a motive for revenge, a desire to exculpate oneself, a bribe, fear of the true perpetrator or some other motive likely to distort rather than enhance truthfulness) that would overcome this reluctance. This too is possible, I suppose, but a lot more than mere possibility is necessary to meet the strict scrutiny standard.

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that equal application of the peremptory challenge to all groups is not discriminatory).

433. *See Batson*, 476 U.S. at 89.

434. Assuming, of course, that the prosecutor had a reasonable good-faith basis for this question.

It is difficult to imagine a legitimate, truly individualized form of the intraracial-accusation argument that would not involve racial classification. I can think of only one: a prosecutor might legitimately attempt to rebut a charge of a racially motivated prosecution by pointing out that the prosecution followed from an intraracial accusation.

f. *Interracial Alibis or Other Exculpatory Testimony*

"When helpful testimony comes from a person of a different race, it is more likely to be true." This is the inference that the Supreme Court appears to endorse in *Schlup v. Delo*.[435] Stated that baldly, the assertion seems preposterous, not to mention violative of the Equal Protection Clause. If Schlup's witnesses had all been white, would the opposite conclusion have been justified? Even more disturbing, if Schlup were Black, could the Supreme Court have come to the opposite conclusion? That is, whether Schlup is *executed* or gets another hearing on his innocence claim depends upon his race.

This cannot be right. It would seem that the inference of greater credibility of interracial exonerating testimony is simply the reflection of the inference of less credibility of intraracial exonerating testimony, an inference that the Court's reasoning in *Batson* would prohibit.[436]

I do not think that it is possible to explain away the racial references in *Schlup*. First, the Supreme Court tells the reader that is choosing among "several" inmate affidavits;[437] given its holding for Schlup, the Court certainly would have chosen to recite those affidavits it found most helpful to Schlup's case. Second, the Court itself, rather than the affidavit from which it quotes, identifies the affiant, Lamont Griffin Bey, as Black.[438] Third, the Court does not quote the full affidavit, but chooses to include in its quote Bey's statement, "When this happened, there was a lot of racial tension in the prison . . . . I would not stick my neck out normally, but I am willing to testify because I know Lloyd Schlup is innocent."[439]

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435. 115 S. Ct. 851 (1995).

436. *Batson* must be interpreted to have prohibited assumptions that a white juror would be more fair in judging a Black defendant, just as it prohibited assumptions that a Black juror would be less fair. Without such a prohibition, the holding in *Batson* would have been meaningless; a prosecutor could justify a challenge by saying she was attempting to gain a "more fair" juror rather than lose a "less fair" juror.

437. *Schlup*, 115 S. Ct. at 858 n.18.

438. *See id.*

439. *Id.*

Can the Court's inference of enhanced credibility be justified by the prison setting, the atmosphere of racial tension, or the two factors combined? Consider how we might try to individualize the claim of enhanced interracial reliability (that is, transform it into an inference that was witness-specific). If the state had attempted to impeach Griffin Bey's testimony by arguing that it was a recent fabrication, Schlup could have tried to bolster Bey's testimony by showing, for example, a prior consistent statement made before the motive to fabricate arose. Alternatively, Schlup might show, by extrinsic evidence, that the alleged motive to fabricate did not exist. Thus, if the state had argued that Bey was lying because of a motivation based on racial solidarity (which, as discussed above, the state ordinarily should not be allowed to do),[440] Schlup could counter by showing that Bey was not of the same race.

This is obviously not what happened in *Schlup*. Suppose, however, that the state had argued that a code leads all prisoners to lie for each other.[441] Perhaps now Schlup could have Griffin Bey testify that the prison code does not extend to persons of another race or that his own racial animosity would override the code. Such a move would resemble what happens when a defendant claims that a government witness is lying because he or she has been granted immunity or entered into some other agreement with the government. At that point, the government may introduce the cooperation agreement and show that it is conditioned on the provision of *truthful* testimony from the witness.

If valid, this analogy might explain what happened in *Schlup*. However, there was no attempt in *Schlup* by the state to impeach through a charge of fabrication. Indeed, there could not have been such an attempt, because there was no testimony; the district court had refused to accept the affidavits or hear the testimony.[442] The general rule, of course, is that a party may not bolster the credibility of a witness absent a prior attack.[443] In other words, in the absence of a charge that prisoner solidarity (or mendacity) had caused Griffin Bey to lie, there could not have been an *individualized* response asserting that such solidarity (or mendacity) was inapplicable because Bey and Schlup were of different races.

