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Stanley P. Williams Jr

University of Texas at Austin, spwilliams@utexas.edu

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Double-Blind Justice: A Scientific Solution to Criminal Bias in the Courtroom

Stanley P. Williams Jr.*

ABSTRACT

Criminal justice and bias cannot continue to coexist. Bias that infiltrates our criminal justice system may threaten the legitimacy of our courts. Bias that penetrates the criminal court unmistakably threatens innocent lives. This Paper invents a novel procedural solution, within the ambit of the Sixth Amendment, that confronts a long-felt but unsolved need to eradicate bias in the criminal courtroom. It aims to revolutionize how criminal proceedings are conducted through a model that embodies our Founding Fathers' pursuit of impartiality while pitting longstanding dogma against scientific data. This Paper discusses how bias affects both judges and jurors, the drawbacks of current methods or proposals designed to address bias, and finally, draws a blueprint for a practical and immediate solution: The Double-Blind System.

INTRODUCTION

Two hundred and thirty years ago, our Founders formed the basis for our Constitution, which sought to establish justice and secure the blessings of liberty for all Americans.¹ No context evokes the palpable sense of justice and liberty in one setting like a courtroom that will decide whether one may be sentenced to imprisonment or death. The Founders appreciated this power and devoted the Sixth Amendment solely to criminal prosecutions.² The Impartial Jury Clause contained in this Amendment—though not as reknown or contested as clauses found in the First or Second Amendments—deserves equal recognition.³

Our inability to fulfill this obligation to impartiality is echoed by a juror's statement that led to a recent sexual assault conviction: "I think he did it because he's Mexican, and Mexican men take whatever they want."⁴ Bias, seemingly like electricity, is neither created nor destroyed but simply transferred or changed from one form to another. In AD 54, it manifested itself in Nero's persecution of

* Deputy District Attorney, Marin County, California. Email: <https://cal.berkeley.edu/spw>. The author thanks professors Wendy E. Wagner and Jennifer E. Laurin for their invaluable insight and feedback. The author also thanks the editors of the *Indiana Journal of Law and Social Equality*, including Tristan Fretwell, Samuel Seeds, James Vandeventer, and Michele Wilcox-Petrites for their tireless work.

1 U.S. CONST. pmb1.

2 See U.S. CONST. amend. VI.

3 *Id.*

4 Adam Liptak, *Racial Bias Among Jurors at Heart of Supreme Court Case*, N.Y. TIMES (Sept. 20, 2016), <http://www.nytimes.com/2016/09/20/us/politics/supreme-court-to-hear-case-on-juror-racial-bias.html>.

Christians.⁵ In 1619, Jamestown, Virginia, planted the seeds of bias in America through the harvests of cotton and tobacco.⁶ In 1933 and 1942, bias concentrated people into camps in Auschwitz and California respectively.⁷ After our Towers fell on 9/11, hate crimes against Muslims soared.⁸ The effects of explicit bias are undeniable, yet what happens to bias that is concealed or implicit? Ideally the walls of a courtroom would repel such biases. In reality, our current system enables them to enter the courtroom virtually unchecked. Our inability to curb these biases produces costs beyond undermining the legitimacy of convictions. The Supreme Court admits bias taints the jury selection process itself.⁹ Bias incurs further costs to taxpayers when trials must be retried: For instance, the national average cost of adjudicating a homicide is between \$22,000 and \$44,000.¹⁰ Other costs are not as easily measured, such as a victim who must relive a trial or the loss of public confidence in our criminal justice system. But what if those costs could be avoided? What if the unfulfilled promise from 1789, that “the accused shall enjoy the right to . . . an impartial jury . . . ,”¹¹ could be delivered regardless of the era?

This Paper addresses that long-felt need by inventing a novel procedural remedy for bias—proven to be effective—that can be implemented immediately. Therefore, the ambit of this Paper is limited to the adjudication stage and is confined to the walls of the courtroom. It addresses biases that affect jurors and judges, explains how our system currently addresses bias, and describes a method to prevent current and future biases. This solution is constitutional, practical, and may serve as one step toward achieving much-needed criminal justice reform.

I. BIAS

In its colloquial form, bias is a loose, umbrella term. Unspecified claims of bias may be levelled against others, such as when Donald Trump said, in reference to a federal district court judge, “He's got bias.”¹² Scholars may identify cognitive biases,

5 See, e.g., *Nero*, HISTORY (2009), <http://www.history.com/topics/ancient-history/nero> (last visited Feb. 26, 2017).

6 See, e.g., *Slavery in America*, HISTORY (2009), <http://www.history.com/topics/black-history/slavery> (last visited Feb. 26, 2017).

7 See, e.g., DAN STONE, *CONCENTRATION CAMPS: A SHORT HISTORY* (2017).

8 Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html>.

9 See *Batson v. Kentucky*, 476 U.S. 79, 79 (1986) (holding that the same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury). See generally *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that exclusion of black jurors violated the Equal Protection Clause of the Fourteenth Amendment).

10 Priscillia Hunt, James Anderson & Jessica Saunders, *The Price of Justice: New National and State-Level Estimates of the Judicial and Legal Costs of Crime to Taxpayers*, 42 AM. J. CRIM. JUST. 231–254 (2016).

11 U.S. CONST. amend. VI.

12 Tom Kertscher, *Donald Trump's Racial Comments About Federal Hispanic Judge in Trump University Case*, POLITIFACT (June 8, 2016, 4:29 PM),

such as availability bias. Accordingly, we must clarify terms used in this Paper at the outset to reduce confusion:

- 1) Explicit biases are attitudes or stereotypes that one consciously endorses.¹³
- 2) Concealed biases are explicit biases that one hides from others in order to adjust to society's mores.¹⁴
- 3) Implicit biases are attitudes or stereotypes that one unwittingly holds, whether or not one endorses those beliefs.¹⁵

A. *Implicit Bias*

The concept of implicit bias warrants a prelude because it is a relatively new concept. Implicit bias is real.¹⁶ In fact, an overwhelming majority of scientists and professors agree it exists beyond a reasonable doubt after producing hundreds of peer-reviewed articles and replicated studies.¹⁷ Implicit bias derives from more than a century-old foundation of cognitive research and fits the contemporary consensus that a vast amount of cognition “occurs automatically, effortlessly, and outside of conscious awareness.”¹⁸ Although this cognition is subconscious, it can be tested just like a doctor might test other subconscious processes, like heart rate or body temperature. Instead of using a thermometer, however, scientists use the Implicit Association Test (IAT) for implicit biases.¹⁹ The IAT measures how quickly someone pairs a description with another entity.²⁰ The amount of time it takes to pair a word with an adjective indicates a positive or negative mental association with the word.²¹ IAT results, including their construct and predictive validity, are corroborated by physiological and psychophysiological evidence.²² Notably, implicit biases that arise out of positive or negative mental associations can be linked with virtually anything,

<http://www.politifact.com/wisconsin/article/2016/jun/08/donald-trumps-racial-comments-about-judge-trump-un/>.

13 Jerry Kang, Mark Bennet, Devon Carbado & Pam Casey, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012).

14 *Id.*

15 *Id.* at 1129.

16 Cf. John T. Jost, Laurie Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Jack Glaser & Curtis D. Hardin, *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORG'L BEHAV. 39, 42 (2009).

17 *See id.* at 42–43.

18 *Id.* at 43.

19 *Id.* at 45; *see also* *Flower-Insect IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/user/agg/blindspot/indexflowerinsect.htm> (last visited Feb. 19, 2017) (online version of the IAT).

20 *See* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 39 (2013).

21 *See id.*

22 Jost et al., *supra* note 17, at 45.

including one's own race or sexual orientation.²³ In other words, an Irishman could hold subconscious negative beliefs about the Irish while extolling Brits.

Consistent mental associations, which develop into implicit or explicit biases, are established as early as childhood and are cemented over a lifetime.²⁴ According to developmental psychology research, kindergarteners show the same implicit racial biases that adults in their culture hold.²⁵ One study revealed that within minutes, children exposed to fictitious groups with varying socioeconomic statuses discerned which groups were wealthier, and, in turn, the children revealed a preference for the wealthier groups.²⁶ After a few weeks, mere demarcations of gender—such as teachers labeling children as “boys” or “girls”—led preschoolers and elementary students to believe boys, but not girls, should become scientists.²⁷ Children also retain antisocial actions or threatening cues more easily than comparable positive actions.²⁸ For instance, if children learn that refugees pose a danger to their society while also learning about instances of refugees who contribute to their society, the children will retain information about the dangerous refugees in greater detail.²⁹ This makes sense under an evolutionary framework: our survival should depend more upon discerning the alligator that eats people in greater detail than the fly-eating lizard.

Evolved traits may not translate perfectly into modern culture: constant alertness, or insomnia, may have saved our ancient ancestors from nightly threats,³⁰ but it sabotages our success on presentations. Similarly, our instincts for fear might misfire in the modern age and sabotage our trial verdicts.