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440. *See supra* Part III.A.1.d.

441. By my analysis, this is distinguishable from arguing that racial solidarity prompted the lie, because the status of being a prisoner is not suspect, and such an argument should be permitted.

442. *See Schlup*, 115 S. Ct. at 858 n.18.

443. *See, e.g.*, FED. R. EVID. 608 (providing that "evidence of truthful character is admissible [to support a witness' credibility] only after the character of the witness for truthfulness has been attacked").

The only defense that I can imagine for the Court's clear implication that race enhanced Bey's credibility here is that it *assumed* there would be an attack on any inmate's truthfulness—a charge of recent fabrication for gain, fabrication due to an inmate code, or fabrication due to a mendacity argued to be common in inmates—and that the district court would be skeptical of inmate testimony even without that attack having yet been made. If this explanation is correct, then it is the strength of the Court's negative views about inmates that causes the blindness to equal protection concerns. This explanation, if correct, implies that *Schlup* should be read narrowly; on this reading, inferences of enhanced credibility from interracial exculpatory testimony in other contexts are not endorsed.

g. *Interracial Accusations or Other Inculpatory Testimony*

What about an argument or inference that an interracial accusation is prompted by racial animosity? As discussed above,[444] such arguments and inferences are easily justified under the Equal Protection Clause when they are witness-specific, for no racial generalization is involved and the burden of justification is therefore low. One can, however, imagine a more generalized (and thus more questionable) variation on such an argument. In the context of the O.J. Simpson case, for instance, consider an argument made *without the testimony concerning Detective Fuhrman's individual racial bias* that the Los Angeles Police Department is racist and that the testimony of its officers (including that of Fuhrman) should therefore be doubted when it is directed at a Black defendant.

One manner of viewing such an inference is to see it as akin to witness-specific motivation. Although the evidence of bias is not peculiar to the individual police officer, it is peculiar to members of the LAPD, and the officer is part of the LAPD. Thus, to the extent that such an inference is a generalization, it is not a racial generalization. To the extent that the inference is based upon either evidence or knowledge within the experience of the juror, it could be considered.

What if the witness has not made statements or taken actions that imply racial motivation and does not belong to an organization with a racist history? Is it then impermissible to consider impeaching credibility of accusing witnesses through allegations of racial bias? My tentative analysis (and this may also be a better method of analyzing the argument about LAPD membership) is that defense counsel should be allowed to inquire into possible racial animosity if counsel has a good-faith basis for doing so and if the allegation and

444. *See supra* Parts III.A.1.a and III.A.2.a.

motive are described in terms that are not unnecessarily inflammatory.[445] Then, if evidence of racial motivation—including demeanor evidence—is uncovered, the attorney is free to argue the evidence and the jury is free to consider it. Why? One answer is that the Confrontation Clause may mandate, and certainly counsels, permitting such inquiries;[446] the Confrontation Clause would then justify the racial classification. A more complete answer looks to the reason that a Confrontation Clause argument is likely to be persuasive: racial animosity, particularly animosity directed against persons of color, is common enough that refusing to permit inquiry into such bias without prior evidence may lead to wrongful convictions. Clearly the state has a compelling interest in preventing wrongful convictions based on racial animosity, and I can think of no more narrowly tailored means of preventing such convictions than by allowing inquiry into the existence of such bias based solely on the race of the accuser. On the other hand, an argument or inference of impeached credibility *where there has been no evidence (including demeanor evidence) of bias adduced and no evidence of membership in a biased group* should be prohibited, because such an argument, while perhaps still supported by a compelling state interest, is not narrowly tailored.

2. Inferences from Race to Accuracy

Like race-based inferences to truthfulness, the permissibility of a race-based inference to accuracy depends upon whether or not the inference employs a racial classification and, if so, whether or not that classification is supported by a compelling state interest and narrowly tailored means.

a. *Witness-Specific Abilities*

Among racially tinged accuracy arguments, the benign extreme is composed of inferences about accuracy that allude to race but do not make any generalizations about the abilities of members of a racial or ethnic group. If, for example, a white witness testified that she has difficulty distinguishing among African Americans, it would involve no racial generalization to deem her testimony less likely to be accurate than the testimony of a person who made no such

445. *See* Johnson, *supra* note 298, at 1801.