To better understand the universal trait of fear, let's consider one of the most commonly feared things by adults: snakes.³¹ Most people who share this fear probably have had no prior direct interaction with a snake to warrant such a strong fear.

23 SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* 74 (2010) (“Just as black children tend to have positive associations with white faces rather than with black faces, gay people can unconsciously harbor the same associations as straight people.”).

24 Yarrow Dunham & Mahzarin Banaji, *The Development of Implicit Intergroup Cognition*, 12 *TRENDS COGNITIVE SCI.* 248, 252 (2008).

25 *Id.* at 250.

26 See Suzanne R. Horwitz, Kristin Shutts & Kristina R. Olson, *Social Class Differences Produce Social Group Preferences*, 17 *DEV. SCI.* 991, 995 (2014).

27 Rebecca S. Bigler, *The Role of Classification Skill in Moderating Environmental Influences on Children's Gender Stereotyping: A Study of the Functional Use of Gender in the Classroom*, 66 *CHILD DEV.* 1072, 1079–80, 1083 (1995); Lacey J. Hilliard & Lynn S. Liben, *Differing Levels of Gender Salience in Preschool Classrooms: Effects on Children's Gender Attitudes and Intergroup Bias*, 81 *CHILD DEV.* 1787, 1794 (2010).

28 See Nicole C. Baltazar, Kristin Shutts & Katherine D. Kinzler, *Children Show Heightened Memory for Threatening Social Actions*, 112 *J. EXPERIMENTAL CHILD PSYCHOL.* 102, 107 (2012).

29 *Id.*

30 See Melissa Bateson, Ben Brilot & Daniel Nettle, *Anxiety: An Evolutionary Approach*, 56 *CAN. J. PSYCHIATRY* 707, 711 (2011); see also Louise Atkinson, *Trouble Sleeping? The Solution Could Lie in our Ancestors' Lifestyle and Taking Rests Like a Caveman*, *DAILY MAIL*, (May 18, 2010, 4:18 PM), <http://www.dailymail.co.uk/health/article-1279204/Trouble-sleeping-The-solution-lie-ancestors-lifestyle-taking-rests-like-caveman.html>.

31 Cat Thrasher & Vanessa LoBue, *Do Infants Find Snakes Aversive? Infants' Physiological Responses to "Fear-Relevant" Stimuli*, 142 *J. EXPERIMENTAL CHILD PSYCHOL.* 382, 382 (2016).

Scientists have shown this fear is not innate, but rather, is acquired.³² Fear that is not innate may be acquired two ways: through direct experience or indirectly through social observation or communication.³³ So why do so many people fear snakes? Studies have shown babies and very young children show a predisposition to fear snakes based merely on a few bad direct experiences or even indirectly via negative portrayals in media.³⁴ Shifting to our court system, such de minimis exposure might lead people to fear an African American or a Muslim defendant based solely on one bad experience or mere news coverage.

The idea that media may indirectly undermine trial impartiality is not a new concept. In 1966, the Supreme Court stated, “Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.”³⁵ This rationale for a change in venue is well suited for ephemeral but intense media coverage regarding one accused individual: for instance, a trial that resembles that of Timothy McVeigh. But the doctrine does not address pervasive or subtle forms of biases, and yet those can be equally damaging. Consider biases that arise for a group after similarly intense but ephemeral coverage of, for example, 9/11; according to Gallup polls, distrust of Arabs in America has steadily increased after 9/11.³⁶ The doctrine also fails to address vestigial attitudes that remain after institutional practices, which are often paired with deliberate propaganda. Widely distributed pro-slavery propaganda in America included purported support from the Bible, the Constitution, economists, and scientific data that claimed Negroes were mentally and physically inferior to the white race.³⁷

Implicit bias may help explain the staggering differences between, for example, African Americans and other ethnicities in regard to African-American experience with the criminal justice system. African Americans are more likely to (1) have their

32 *Id.* at 388.

33 Andreas Olsson, Katherine I. Nearing & Elizabeth A. Phelps, *Learning Fears by Observing Others: The Neural Systems of Social Fear Transmission*, 2 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 3, 3 (2007).

34 Clara Moskowitz, *Why We Fear Snakes*, LIVE SCIENCE, (Mar. 3, 2008, 7:00 PM), <http://www.livescience.com/2348-fear-snakes.html>.

35 Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

36 Costas Panagopoulos, *The Polls-Trends: Arab and Muslim Americans and Islam in the Aftermath of 9/11*, 70 PUB. OPINION Q. 608, 613, 624 (2006).

37 Albert Deutsch, *The First U.S. Census of the Insane (1840) and Its Use as Pro-Slavery Propaganda*, 15 BULL. HIST. MED. 469, 469 (1944); *see also* Transcript of Oral Argument at 67, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 14-981) (Indeed in 2015, Justice Scalia surmised, “[T]here are those who contend that it does not benefit African-Americans to . . . get them into the University of Texas [Austin] where they do not do well, as opposed to having them go to a less advanced school, a less—a slower track school where they do well.”). *But see* Michael McGough, Opinion, *No, Scalia’s Comment About “Less-Advanced” Schools Wasn’t Racist*, L.A. TIMES (Dec. 9, 2015, 2:51 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-scalia-affirmativeaction-supremecourt-20151209-story.html> (“[I]t’s equally silly to suggest that Scalia was being racist when he clumsily invoked the mismatch theory.”); *see also* Katharine Q. Seelye, *Protesters Disrupt Speech by “Bell Curve” Author at Vermont College*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html> (“‘The Bell Curve,’ published in 1994, linked lower socioeconomic status with race and intelligence.”).

cars searched; (2) be arrested for drug use; (3) be jailed while awaiting trial; (4) be offered a plea deal that includes prison time; (5) be excluded from juries because of their race; (6) serve longer sentences than white Americans for the same offense; (7) be disenfranchised because of a felony conviction; and (8) have their probation revoked.³⁸ Generally, one in three African-American males is likely to become incarcerated at some point, as opposed to Caucasian males, who face a chance of one in seventeen.³⁹

To demonstrate how pervasive and pernicious implicit bias can be, let's take a momentary step away from the adversarial system of criminal law and examine two fields where all parties' interests are aligned: healthcare and education. Both fields demonstrate negative implicit biases that providers may not consciously endorse but nonetheless act on, producing harmful or even lethal effects.

Preschool teachers—both black and white—scrutinized black children more closely than white children when asked to spot challenging behavior, though, in reality, the children never displayed misbehavior because they were child actors.⁴⁰ The Department of Education found black preschool children are over three times more likely to be suspended from school than white preschool children.⁴¹ These findings suggest that implicit biases held by preschool teachers may have tangible effects on students, despite teachers' best intentions.

Some doctors and other healthcare providers hold strong implicit biases towards obese patients.⁴² This increases the chances of a diagnosis bias, which may hinder doctors' ability to reevaluate initial value judgments once they have made them. When one patient told her doctor she was unable to breathe, the doctor responded, "That's the problem with obesity. . . . Have you ever considered going on a diet?"⁴³ Subsequent tests revealed that patient's symptoms stemmed from life-threatening blood clots in her lungs.⁴⁴ As a second patient began to explain her

38 Andrew Kahn & Chris Kirk, *What It's Like to Be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015, 12:11 PM), http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_criminal_justice_system_eight_charts_illustrating.html (showing eight charts that show how the justice system is stacked against black Americans).

39 *Racial Disparities in Criminal Justice*, ACLU, <https://www.aclu.org/issues/mass-incarceration/racial-disparities-criminal-justice> (last visited Feb 20, 2017).

40 Walter S. Gilliam, Angela N. Maupin, Chin R. Reyes, Maria Accavitti & Frederick Shic, *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, YALE CHILD STUD. CTR. 1, 5–7 (2016), http://www.addressingracialmicroaggressions.com/wp-content/uploads/2016/10/Preschool-Implicit-Bias-Policy-Brief_final_9_26_276766_5379.pdf.

41 U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *A First Look: Key Data Highlights on Equity and Opportunity Gaps in Our Nation's Public Schools* 1, 3 (Oct. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

42 S.M. Phelan, D.J. Burgess, M.W. Yeazel, W.L. Hellerstedt, J.M. Griffin & M. van Ryn, *Impact of Weight Bias and Stigma on Quality of Care and Outcomes for Patients with Obesity*, 16 OBESITY REVS. 319, 320–21 (2015).

43 Gina Kolata, *Why Do Obese Patients Get Worse Care? Many Doctors Don't See Past the Fat*, N.Y. TIMES (Sep. 27, 2016), <http://www.nytimes.com/2016/09/26/health/obese-patients-health-care.html>.

44 *See id.*

symptoms, the doctor cut her off, saying, “Let me cut to the chase. You need to lose weight.”⁴⁵ The doctor diagnosed that second patient with “obesity pain;” however, practitioners later discovered her symptoms resulted from a condition that was not caused by obesity.⁴⁶ Considering that almost 70 percent of American adults are considered to be overweight or obese,⁴⁷ implicit bias may cause caregivers to forgo life-saving measures despite their earnest efforts to heal.

B. *Judicial Bias*

Just as doctors take a Hippocratic Oath to do no harm, judges take an oath to administer justice impartially.⁴⁸ When asked, 97 percent of judges placed themselves in an above average category when ranking their ability to “avoid racial prejudice in decision-making” relative to other judges in their conference.⁴⁹ Of course, those estimates are impossible, since 97 percent of one group, by definition, cannot fit in the top 50 percent. Justice Kennedy once explained, “Bias is easy to attribute to others and difficult to discern in oneself.”⁵⁰

A study including over one-hundred actual judges—both appointed and elected judges—from three different jurisdictions revealed judges do harbor implicit racial biases.⁵¹ Just like other black adults generally, black judges individually varied in their preference for white or black individuals.⁵² White judges demonstrated implicit white preferences on par with the general population and capital defense attorneys.⁵³ Importantly, these implicit biases held by judges of disparate backgrounds translate into tangible effects.⁵⁴ Judges with strong white preferences gave harsher judgments to black defendants when subliminally primed.⁵⁵ Alternatively, judges with strong black preferences were more lenient with black defendants when subliminally primed.⁵⁶ Other recent research has shown that judges consistently exhibit negative in-group biases; when a black judge rules on a black defendant or a white judge rules on a white defendant, the sentences are 14 percent longer than when ruling on a defendant of an out-group.⁵⁷ Despite swearing to administer justice impartially and

45 *Id.*

46 *Id.*

47 U.S. Dep’t of Health & Human Servs., *Overweight and Obesity Statistics*, <https://www.niddk.nih.gov/health-information/health-statistics/Pages/overweight-obesity-statistics.aspx> (last visited Feb 20, 2017).

48 *See, e.g.*, 28 U.S.C. § 453 (2012).

49 Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225–26 (2009).

50 *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

51 Rachlinski et al., *supra* note 50, at 1221.

52 *Id.* at 1199-1200, 1221.

53 *Id.* at 1222.

54 *Id.* at 1197.

55 *Id.* at 1223.

56 *Id. But see id.* at 1223 (showing that when race is explicitly manipulated, however, judges show the capacity to treat defendants comparably).

57 Jeff Guo, *Researchers Have Discovered a New and Surprising Racial Bias in the Criminal Justice System*, WASH. POST (Feb. 24, 2016),

undoubtedly attempting to do so in good faith, judges were incapable of acting impartially when primed with everyday situations.⁵⁸

Even if the aforementioned biases exist, one may argue a guilty or innocent verdict depends on the jury, not the judge who just calls balls and strikes. Since the jury cannot telepathically read the mind of a judge, a judge's internal biases should have no practical effect on verdicts. In reality, a judge's unspoken biases may influence a jury; study participants who were blind to the result of a trial accurately predicted jury verdicts based solely on the judge's verbal and nonverbal cues.⁵⁹

Many variables of a judge's background—including, “among others, age, sex, race, political ideology, and number of years on the bench”—affect judicial behavior toward trial participants.⁶⁰ In turn, the interplay of these variables that affect behavior may directly affect jury deliberations.⁶¹ Judicial behavior stems from expectations of cases based on numerous factors; however, one salient factor that carries no legal significance is the defendant's socioeconomic status.⁶² Yet, judges tended to infer guilt when defendants came from lower socioeconomic backgrounds.⁶³ Additionally, when judges faced defendants from higher socioeconomic backgrounds, study participants deemed the judges' nonverbal behavior to be more professional and competent.⁶⁴

C. *Juror Bias*

Jury deliberations are black boxes by design so that discussions remain secret, which promotes juror impartiality, privacy, and candidness. In 2010, a room of jurors tasked with deciding a sexual assault case turned dark for entirely different reasons. One juror, a former law enforcement officer, told fellow jurors, “I think he did it because he's Mexican, and Mexican men take whatever they want.”⁶⁵ He continued, “[N]ine times out of 10” Mexican men were guilty of “being aggressive toward women and young girls” because of a Mexican “sense of entitlement [and] bravado.”⁶⁶ After just two jurors broke their code of silence to report these remarks that occurred during jury deliberations, the Supreme Court wrestled with the need to preserve the privacy of jury

https://www.washingtonpost.com/news/wonk/wp/2016/02/24/researchers-have-discovered-a-surprising-racial-bias-in-the-criminal-justice-system/?utm_term=.51cdaffd9f8; Briggs Depew, Ozkan Eren & Naci H. Mocan, *Judges, Juveniles and In-Group Bias* (NBER, Working Paper No. w22003, Feb. 2016), <https://ssrn.com/abstract=2736079>.

58 See, Rachlinski et al., *supra* note 50, at 1225.

59 See, Peter Blanck, Robert Rosenthal & LaDoris Hazzard Cordell, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 136–37 (1985).

60 *Id.* at 104.

61 See *id.* at 136–37.

62 *Id.* at 121.

63 *Id.*

64 *Id.* at 128.

65 Liptak, *supra* note 4.

66 Mark Joseph Stern, *The Supreme Court Debates Juror Bias*, SLATE (Oct. 12, 2016), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/10/samuel_alito_is_more_worried_about_pc_run_amok_than_a_blatantly_racist_jury.html.

deliberations while upholding the values of impartial justice.⁶⁷ The Court ruled in this case that the secrecy of jury deliberations may be pierced in instances of “overt racial bias.”⁶⁸ Yet, the Court provided no standard “for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.”⁶⁹

If the former officer held this belief to himself, would that conviction be any more just? What if the officer was unknowingly biased against Mexicans and voted for a guilty verdict? What if all twelve jurors said in unison, “He did it because he’s Mexican” and delivered a guilty verdict? Our current system fails to account for these respective situations of concealed biases, implicit biases, and explicit biases that go unreported. Undoubtedly, this former officer swore during voir dire that he would act impartially. This illuminates that a concealed bias may become an explicit bias based on who is listening. One could argue this is an isolated incident. On the other hand, the sign of one roach may indicate many more hiding and multiplying.

Listing a taxonomy of these roaches—or biases—is unnecessary, as biases held by juries encompass all human bias, which has been discussed *ad nauseum* in other books and publications.⁷⁰ Rather than listing all of these biases, let’s consider some biases that uniquely arise in a courtroom.

During the course of a trial, jurors noticed the defendant fastidiously drawing on pieces of paper as he looked toward the jury box.⁷¹ As the trial proceeded, one juror finally approached the judge with some concern.⁷² The juror told the judge that she felt uncomfortable because the defendant was drawing pictures of the jurors’ faces.⁷³ In fact, when questioned, other jurors admitted feeling anxious about the drawings and felt the drawings were inappropriate.⁷⁴ The judge told the jurors the drawings were permissible and did not resemble them.⁷⁵ The judge then asked the jurors, “Can you remain fair and impartial?”⁷⁶ The jurors responded, “yes,” and later convicted the defendant.⁷⁷ Unlike the 2010 case in which two jurors came forward, no jurors broke the silence of the jurors’ deliberations. So we will never know if in addition to asking, “is he guilty beyond a reasonable doubt,” one or more jurors asked, “if we find him not guilty, does he get to keep our portraits?”

A few questions arise: First, were jurors able to anxiously watch the defendant draw them while simultaneously weighing the credibility of testifying witnesses, weighing the evidence presented, and following all rulings on objections? Second, why were the jurors observing the defendant at all? Certainly, his drawings or expressions

67 See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

68 *Id.*

69 *Id.* at 870.

70 See generally, DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

71 *United States v. Sturman*, 951 F.2d 1466, 1478 (6th Cir. 1991).

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 See *id.*

77 See *id.* at 1471, 1478.

had no impact on the legal merits of the evidence. Third, did the drawings make the jurors fearful of setting the defendant free?

Consider another case involving a rape allegation. Naturally, the jurors swore at the outset that they could rule impartially on the defendant's guilt or innocence. The female victim recounted how she had been drugged and raped by three men in succession.⁷⁸ What sets this case apart from others is not the "not guilty" verdict. Rather, it is the fact that all eight jurors were smiling and posing for photos with one of the defendants after trial.⁷⁹ This defendant was a first-round draft pick in the National Basketball Association (NBA), was Rookie of the Year, and was named the NBA's Most Valuable Player.⁸⁰ He was Derrick Rose. Lest you suspect some impropriety, the jurors made clear, "Rose's stardom as one of the NBA's most prominent point guards played no role in their decision."⁸¹

In the first case, the idea of a photo produced shock; however, in the second case, it produced selfies. What unifies the two cases is one question: what legal purpose does the juror's view of the defendant serve if the defendant never testifies? Better yet, why is the defendant present at all?