446. *See* Chambers v. Mississippi, 410 U.S. 284 (1973).

statement (whether that person were Black or white).[447] To take another example, if a witness admits that he is nervous (or agitated or angry) when in the presence of persons of another race and that he therefore he has difficulty remembering events that take place in the presence of a person of that race, strict scrutiny need not be applied to an inference that testimony from that person about events that took place in the presence of such persons is less reliable. Indeed, even if the person were only to say that he is nervous in the presence of persons of another race, the jury could legitimately add its own race-neutral premise: people remember events less well when they are nervous. Again, an inference of lesser credibility would be proper.[448]

b. *Racial Characteristics*

At the other extreme are assertions about supposed racial or ethnic abilities that enhance or detract from the ability to observe, infer or report. These are clearly racial generalizations that invoke the strict scrutiny standard and just as clearly are unable to pass it. Arguments that Black witnesses are less knowledgeable or intelligent than white witnesses violate the Equal Protection Clause,[449] as would any such inference by a fact finder.[450] Statements about an expert witness' accent that imply lesser competence are also impermissible, as are a juror's mimicking of Black dialect.[451]

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447. By contrast, the prosecutor's statement that it is difficult for him to distinguish among African Americans in order to explain the prosecution witness' doubt about the identity of a Black defendant was impermissible. *See* Patterson v. Commonwealth, 555 S.W.2d 607 (Ky. Ct. App. 1977). As the reviewing court stated, the prosecutor's statement implies that the witness' uncertainty was normal, but, contrary to the reviewing court's view, such an argument is not proper. *See supra* Part III.A.2.d.

448. Alternatively, the jury might add a quite different, but still race-neutral, premise: sometimes nervousness looks like lying. Adding this premise to the fact that the witness was testifying in front of persons of another race, the jury might infer that the witness was *more* credible than she appeared to be. This too would be witness-specific and would not invoke strict scrutiny.

449. *See supra* Part III.A.2.b.

450. Judge Eisele's comments in the *Fairchild* case about the fragile personalities of the Black witnesses suggest this reasoning. *See supra* Part I.B.2.b.iv.

451. *See* Smith v. Brewer, 444 F. Supp. 482, 488 (S.D. Iowa), *aff'd*, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978) (reviewing case in which juror strutted like a minstrel and mimicked Black dialect during deliberations).

c. *Intraracial Identifications*

The Supreme Court implied in *Manson v. Brathwaite*[452] that an undercover officer's identification of Brathwaite was more reliable because the officer and Brathwaite were both Black.[453] Although one could imagine some bizarre scenario in which this would be an individualized claim about ability (such as if the defendant tried to impeach the identification as less reliable because it was cross-racial and the State responded by saying it was not cross-racial), such was not the case in *Brathwaite.*

In *Brathwaite*, the Court of Appeals had commented only that the description of the suspect was so scant as to fit hundreds of Black men in the city, and thus that the match between the description and Brathwaite offered no indicia of reliability.[454] The Court of Appeals may have also been implying that the scant description created some doubt as to whether the officer who gave the description had a clear look or good memory of the perpetrator's appearance. Under such circumstances, the Supreme Court's claim that the racial match between the witness and the accused enhanced the likelihood that the witness' identification was accurate depended upon a racial generalization.

That generalization cannot withstand strict scrutiny. I know of no evidence that one African American's identification of another African American is more likely to be accurate than is the typical[455] identification; certainly there was no such evidence available at the time the Court handed down the *Brathwaite* decision.[456]

d. *Interracial Identifications*

There is, on the other hand, substantial empirical support for the proposition that many white persons are impaired in their identifications of African Americans.[457] Moreover, such impairments neither depend upon the white observer's racial bias nor are the subject of her conscious awareness. The state's interest in preventing the wrongful conviction of its citizens is surely compelling, and under these circumstances, argument and inferences based upon the

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452. Manson v. Brathwaite, 432 U.S. 98 (1977).

453. *See also* discussion, *supra* note 318 and accompanying text.

454. *Brathwaite*, 527 F.2d at 371.

455. Here I think the relevant "average" is the typical or modal identification rather than the mean identification. However, I do not know of any data comparing means either.

456. *See* Johnson, *supra* note 92 (reviewing the available literature on race and identifications).

457. *Id.*

lesser accuracy of cross-racial identifications are narrowly tailored to that interest and therefore permissible.

e. *Interpretive Competence*

May a fact finder permissibly draw an inference about the correctness of a witness' interpretation of the meaning of a gesture or phrase based upon the witness' race? About the witness' knowledge of a neighborhood or the culture of a group? I think not, with the possible exception of perceptions of prejudice, for which there is empirical evidence suggesting that members of the racial majority are less adept at detecting.[458] With respect to other interpretive questions, I doubt that reliance upon race, without more evidence, could meet the strict scrutiny standard.[459]

B. *Mechanisms for Enforcing Prohibited Race and Credibility Inferences*

This is the easy part. I could be mistaken in some of my applications of equal protection doctrine to specific arguments, but I do not see how I could be mistaken in asserting that equal protection arguments constrain race and credibility inferences made by juries and courts. If there are such constraints, two kinds of remedies for the violation of those constraints practically suggest themselves.