Put simply, the defendant's presence is generally optional. The defendant's right to be present at his or her trial stems from the Confrontation Clause, the Due Process Clause, and various statutes.⁸² The key rights include the right of cross-examination, the right of face-to-face confrontation, and the defendant's right to be present at his or her trial.⁸³ The first Supreme Court decision to interpret the Confrontation Clause stated the clause's primary objective was "to prevent depositions or ex parte affidavits . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness."⁸⁴ Historically, such ex parte affidavits infamously led to the death of many who never had the opportunity to question their accusers, as exemplified by the trial of Sir Walter Raleigh.⁸⁵ The court sentenced Raleigh to death for treason. The crucial evidence against him was out-of-court statements by a witness who never appeared in court to testify, despite Raleigh's claims that the witness lied to save himself.⁸⁶

Accordingly, the defendant's most basic right under the Confrontation Clause is "to be present in the courtroom at every stage of the defendant's trial."⁸⁷ By being

78 Joel Rubin, *Jury Finds Claim that NBA Star Derrick Rose and Two Friends Sexually Assaulted Woman Not Credible*, L.A. TIMES (Oct. 19, 2016), <http://www.latimes.com/local/lanow/la-me-derrick-rose-verdict-20161019-snap-story.html>.

79 *Id.*

80 *Derrick Rose*, ESPN, http://www.espn.com/nba/player/_id/3456/derrick-rose (last visited Sep. 17, 2017).

81 Rubin, *supra* note 78.

82 See, e.g., U.S. CONST. amend. VI. ("the accused shall enjoy the right to... be confronted with the witnesses against him"); Cal. Penal Code § 977 ("The accused may execute a written waiver of his or her right to be personally present..."); Wis. Stat. Ann. § 971.04 ("A defendant charged with a misdemeanor may ... be excused from attendance at any or all proceedings").

83 *Crawford v. Washington*, 541 U.S. 36, 57 (2004).

84 *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

85 *Crawford*, 541 U.S. at 44.

86 *Id.*

87 *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

present, the defendant is able to defend against accusations and confront witnesses. Thus, the Confrontation Clause does not protect the defendant's presence per se; rather it protects it as a means to an end. Yet even in 1895, the Supreme Court acknowledged that this general rule, however valuable to the defendant, "must occasionally give way to considerations of public policy and the necessities of the case."⁸⁸

Courts originally inferred in dicta—apparently as an outgrowth of the right to be present—a right of face-to-face confrontation.⁸⁹ Later, the Supreme Court held that the "Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."⁹⁰ Notably, a face-to-face requirement is not written in the Constitution.⁹¹ Scalia stated face-to-face interactions help ensure the integrity of the fact-finding process because "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"⁹² Scalia underscores the need for the jury to view the witness's behavior, as opposed to viewing the defendant's behavior, during this fact-finding process.⁹³ Indeed, since 1895, the Supreme Court has stressed the role of the jury to assess the witness—not the defendant—to determine the witness's credibility.⁹⁴ Scalia also found it essential to "undo the false accuser."⁹⁵ Face-to-face confrontation, however, is not an indispensable element of the Sixth Amendment; it is a preference.⁹⁶ This preference may be outweighed by public policy considerations and the necessities of the case.⁹⁷ Although this preference for physical, face-to-face confrontation may not be easily disregarded, important public policy considerations can trump this right as long as the reliability of testimony is otherwise assured.⁹⁸ For instance, the need to admit hearsay statements made by an absent declarant can trump this preference.⁹⁹

88 *Mattox*, 156 U.S. at 243.

89 *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (citing *Delaware v. Fensterer*, 474 U.S. 15, 18–19 (1985) (per curiam)) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."); *Kirby v. United States*, 174 U.S. 47, 55 (1899) ("A fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses . . . upon whom he can look while being tried . . .").

90 *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (citing *Kentucky v. Stincer*, 482 U.S. 730, 748, 749–750 (1987) (Marshall, J., dissenting)).

91 See U.S. CONST. amend. VI.

92 *Coy*, 487 U.S. at 1019.

93 *Id.* ("The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.")

94 *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) ("The primary object of the constitutional provision . . . [is] [to compel the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.")

95 *Coy*, 487 U.S. at 1020 ("That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.")

96 *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (citing *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

97 *Id.* at 849–50 (citing *Mattox*, 156 U.S. at 243).

98 *Id.* at 850.

99 *Id.* at 849.

When the defendant is not confronting witnesses, the Due Process Clause may still ensure the defendant's right to be present at trial, but only to the extent that the defendant's absence would impede a fair and just hearing.¹⁰⁰ Additionally, federal statutes and state rules or constitutions may codify the defendant's right to be present at trial.¹⁰¹

Ultimately, these aforementioned rights belong to the defendant, rather than the State. Hence, the defendant may waive or forfeit his or her right to be physically present in the courtroom.¹⁰² Likewise, other rights under the Sixth Amendment, such as the right to confrontation, may be waived if performed intelligently and knowingly.¹⁰³

II. CURRENT SOLUTIONS TO BIAS AND THEIR LIMITATIONS

Since the defendant's mere physical presence might cause the judge or the jury to become biased, it is imperative that courts consider alternatives to the status quo to meet their obligation to impartiality.

A. Court Solutions

i. Bias in Judges

Although courts define bias broadly, instances of concealed or implicit bias will virtually always fail to meet the burden for recusal. According to the U.S. Code, a judge must recuse himself or herself in the case of "a personal bias or prejudice" against any party to the proceeding.¹⁰⁴ Judicial bias includes both the appearance of bias as well as specific instances of bias in fact, such as when a judge has a financial interest in the case.¹⁰⁵ The Supreme Court explained that disqualification is triggered by personal bias from an "extrajudicial source" that results "in an opinion on the merits on some basis other than what the judge learned from his participation in the

100 United States v. Gagnon, 470 U.S. 522, 526 (1985) (citing Snyder v. Massachusetts, 291 U.S. 97, 108 (1934)); *e.g.*, State v. Dann, 74 P.3d 231, 245 (Ariz. 2003) (stating the defendant's right to be present does not extend to in-chambers pretrial conferences, brief bench conferences with attorneys, and "various other conferences characterized as relating only to the resolution of questions of law.").

101 *See, e.g.*, FED. R. CRIM. P. 43 ("The defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing."); CAL. PENAL CODE § 1043 (2004); N.Y. CRIM. PROC. LAW § 340.50 (2004); TEX. CODE CRIM. PROC. ANN. art. 33.03 (2004).

102 Taylor v. United States, 414 U.S. 17, 19–20 (1973) (stating waiver occurs when a defendant voluntarily absents himself from the courtroom after proceedings have begun, but judicial warning is not required); Illinois v. Allen, 397 U.S. 337, 343 (1970) (contrastingly, forfeiture occurs when a defendant's conduct is "so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," but the defendant must be warned by the court prior to his or her removal).

103 *See, e.g.*, Brookhart v. Janis, 384 U.S. 1, 4–5 (1966).

104 28 U.S.C. § 144 (2006).

105 *Id.* at § 455.

case.”¹⁰⁶ The Third Circuit developed a three-part test for judicial disqualification in which the movant carries the burden: “1. The facts must be material and stated with particularity; 2. The facts must be such that, if true they would convince a reasonable man that a bias exists; and 3. The facts must show the bias is personal, as opposed to judicial, in nature.”¹⁰⁷ In practice, this is a very difficult burden to meet, except for obvious cases of familial or financial conflicts.¹⁰⁸

Judges must also adhere to the American Bar Association (ABA) Model Code of Judicial Conduct (CJC), which sets their ethical standards.¹⁰⁹ According to the CJC, a judge must “act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary, and [must] avoid impropriety and the appearance of impropriety.”¹¹⁰ The CJC’s preamble recognizes that a “fair and impartial judiciary is indispensable to our system of justice.”¹¹¹ Accordingly, judges “should aspire at all times to conduct that ensures the greatest possible public confidence in their . . . impartiality.”¹¹² Ultimately, both rules mandate that a judge who, in fact, acts impartially still must be disqualified when the mere appearance of personal bias arises.

ii. Bias in Jurors

Due Process and the Sixth Amendment both independently require an impartial and indifferent jury.¹¹³ “The bias or prejudice of even a single juror would violate [the defendant’s] right to a fair trial.”¹¹⁴ Although impartiality is defined as “a state of mind,” there is no particular test or procedure to ascertain whether a juror is impartial.¹¹⁵ In the absence of a standardized test, trial judges are given wide latitude to determine whether a juror is impartial.¹¹⁶ Courts may consider the

106 United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (citing *Berger v. United States*, 255 U.S. 22, 31 (1921)).

107 United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973) (citing *Berger*, 255 U.S. at 31).

108 See *When Do Supreme Court Justices Recuse Themselves?*, SLATE (Oct. 2, 2000, 5:54PM), http://www.slate.com/articles/news_and_politics/explainer/2000/10/when_do_supreme_court_justices_re_cuse_themselves.html.

109 MODEL RULES OF JUD. CONDUCT r. 1.1, pmb. (AM. BAR AAA’N 2010).

110 *Id.* at r. 1.2.

111 *Id.* at pmb.

112 *Id.*

113 *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (citing *Turner v. Louisiana*, 379 U.S. 466, 471 (1965)).

114 *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998).

115 *Irvin v. Dowd*, 366 U.S. 717, 724–25 (1961) (quoting *United States v. Wood*, 299 U.S. 123, 145–46 (1936)) (“Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.”).

116 See, e.g., *United States v. Taylor*, 92 F.3d 1313, 1324 (2d Cir. 1996) (“We do not minimize the importance to criminal defendants of removing the possibility of racial bias on the jury. How best to do that, however, is primarily left to the broad discretion of the district court.”); *DeVaughn v. State*, 769 S.E.2d 70, 74 (Ga. 2015), *cert. denied*, 136 S. Ct. 56, (2015) (“The trial court has broad discretion to determine a potential juror’s impartiality and to strike for cause jurors who may not be fair and impartial.”); *State v. Lucky*, 96-1687 (La. 4/13/99); 755 So. 2d 845, 850 (“Not every predisposition or leaning in any direction rises to the level of substantial impairment. Significantly, it is in the determination of substantial impairment that the trial judge’s broad discretion plays the critical role.”);

following factors when deciding juror impartiality: preconceived notions,¹¹⁷ opinions,¹¹⁸ views,¹¹⁹ biases or prejudices,¹²⁰ and prior knowledge or impressions.¹²¹ Ultimately, the defendant carries the burden of demonstrating a juror's bias.¹²²

The courts recognize two types of biases held by jurors: actual bias and implied bias.¹²³ Actual bias—the more common of the two—is “bias in fact,” or a state of mind that indicates the person will not act completely impartially.¹²⁴ Examples include where a juror states he or she cannot be impartial, where a juror has a specific negative experience with one of the parties and equivocates on whether he or she can be impartial, and where a juror expressed doubts about being impartial in a case that involved an offense similar to the one the juror had been convicted of.¹²⁵ Thus, actual bias is typically ascertained by evidence obtained on *voir dire*.¹²⁶

Alternatively, implied bias is “conclusively presumed as a matter of law.”¹²⁷ The issue is “whether an average person in the position of the juror in controversy would be prejudiced.”¹²⁸ Jurors found to harbor implied biases “must be recused even where the juror affirmatively asserts (or even believes) that he or she can and will be impartial.”¹²⁹ Examples of implied bias include a juror who had a personal experience similar to the fact pattern in the current trial, a juror who knew of highly prejudicial information about the defendant, a juror whose children were convicted of using the drug involved in the current case, a juror who failed to disclose that her brother was murdered while on a murder case, and jurors deliberating on a robbery and murder case who coincidentally experienced a hotel room break-in.¹³⁰ Consequently, findings

Commonwealth v. Stroyny, 760 N.E.2d 1201, 1206 (Mass. 2002) (“Whether to accept the declaration of a juror that he or she is disinterested lies within the broad discretion of the trial judge.”); Murff v. Pass, 249 S.W.3d 407, 411 (Tex. 2008) (“Because trial judges are present in the courtroom and are in the best position to evaluate the sincerity and attitude of individual panel members, they are given wide latitude in both conducting voir dire proceedings and in determining whether a panel member is impermissibly partial.”).

117 State v. Iuli, 65 P.3d 143, 151 (Haw. 2003) (citing State v. Graham, 780 P.2d 1103, 1107 (1989)).

118 United States v. Gonzalez, 214 F.3d 1109, 1114 (9th Cir. 2000) (“A juror is considered to be impartial ‘only if he can lay aside his opinion and render a verdict based on the evidence presented in court.’”) (citations omitted).

119 State v. White, 693 N.E.2d 772, 777 (Ohio 1998) (“[T]he court must determine whether the prospective juror's views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” (quoting Adams v. Texas, 448 U.S. 38, 45 (1980))).

120 Pietri v. State, 885 So. 2d 245, 257 (Fla. 2004) (“The test for determining juror competency is whether the juror can lay aside any bias or prejudice.” (citing Lusk v. State 446 So. 2d 1038, 1041 (Fla. 1984))).

121 State v. Jaynes, 549 S.E.2d 179, 190 (N.C. 2001).

122 See Irvin v. Dowd, 366 U.S. 717, 723 (1961) (quoting Reynolds v. United States, 98 U.S. 145, 157 (1878)).

123 Solis v. Cockrell, 342 F.3d 392, 395 (5th Cir. 2003).

124 United States v. Gonzalez, 214 F.3d 1109, 1112 (9th Cir. 2000) (quoting United States v. Torres, 128 F.3d 38, 42 (2d Cir. 1997)).

125 *Id.*

126 *Id.* at 1111–13.

127 *Id.* at 1111 (citing 47 AM. JUR. 2D Jury § 266 (1995)).

128 *Id.* at 1112 (quoting United States v. Cerrato-Reyes, 176 F.3d 1253, 1260–61 (10th Cir. 1999)).

129 *Id.* at 1113.

130 *Id.* at 1112–13.

of both actual and implied biases require a juror to be aware of, and to report, possible conflicts or require concrete evidence of conflicts.

This is our sole safeguard against bias. Hence, the juror with concealed biases will continue to be selected for juries. The African-American judge who is more lenient with African-American defendants will continue to provide disparate sentences, just as the Caucasian judge who hands out disproportionately harsh sentences to African-American defendants will continue to provide those disparate sentences. These practices will continue because our system fails to detect and to address concealed and implicit biases. Because of this long felt, but unsolved, need to inhibit bias in the courtroom, scholars have proposed a multitude of suggestions for both judges and jurors. As we will see, however, these solutions merely offer a band-aid solution.

B. *Academic Proposals*

i. *Bias in Judges*

a. *Training*

One proposal is testing and training sessions to mitigate bias amongst judges. This method is gaining traction as more than 250 federal immigration judges attended a mandatory anti-bias training session in August 2016.¹³¹ A paper co-written by law professors at Cornell and Vanderbilt, along with a U.S. District Court judge, explains this approach and its limitations.¹³² First, testing may be accomplished through the IAT.¹³³ The testing results will not disqualify or have any other practical impact on judges, other than informing them of potential bias.¹³⁴ Second, they suggest providing training sessions on bias, without providing specifics on how to conduct such sessions.¹³⁵ The authors acknowledge the procedure's limitations: "there is a risk of insufficient correction, unnecessary correction, or even overcorrection" that results in a distorted decision.¹³⁶

Other drawbacks to training exist. First, training sessions are not equipped to address the plethora of biases that may shift over time; positive or negative biases can derive from subjective ideas of beauty, danger, intelligence, culture, and religion, all of which go far beyond simplistic concepts of racial biases. Second, these training sessions are unlikely to overwrite a lifetime of mental associations that produce biases. It is unlikely that biases, which must first be identified, will be overwritten in two hours or two months. After all, judges appeared to retain the same biases for

131 Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 11, 2016), http://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html?emc=edit_ca_20161005&nl=california-today&nid=70044346&te=1&r=1.

132 Rachlinski et al., *supra* note 50, at 1226–27.

133 *Id.* at 1198–99, 1227.

134 *Id.* at 1227–28.

135 *See id.* at 1228.

136 *Id.* at 1229.

wealth that children shared in independent studies. Third, the simulated sessions are unlikely to translate to lasting changes in practice. The concepts of ego depletion and cognitive load explain that efforts to maintain will or self-control are tiring: “if you have had to force yourself to do something, you are less willing or less able to exert self-control when the next challenge comes around.”¹³⁷ Judge Dana Marks, an immigration judge, explained that massive caseloads frustrate the ability to methodically check one’s biases: “[W]ould I treat a young person the same way I’m treating this old person?” she said. ‘Would I treat a black person the same way I’m treating this white person? This situation of rush, rush, rush as fast as we can go, it’s not conducive to doing that.’”¹³⁸ Fourth, these training sessions may produce a cobra effect due to a normalization of stereotypes; research shows that training sessions that increase awareness of stereotypes led participants to express more stereotypes than those who received no awareness training.¹³⁹

b. Exposure

A second approach involves “stereotype-incongruent models” or exposure to counter-typical associations.¹⁴⁰ This model posits that a person’s bias against a group will cease upon exposure to group members who lack that stereotypical feature.¹⁴¹ This may be accomplished by “direct contact with countertypical people,” or “vicarious contact” through the use of “images, videos, simulations, or even imagination.”¹⁴² For example, posting a picture of Obama alongside judges who have a bias against black defendants theoretically mitigates the bias.¹⁴³

Yet, the debiasing effects of vicarious contact have already been proven to be minor.¹⁴⁴ When a jurisdiction consisted of roughly half white judges and half black judges, white judges still showed a “strong set of implicit biases.”¹⁴⁵ This model may also introduce a cobra effect by inverting a negative bias to a positive bias rather than neutralizing the bias altogether. Additionally, it seems suited for race at the expense of other abstract biases that may derive from political associations or concepts of beauty.

c. Self-Improvement

137 KAHNEMAN, *supra* note 70, at 41–42.

138 Dickerson, *supra* note 130.

139 See Michelle M. Duguid & Melissa C. Thomas-Hunt, *Condoning Stereotyping? How Awareness of Stereotyping Prevalence Impacts Expression of Stereotypes*, 100 J. APPLIED PSYCHOL. 343, 352 (2015).

140 Rachlinski et al., *supra* note 50, at 1226; Kang et al., *supra* note 9, at 1169 (“One potentially effective strategy is to expose ourselves to countertypical associations.”).