1. Incorporating Constraints on Race and Credibility Inferences into Existing Legal Mechanisms

Once rules for judging which race and credibility inferences are forbidden have been deduced from equal protection doctrine, incorporation of those standards into existing remedial legal devices should not be difficult.

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458. Steven A. Rollman, *The Sensitivity of Black and White Americans to Nonverbal Cues of Prejudice*, 105 J. SOCIAL PSYCHOL. 73 (1978); Martin F. Sherman et al., *Racial and Gender Differences in Perceptions of Fairness: When Race is Involved in a Job Promotion*, 57 PERCEPTUAL & MOTOR SKILLS 719 (1983).

459. I am, of course, not knowledgeable about all of these subjects. The permissibility of other such accuracy arguments is not precluded, but a heavy burden of justification would rest on the proponent.

a. *Ineffective Assistance of Counsel*

If a defendant's lawyer screens the witnesses he will present to the jury based upon an inference about race and credibility that would be forbidden to the fact finder, and if the use of that screening inference has harmed the defendant, I do not see how counsel can be said to have provided effective assistance. In other words, I do not think that making a racial generalization (as opposed to witness-specific claims) about credibility (other than those few that are supported by narrowly tailored means) is sound trial strategy. At the very least, it is not sound trial strategy to refuse to *investigate* a claim or *interview* a witness (as I think the trial lawyer in *Drayton* did)[460] because of a presumption that racial propensity casts doubt upon the witness' testimony. Nor can I imagine how it could be sound trial strategy to refuse to present a claim at all because of an assumption that the fact finder will discredit the witness' testimony based on a racial generalization. It might be otherwise with choices among witnesses who could testify to the same things.

If one imagines some extreme factual situation in which the refusal to investigate or present a claim based on the race of the witness actually was the right strategic choice, then an assistance of counsel claim would almost certainly fail due to an inability to show prejudice. The Supreme Court has offered three justifications for the enormous deference ordinarily given to counsels' choice as to trial strategy, and none of them carry much weight here. First, the Court has said that there are countless means of providing effective assistance in any given case,[461] but this does not mean that an attorney's racially motivated decision not to investigate or not to put any witnesses on the stand should be among those countless ways. Second, the Court has said that ineffective assistance of counsel claims must meet a high standard to avoid proliferation of such claims,[462] but I find it difficult to believe that race-based failures to investigate or put on a defense are common. If such failure are common, surely this degree of racism in the defense bar only furthers the argument for increased judicial oversight in this area. Finally, the Court has said that in the absence of deference, a defense attorney's willingness to represent criminal defendants and his performance in such representation could be adversely affected,[463] but it is difficult to believe that this subset of ineffective assistance claims would deter many lawyers or impair many performances.

460. *See supra* Part I.B.3.
461. Strickland v. Washington, 466 U.S. 668, 689 (1983).
462. *Id.* at 690.
463. *Id.*

b. *Inflammatory Questions and Arguments*

If a question or an argument implies an assertion that violates the Equal Protection Clause, then that question or argument is clearly impermissible. Delineation of those inferences that are constitutionally forbidden should aid lower courts in some of their sorting, although it will not complete their task because some otherwise permissible inferences may be phrased in impermissibly inflammatory language. The appropriate remedy for an impermissible question or argument is another matter. As I have argued elsewhere, I believe that the use of racial imagery of any kind should, as a matter of statute, lead to the right to a mistrial, and the automatic reversal of a conviction if a mistrial has not been offered.[464] I do not believe that an automatic reversal/mistrial standard is constitutionally mandated, although I do believe that a much greater degree of care in harmless error findings is.

c. *Juror Misconduct Allegations*

I am sympathetic toward Professor Alschuler's general view that too much concern is placed on the symbols of jury selection and too little attention paid to the substantive outcomes produced by the jury.[465] His criticism of the Supreme Court's refusal to hear allegations of juror abuse of alcohol, marijuana and cocaine seem to me on the mark. But whatever the proper balance between finality and fairness when racial bias is not at stake, it seems to me that a special case can be made for permitting the impeachment of verdicts where racial bias, related to credibility or otherwise, is involved. The injustice done to an individual whose guilt is wrongly ascertained may be the same regardless of the cause of the mistake, but this country's history of racially biased guilt adjudications[466] argues that the prevalence of such injustices is quite different.