141 Kang et al., *supra* note 14, at 1169.

142 *Id.* at 1170–71.

143 See Rachlinski et al., *supra* note 50, at 1227.

144 Kang et al., *supra* note 14, at 1172.

145 Rachlinski et al., *supra* note 50, at 1227.

A third approach seeks to break the causal effect of bias on a judge's decision-making, rather than eliminating the bias, through three steps: (1) by doubting one's objectivity; (2) by increasing one's motivation to be fair; and (3) by improving conditions of one's decision making.¹⁴⁶ The second step is accomplished by persuading judges that a genuine problem exists through self-study, while the third step encourages "judges to take special care when they must respond quickly" and encourages them to avoid elevated emotional states such as anger against certain social categories.¹⁴⁷

The self-improvement approach faces many of the same limitations already discussed. First, it is clear that people overrate their objectivity and likewise, may miscalculate how much skepticism is required. Also, judges already have motivation to be fair due to ethical and legal obligations. Self-study is commendable, but it is neither standardized nor measurable. It also imposes increasing time commitments for judges. Additionally, encouraging judges to slowly deliberate and to avoid certain emotions just fails to account for the practical realities of increasing docket loads and inherently emotional trials.

d. Audits

Fourth, scholars propose judges should undertake audits of their judicial decisions.¹⁴⁸ For example, Kang suggests that judges adopt an accountability model, whereby judges record all of their rulings to help reveal biases through a history of data points.¹⁴⁹ Kang argues such knowledge will create a negative feedback loop that will allow them to make corrective changes based on evidence of biased performance.¹⁵⁰

Kang, however, readily admits some limitations: judges may "lack both the quantitative training and the resources to track their own performance statistics."¹⁵¹ Beyond this, auditing fails to account for ego depletion due to overwhelming dockets. More importantly, the argument that knowledge of biased decisions creates a negative feedback loop runs counter to overwhelming evidence of how habits are formed.¹⁵² The cue for biased judgment is not obliviousness to the bias, the cue is the defendant. For example, an alcoholic knows drinking is harmful, but the sight of a beer bottle may trigger a habit loop just as the sight of a defendant may trigger implicit biases. This is a reactive remedy rather than a proactive solution, and an unproven one at that.

146 Kang et al., *supra* note 14, at 1172–77.

147 *Id.* at 1174, 1177.

148 Rachlinski et al., *supra* note 50, at 1226, 1230; see Kang et al., *supra* note 14, at 1178.

149 Kang et al., *supra* note 14, at 1178–79.

150 *Id.*

151 *Id.* at 1179.

152 See CHARLES DUHIGG, *THE POWER OF HABIT: WHY WE DO WHAT WE DO IN LIFE AND BUSINESS* (2012) (Habits involve a "three-step loop": (1) a cue "that tells your brain to go into automatic mode"; (2) a routine, "which can be physical or mental or emotional"; and (3) a reward.).

e. Procedural Changes

Last, scholars recommend that judges alter courtroom practices.¹⁵³ Some examples include expanding “the use of three-judge courts” or increasing “appellate scrutiny” by “employing de novo review rather than clear error review.”¹⁵⁴

The author readily concedes that employing a three-judge panel may be too costly or too inefficient.¹⁵⁵ The author fails to account for another effect: biased appeals. Research suggests that black judges are consistently overturned more often than white judges, even when accounting for variables such as ideological differences.¹⁵⁶ Substitution of one bias for another is no remedy.

ii. Bias in Jurors

Scholars offer distinct recommendations to reduce bias amongst jurors, except for the aforementioned suggestion of exposure to counter-typical associations.¹⁵⁷

a. Screening

Individual screening is advocated as a method to screen out jurors with excessively high biases.¹⁵⁸ Yet, questions abound: how much is too much? Which biases will be tested? Will this produce satellite litigation over unreliable IATs?

b. Diversity

Jury diversity may cancel out the biases of other jurors by way of increasing the pool of biases.¹⁵⁹

While juror diversity may be more effective in reaching a fair decision, this solution seeks to increase biases rather than mitigating or eliminating them. Accordingly, it is fraught with unforeseen consequences. For example, a juror pool with Asians, Caucasians, and Latinos may still hold the same implicit biases toward Native Americans. Likewise, increasing the pool of African-Americans may still result in a unanimous bias against African-Americans. Moreover, increasing diversity may simply trigger concealed bias. Besides, with a maximum of twelve jurors, it is unlikely to account for every bias that might occur at trial and it would be costly to mandate a representative of every group.

153 Rachlinski et al., *supra* note 50, at 1231.

154 *Id.*

155 *Id.*

156 Maya Sen, *Is Justice Really Blind? Race and Reversal in US Courts*, 44 J. LEGAL STUD. S187, S220–21 (2015).

157 See Kang et al., *supra* note 14, at 1169, 1179–86.

158 *Id.* at 1179.

159 *Id.* at 1180–81.

c. Instructions

Scholars also propose jury instructions to mitigate implicit bias in jurors.¹⁶⁰ Kang concedes no empirical studies have tested the effectiveness of this model, but argues such instruction is “likely to do more good than harm.”¹⁶¹ In fact, a similar system has been tested and failed because of the cobra effect. After considerable research about flaws in eyewitness testimony emerged, New Jersey enacted a law requiring judges to give instructions whenever a case involved eyewitness testimony.¹⁶² These jury instructions informed jurors of the current status of eyewitness research and gave them factors to decide whether such testimony was reliable.¹⁶³ The jury instructions accomplished the complete opposite of the intended effect: in practice, jurors became skeptical of “all eyewitness testimony—even testimony that should be considered reasonably reliable.”¹⁶⁴ In this case, jury instructions about implicit bias may have similar unintended effects. Another study found that seemingly innocuous instructions regarding the presumption of innocence actually may trigger racial stereotypes.¹⁶⁵ Hence, incorporating more jury instructions may simply add confusion for jurors, or worse, trigger biases that might not occur otherwise.

d. Category-conscious strategies

Last, Kang recommends category-conscious strategies—which entail jurors explicitly discussing their biases amongst fellow jurors—and perspective shifting strategies, whereby jurors try empathizing with a party to the case or with other ethnicities by metaphorically stepping into their shoes.¹⁶⁶

This model requires jurors to be aware of all biases, which ignores the reality of implicit bias.¹⁶⁷ Moreover, this model would further delay trial proceedings and risk jurors digressing into long conversations completely unrelated to the evidence. The goal for jurors is to weigh, and most importantly, remember the evidence. This solution risks undermining both of those tasks. Notably, this solution assumes jurors will reveal their concealed biases. According to the Bradley effect—a theory based on the failed political run by Tom Bradley, an African American who lost despite being

160 *Id.* at 1181–82.

161 *Id.* at 1183–84.

162 Nell Greenfieldboyce, *A Judge’s Guidance Makes Jurors Suspicious of Any Eyewitness*, NPR (Jan. 26, 2016, 5:04 AM), <http://www.npr.org/sections/health-shots/2016/01/26/464300484/a-judges-guidance-makes-jurors-suspicious-of-any-eyewitness>.

163 *Id.*

164 *Id.*

165 Danielle M. Young, Justin D. Levinson & Scott Sinnett, *Innocent Until Primed: Mock Jurors’ Racially Biased Response to the Presumption of Innocence*, 9 PLOS ONE 1, 3 (2014).

166 Kang et al., *supra* note 14, at 1184–85.

167 *Id.* at 1126.

ahead in the polls—concealed biases may be hidden even from strangers in order to appear politically correct.¹⁶⁸

iii. Virtual Avatars

Adam Benforado, a law professor at Drexel University, offers an all-encompassing, unique solution that deserves its own section: he suggests dispensing with live trials and replacing them with trials consisting of virtual avatars.¹⁶⁹ Neutral avatars would replace every person in the court, including judges, attorneys, defendants, and jurors.¹⁷⁰ The avatar system would also standardize everyone’s voice, presumably akin to voice disguise, so that any identifiable accents are removed.¹⁷¹ Additionally, the virtual environment would be standardized so that courtroom colors, lighting, heights of physical objects, and any other variability of a physical courtroom is negated.¹⁷² Benforado also recommends broadcasting criminal trials to “supplement[] the spotty error- and bias-checking done by attorneys and judges with crowdsourced oversight.”¹⁷³ Benforado argues witness demeanor is irrelevant, asserting “traditional justifications—particularly that judges and jurors need to be able to take in a witness’s entire demeanor—just do not stack up against the science.”¹⁷⁴ He claims, “In most trials, there is no compelling reason for jurors to inspect the defendant, witness, or attorney in the flesh.”¹⁷⁵ He contends judges should “stop instructing [jurors] to focus on demeanor evidence . . . [or] simply . . . bar [jurors] from observing demeanor altogether.”¹⁷⁶ Benforado also suggests the virtual system will help eliminate attorney and judicial bias towards jurors.¹⁷⁷

These methods of removing bias from the courtroom are unconstitutional, clash with scientific studies, and are impractical. Scalia mused, “[it] is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter” than the placement of a screen between the criminal defendant and testifying witness.¹⁷⁸ The constitutional violations of a physical screen in *Coy* pale in comparison to the constitutional violations of an avatar system. An avatar system would re-introduce “the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused,” which was the primary evil the Confrontation Clause sought to eradicate.¹⁷⁹ Assuming avatars will take an oath and may be cross-examined, the avatars will nevertheless discard a central

168 *Bradley Effect*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bradley_effect (last visited Feb. 20, 2017).

169 ADAM BENFORADO, UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE 266–68 (2015).

170 *See id.*

171 *Id.* at 267.

172 *See id.* at 268.

173 *Id.* at 268–69.

174 *Id.* at 270.

175 *Id.* at 266–67.

176 *Id.* at 267.

177 BENFORADO, *supra* note 168, at 267.

178 *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

179 *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

element of the Confrontation Clause: “[O]bservation of demeanor by the trier of fact.”¹⁸⁰

Scalia championed face-to-face confrontation, noting it is harder “to lie ‘[to someone’s] face’ than ‘behind his [or her] back.’”¹⁸¹ Alternatively, Benforado suggests an avatar system and claims “there is no compelling reason for jurors to inspect the . . . witness . . . in the flesh.”¹⁸² According to science, however, Scalia is closest to the truth.

One study squarely addresses this question of whether it is easier to lie to someone’s face or easier to lie in a virtual environment.¹⁸³ The study concluded that people are less likely to detect highly motivated liars’ deception in virtual environments than via face-to-face interactions.¹⁸⁴ Although this study compared text messaging with face-to-face interactions, a text-messaging system is analogous to Benforado’s avatar system because the avatars would be devoid of expression, mannerisms, and vocal changes.¹⁸⁵ The study reasoned that a digital environment facilitates deception because it removes “nonverbal and vocal behavior” that help viewers determine whether one is lying: behaviors include “facial characteristics like gaze aversion, smile duration, eye blinking or broken eye contact;” “bodily movements like self-manipulations, illustrators, and shifting (or rigid) body positions;” and other vocal properties.¹⁸⁶

In addition to the legal and scientific hurdles of such a proposal, Benforado’s virtual avatar system is impractical and raises more questions than answers. No logistics are mentioned, and without more, such a system cannot be implemented even if it did not run afoul of the Constitution.

III. THE DOUBLE-BLIND SYSTEM

A. Overview

The Double-Blind System stops biases where our current system and other proposals fail to do so. It works by removing the defendant from view, thereby precluding any biases—whether concealed, implicit, or currently undefined—from occurring at the source. Its simplicity is its core function, allowing juries to focus on the evidence rather than falling susceptible to unavoidable biases. Moreover, this procedure can be accomplished using technology and procedures that already exist in the courtroom. In a single-blind system, the jury will no longer view or hear the

180 Maryland v. Craig, 497 U.S. 836, 837 (1990).

181 Coy, 487 U.S. at 1019.

182 BENFORADO, *supra* note 168, at 266–67.

183 See Mike Woodworth, Jeff Hancock & Saurabh Goorah, *The Motivational Enhancement Effect: Implications for Our Chosen Modes of Communication in the 21st Century*, PROC. 38TH ANN. HAW. INT’L CONF. SYS. SCI. 1, 3 (2005).

184 *Id.* at 7 (“Indeed, a comparison across the four conditions in the study reveals that the highly motivated CMC senders were the most successful in their ability to deceive their partner.”).

185 See *id.* at 2.

186 *Id.* at 2, 7.

defendant in a criminal trial, except when the defendant testifies by right. In a double-blind system, both the jury and the judge will no longer view or hear the defendant, except when the defendant testifies.

i. The Defendant

The defendant may be housed in the jail conference room, in the attorney-client meeting room located adjacent to the courtroom, in the room normally reserved for child witness examinations, or another room approved by the judge. The defendant will be able to use any items that he normally would have access to, such as writing utensils and paper. The defendant will have uninterrupted access to audio channels to communicate with defense counsel at all times. The defendant also will have a two-way closed-circuit television (CCTV) that allows live face-to-face confrontation with all witnesses. The defendant's TV monitor can also include a picture-in-picture option to view courtroom demonstrations and the jury. The defendant's name will be substituted with initials, as is done in cases involving minors, to prevent inferences based on the name.

ii. The Witness

The witness stand would be equipped with a two-way CCTV monitor that contains a clear view of the defendant. In child sexual assault cases, this monitor could be turned off pursuant to court discretion and case-specific findings: in these cases, the two-way CCTV would be switched to one-way CCTV, whereby the defendant can see and hear the witness but the witness would not see or hear the defendant. To be clear, this one-way use will be limited to a very narrow set of cases that are already allowed under precedent, including *Coy* and *Craig*.¹⁸⁷ Otherwise, the monitor will always present a face-to-face view of the defendant, just as the defendant's monitor will show a clear view of the witness during live testimony. The witness will be unable to hear the defendant. All in-court identifications of the defendant will be made by the witness through a closed-circuit television or in court outside of the jury's presence.

iii. The Jury

The jury will be unable to see or hear the defendant at all times. Importantly, the jury will always view witnesses as they have for hundreds of years: via the witness stand. Even in cases of child sexual assault, the jury will always view the child witness as the witness testifies from the witness stand. This is a major improvement on the current system, which allows children who are overcome by fear of the defendant to testify outside the presence of the jury.¹⁸⁸

187 *Maryland v. Craig*, 497 U.S. 836, 860 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

188 *See, e.g., Maryland*, 497 U.S. at 853.

iv. The Judge

Under a double-blind setup, the judge will be unable to see or hear the defendant, akin to the jury in a single-blind setup. In a single-blind setup, the judge's role remains unchanged.

B. *The Constitutionality of the Double-Blind System*

The Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed . . . [and the right] to be confronted with the witnesses against him"¹⁸⁹

In order to understand the policies behind the Double-Blind System, it is critical to understand how three cases established the bedrock of face-to-face constitutional analysis.

i. Witness Screens

In *Coy*, Iowa enacted a statute that authorized the placement of a screen between the defendant and alleged underage victims of sexual assault who testified against that defendant.¹⁹⁰ The screen made it impossible for the testifying victims to see the defendant during trial, but the defendant was able to see the witnesses dimly through the screen.¹⁹¹ On appeal, the Supreme Court ruled that the screen violated appellant's Sixth Amendment right to face-to-face confrontation because the screen blocked the witness's view of the defendant.¹⁹² Yet, without addressing specific exceptions, the Court acknowledged the "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests."¹⁹³ The Court clarified that any potential exception must "further an important public policy."¹⁹⁴ Although the Court did not address the possibility of using closed-circuit television, O'Connor suggested that such technology "may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant."¹⁹⁵

189 U.S. CONST. amend. VI.

190 *Coy*, 487 U.S. at 1020.

191 *Id.* at 1012.

192 *See id.* at 1020, 1022.

193 *Id.* at 1020.

194 *Id.* at 1021.

195 *Id.* at 1023 (O'Connor, J., concurring).

ii. Closed Circuit Television (CCTV)

Two years later, the Supreme Court identified a specific exception to the right of face-to-face confrontation: cases involving sexual abuse of minors.¹⁹⁶ In *Craig*, the State accused the defendant of sexually abusing a six-year-old child.¹⁹⁷ Fearing the child would suffer serious emotional distress upon seeing the defendant in court, the State invoked a statutory procedure that allowed testimony via one-way closed-circuit television that prevented the witness from seeing the defendant but still allowed the defendant to view the witness.¹⁹⁸ The Court ruled the procedure to be constitutional, explaining, “the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,’ a preference that ‘must occasionally give way to considerations of public policy and the necessities of the case.’”¹⁹⁹ The Court underscored that the preference is not easily dispensed with.²⁰⁰ Rather, “a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”²⁰¹ The Court clarified, “the presence of . . . other elements of confrontation—oath, cross-examination, and observation of the witness’ demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.”²⁰²

In *Craig*, the Court held the “State’s interest in the physical and psychological well-being of child abuse victims” constitutes an important state interest, as long as the State makes “an adequate showing of necessity,” which must be a case-specific inquiry.²⁰³ In cases of child abuse victims, necessity is shown when the defendant, rather than the courtroom, traumatizes the child witness.²⁰⁴

In 2004, the Court’s test for the admissibility of out-of-court statements changed from one based on “reliability” to whether the statements were “testimonial” in *Crawford v. Washington*.²⁰⁵ *Crawford* held the Confrontation Clause bars out-of-court statements that are testimonial, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable.²⁰⁶ Some may question whether *Craig*’s interpretation survives the analysis provided by *Crawford*, which rejects the idea that the Confrontation Clause generally protects evidentiary reliability.²⁰⁷ It is an

196 *Maryland v. Craig*, 497 U.S. 836, 860 (1990).

197 *Id.* at 836.

198 *Id.*

199 *Id.* at 849, 852 (citations omitted).

200 *Id.* at 850.