Put differently, race-based decisions get strict scrutiny and other decisions—even very bad ones—do not. So at least where statements and inferences have been made that, if acted upon, would constitute impermissible race discrimination, I think that the Fourteenth Amendment compels hearing the claim that the jury's ultimate decision was attributable to race and reversing the

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464. Johnson, *supra* note 298, at 1797-1803.

465. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989).

466. *See supra* Part I.A.

conviction if the state cannot show that the decision would have been the same regardless of the impermissible racial factor.[467]

d. *Habeas Corpus Review of State Factual Findings*

Ordinarily, federal courts must defer to state court findings. This presumption does not apply when a full and fair hearing has been not been provided.[468] What could be less "fair" than a hearing in which racial discrimination influenced the trier of fact in his or her findings? Thus, a federal court, upon an allegation of racially biased fact-finding, must assess the truth of that allegation, and if the allegation is true, must hold a new hearing on the merits of the underlying claim. This is true as a matter of statutory interpretation, but as I shall demonstrate below, such a result would be required even if the statute did not predicate deference upon a full and fair hearing.

2. Creating a Mechanism for Constraining Unconstitutional Credibility Determinations

Although existing mechanisms may control some uses of race in credibility determinations, they cannot control the most important and probably the most frequent kind. The information that we have about racial stereotypes and about modern forms and manifestations of prejudice suggests that the silent—and sometimes even subconscious—inferences of jurors will often be tainted racial generalizations, yet the influence of such inferences on jurors is not subject to challenge through any existing legal mechanism. Moreover, just as there is no vehicle to challenge the inferences of the first and most important fact finder, there is no vehicle to challenge the reasoning of the last possible fact finder, the federal district court judge.

In several other contexts, the errors made by the jury in the Clarence Brandley case[469] or by the district court judge in the Barry Fairchild case[470] would be viewed as evidence of discrimination. If evidence of disparate impact, unusual outcomes, deviations from

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467. I am inclined to go further: when it can be shown that race has tainted the decision-making process, whether or not the result would have been the same, I would like to see a new trial ordered. I do not think, however, that the Constitution mandates this, at least not under existing equal protection doctrine.

468. *See supra* notes 398-402 and accompanying text (describing full and fair hearing requirement in light of the 1996 revision of the habeas statute).

469. *See supra* Part I.B.1.b.

470. *See supra* Part I.B.2.

normal procedures, contemporary statements or historical background were shown in a case challenging a governmental employment decision, a zoning decision, a redistricting decision, or a peremptory challenge, a reviewing court would need to make a determination of whether or not a prima facie case of racial discrimination had been made; if it had, the government would have to rebut the inference of racial discrimination or reverse its decision.

The failure of a jury or a judge to assess credibility without forbidden racial discrimination is no less serious than government employment or zoning decisions, where challenges to discrimination are well established. On the contrary, "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system."[471] If this principle justifies establishing a procedure for enforcing constitutional constraints on jury *selection*, it certainly justifies establishing a procedure for enforcing constitutional constraints on jury *decision making*.

McCleskey v. Kemp is not to the contrary.[472] In *McCleskey*, the Court ruled that the statistical evidence, gathered from a large number of cases and reflecting the choices of a number of decision makers, did not prove racial discrimination, at least not in any particular defendant's case. *McCleskey* assumes, however, that a defendant is free to show that racial discrimination invalidates *his* jury determination; it also counsels that proof of discrimination should be specific to the defendant's case.[473]

It is true that proving racial discrimination in the assessment of credibility in individual cases will not be easy. I would expect that proving discrimination usually would be more difficult with respect to jury decisions than with respect to judge's decisions, because a defendant has less information about the jury's decision-making process and rationale. Nevertheless, some jury cases may approach "stark pattern" evidence; in others, disparate impact evidence may be bolstered by juror testimony or extra-judicial accounts. Either situation will sometimes allow a defendant to establish a prima facie case. The fact that defendants will only rarely be able to establish a prima facie case hardly argues that the law should ignore judges' or juries' racially biased credibility assessments when they *are* able to

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471. Powers v. Ohio, 499 U.S. 400, 415 (1991).

472. *See* McCleskey v. Kemp, 481 U.S. 279 (1987). I do not defend *McCleskey* but merely distinguish it; even if the *McCleskey* majority is correct, the validity of a claim of racial discrimination in an individual case is not implicated by the Court's reasoning. For my views on *McCleskey*, see Johnson, *supra* note 356.

473. *See McCleskey*, 481 U.S. at 292-93.

do so. Once the defendant has established a prima facie case, the government should of course be permitted to rebut the claim.

I have argued above that there should be an opportunity to allege and prove racially biased credibility determinations, but I have not yet specified precisely the procedural vehicle that should be created or adapted to provide the opportunity. At this point, I am not terribly concerned with that question, although I certainly hope I may be later. *Batson* provides one model for a procedural vehicle: developing a separate hearing.[474] Another possibility would be to superimpose equal protection constraints on the litigation of other issues; arguments about race and credibility inferences could be incorporated into legal sufficiency arguments or into arguments about whether the record supports a lower court's factual findings.

Whether or not a separate proceeding is designed, precedent from *Batson* cases may aid in determining whether or not a prima facie case of racially biased credibility determination has been established.[475] Perhaps the original *Arlington Heights* list of probative factors might be expanded based on the nearly twenty years of lower court experience in applying this "not exclusive" list.[476] Such a revised list could reflect recent advances in our knowledge about how racist thinking reveals itself.[477]

Whatever the precise form of the mechanism, some mechanism must be recognized. Consider how Fairchild's lawyers concluded their petition for rehearing:

> Before the court decides whether to carry out Mr. Fairchild's sentence, the Court owes it to Mr. Fairchild and to the community to give its full attention to the unmistakable appearance that the district court made its decision on the basis of race. Without that, there will be no assurance that race did not determine the outcome in this case. There will only be the haunting and substantial appearance that it did.[478]

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474. *Batson*, 476 U.S. at 100.

475. The motion for rehearing en banc in Barry Lee Fairchild's case argued that several factors that are relevant in *Batson* cases had parallels in the judge's findings in Fairchild. *See* Petition for Rehearing and Suggestion for Rehearing En Banc, Fairchild v. Lockhart, 979 F.2d 636 (8th Cir. 1992).

476. *See* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?* 76 CORNELL L. REV. 1151 (1991) (reviewing the factors that seem to predict success in race discrimination claims).

477. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1978).

478. Petition for Rehearing and Suggestion for Rehearing En Banc, Fairchild v. Lockhart, 979 F.2d 636 (8th Cir. 1992).

In Mr. Fairchild's case, there will always be that haunting and substantial appearance.

CONCLUSION

I have often worried in the middle of a project that everything that I have said is self-evident, and I am surprised when people think my proposals are radical. This time, though, my proposals really are modest. It must be almost self-evident that if you have a right to show that racial discrimination denied you employment, then you must also have a right to show racial discrimination denied you liberty or is about to deny you life.

If I were a government employer, and I had two recommendations in front of me, both written by the same African American applicant and both containing the exact same words, but one was written for a white man and one written for an African American, then surely I could not decide to hire the white man by reasoning that an interracial recommendation was more likely to be true. Yet, is that not what the Supreme Court seems to say in *Schlup*: at the margin, interracial recommendations are more credible.[479]

If I were a white government employer, and I received six letters of recommendation for an African American candidate, all written by African Americans, and one letter of recommendation for a white candidate written by a white person, and the African American recommenders seemed to know more about their candidate than the white recommender knew about his, surely an inquiry into why I chose the white candidate would be appropriate. Yet, *Drayton* involved similarly disparate evidence.[480] If it were then discovered that I had supported egregious racial discrimination in the public sphere in the past and that I continue to belong to private white clubs, would I expect my employment decision to be upheld?

If the costs of inquiry are worth the candle in employment decisions, then they must be worth the candle in an arena where stronger stereotypes and greater stakes are at play. Surely a criminal defendant must be allowed to reverse a decision about his guilt or about the validity of his conviction if he can show that the decision depended upon constitutionally prohibited inferences from race to credibility.

Reviewing the history and modern scope of the uses of race in credibility decisions, one cannot avoid the conclusion that virtually all of the forbidden inferences have been used to disadvantage Black

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479. *See supra* Part I.B.4.c.ii.

480. *See supra* Part I.B.3.

witnesses or Black defendants. Given the racial make-up of most juries, this may not be surprising. Given the overwhelmingly unidirectional nature of race and credibility inferences, a refusal to permit challenges to racially skewed credibility determinations would lead to another conclusion: the only color of legal truth is (still) white.