201 *Id.*

202 *Id.* at 851.

203 *Id.* at 853, 855.

204 *Id.* at 855–56.

205 541 U.S. 36, 53 (2004).

206 *Id.* at 42–56.

207 *Id.* at 61–68.

important question for cases similar to *Craig* because the minors testified out of court, without face-to-face confrontation. In *Crawford*, Scalia explained the Confrontation Clause ensures reliability of evidence procedurally through cross-examination, rather than ensuring the reliability of evidence substantively.²⁰⁸ In other words, the Confrontation Clause does not guarantee evidence is reliable; it only guarantees evidence is scrutinized, which normally should result in reliable evidence.²⁰⁹ Ultimately, courts and commentators agree *Crawford* did not overrule *Craig*.²¹⁰ Under the Double-Blind System, this question is irrelevant, since witnesses always testify in court, unlike what occurs under *Craig* exceptions. Hence, a *Crawford* analysis is never triggered.

iii. Current Law

Maryland v. Craig still governs the use of testimony via CCTV where the defendant is denied a physical face-to-face confrontation. This legal standard applies to both formats of the Double-Blind System, which incorporates a two-way, closed-circuit television except in the rare situations that call for one-way testimony under *Craig*. As mentioned, one-way CCTV is only permissible when: (1) denial of physical, face-to-face confrontation is necessary to further an important public policy, and (2) the reliability of the testimony is otherwise assured.²¹¹ Under the Double-Blind System, the latter is assured because the witness always testifies in court, and a virtual face-to-face encounter creates no material differences from its physical counterpart. Thus, the last step for determining whether the Double-Blind System is constitutional depends on whether or not it furthers an important public policy. Until courts endorse the Double-Blind System as a bright-line rule, this finding must be case-specific, and the following public policies may enable the Double-Blind System to be employed today.

208 *Id.* at 61 (“[The Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

209 *Id.*

210 *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (“The *Gigante* trial court should have applied *Craig*.”); *Kansas v. Blanchette*, 134 P.3d 19, 29 (Kan. Ct. App. 2006) (“In *Crawford*, the majority did not overrule or even mention *Craig*. Several post-*Crawford* decisions have continued to uphold the constitutionality of closed-circuit television testimony against Confrontation Clause challenges.”); *Roadcap v. Virginia*, 653 S.E.2d 620, 625 (Va. Ct. App. 2007) (“As nearly all courts and commentators have agreed, *Crawford* did not overrule *Craig*.”).

211 *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

C. *The Double-Blind System Furthers Numerous Public Policies and Compelling State Interests*

i. *The Double-Blind System Furthers Jury Impartiality and Legitimacy*

“Due process requires that the accused receive a trial by an impartial jury free from outside influences.”²¹² Due process necessitates a jury that is both “capable and willing to decide the case solely on the evidence before it.”²¹³ Most importantly, the Sixth Amendment mandates that in “all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed.”²¹⁴ As previously demonstrated, jurors are often incapable of mechanically ignoring biases—whether explicit, concealed, or implicit—toward a defendant. According to the Constitution and the Due Process Clause, the interest in securing jury impartiality alone should enable the Double-Blind System.

Considering the demographics of America, an all-white jury pool may be both common and cause for alarm. This is not a new concern. Ironically, our Founders also feared an all-white jury when Britain attempted to outsource juries for crimes that occurred in the colonies during the late eighteenth century.²¹⁵ A study by Duke University found that “all-white jury pools in Florida convicted black defendants 16 percent more often than white defendants, a gap that was nearly eliminated when at least one member of the jury pool was black.”²¹⁶ This disparity may exacerbate public sentiment towards highly-charged cases, such as police killings. However, increased confidence in unbiased and principled procedures may increase the public’s acceptance of verdicts, regardless of the preferred outcome.²¹⁷

The Double-Blind System reduces the appearance of partiality and potential biases that result from a homogenous jury by eliminating the jury’s view of the defendant. As one columnist said, “all-white juries risk undermining the perception of justice in minority communities, even if a mixed-race jury would have reached the same verdict or imposed the same sentence.”²¹⁸

Of course, all-white juries are not offensive in themselves. Rather, it’s the perception that tribalism may render a biased verdict against the defendant, who is

212 Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

213 Smith v. Phillips, 455 U.S. 209, 209 (1982).

214 U.S. CONST. amend. VI.

215 Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 742 (2006); see *infra* discussion on Groupthink, p. 36–37.

216 Steve Hartsoe, *Study: All-White Jury Pools Convict Black Defendants 16 Percent More Often than Whites*, DUKE TODAY (Apr. 17, 2012), <https://today.duke.edu/2012/04/jurystudy>).

217 See Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 421 (2008) (“[I]n many settings, perceptions of process fairness exert greater influence over acceptance of the result than do the outcomes themselves.”).

218 Jon O. Newman, Opinion, *To Save Our Justice System, End Racial Bias in Jury Selection*, N.Y. TIMES (May 27, 2016), <http://www.nytimes.com/2016/05/28/opinion/to-save-our-justice-system-end-racial-bias-in-jury-selection.html>.

a cultural outsider. This concern is rooted in the same fears our Founders held. Thus, a court's legitimacy will be improved because one causal connection between a biased jury and a biased verdict will be severed.

ii. The Double-Blind System Ensures the Reliability of Evidence

The four procedural elements that ensure the reliability of evidence, pursuant to the Confrontation Clause, include (1) the witness's physical presence; (2) witness statements given under oath, which signals the seriousness of the matter and guards against lying due to the consequences of perjury; (3) cross-examination; and (4) observation of the witness's demeanor by the trier of fact.²¹⁹ Under the Double-Blind System, the witness always testifies in court. Thus significant gains are made in sexual abuse trials involving minors, who often testify outside of the jury's presence.

In one case involving a minor, the court had no control over the examination process, the camera failed to show a complete view of the witness, and the examiner and an unauthorized individual conducted part of the child's examination.²²⁰ None of those circumstances, which impermissibly ran afoul of the Confrontation Clause's procedural elements, would occur under the Double-Blind System. Obviously, an incomplete view of the witness undermines the jury's primary objective under the Confrontation Clause: the ability "to stand face to face with the [witness] in order that [the jury] may look at [the witness], and judge by [the witness's] demeanor upon the stand and the manner in which [the witness] gives [the witness's] testimony whether he is worthy of belief."²²¹ The proposed solution, rather than undermining that objective, ensures it by always placing the witness in the witness stand.

Second, the mere separation of the child witness from the courtroom, for example, through videotaped depositions, may create biases against the defendant. One study found that jurors who viewed videotaped depositions of underage victims of sexual assaults were more certain of a defendant's guilt than jurors who viewed similar testimony in court.²²² The study also concluded that jurors may speculate about the defendant's harmful effect on a child when both are physically present in the same room, thereby opening the door for undue considerations.²²³ These results suggest that defendants may be prejudiced by excluding child witnesses on an ad hoc basis. The Double-Blind System, however, would eliminate such prejudice by normalizing the absence of the defendant. As a result, there will be no speculation as to why the defendant and the witness are not in the same room. More importantly, there will be no presumption that the separation of the defendant from the witness is due to the court's determination that the defendant may pose a danger to the witness.

219 Maryland v. Craig, 497 U.S. 836, 845–46 (1990).

220 Nebraska v. Warford, 389 N.W.2d 575, 579, 582 (1986).

221 Mattox v. United States, 156 U.S. 237, 242–43 (1895).

222 See Janet K. Swim, Eugene Borgida & Kathy McCoy, *Videotaped Versus In-Court Witness Testimony: Does Protecting the Child Witness Jeopardize Due Process?*, 23 J. APPLIED SOC. PSYCHOL. 603, 621 (1993).

223 See *id.* at 627.

iii. The Double-Blind System Increases Efficiency and Maintains Juror Secrecy

Since the connection between demographic profiles of the jury will be severed from the demographic profile of the defendant, the Double-Blind System may result in a significant reduction of *Batson* hearings. Relatedly, the amount of appeals that pertain to biases held by judges or jurors may drop precipitously. For instance, the case involving the biased juror who presumed the defendant was guilty precisely because the defendant is Mexican is unlikely to be replicated under this system, let alone make its way to the Supreme Court. Future appeals may raise issues of bias towards witnesses, victims of crimes, or attorneys. Yet, the majority of cases likely involve prejudice directed towards the defendant. Consequently, court costs should decline along with docket loads that pertain to bias. Similarly, the Double-Blind System would avert future inquiries into piercing secret deliberations by jurors due to allegations of bias.

iv. The Double-Blind System Reduces Suggestibility and Eyewitness Misidentification

The Supreme Court noted, “[I]t is in the prosecution’s interest as well as the accused’s that witnesses’ identifications remain untainted,” so all parties agree suggestibility should be reduced.²²⁴ The Double-Blind System shares the same underlying flaws of suggestibility as current in-court identification procedures, but it improves upon the flaws of suggestibility in several regards.

Any witness—especially those who have seen trials on television—can determine who the defendant is in a trial.²²⁵ In most cases, no objection is made, despite this suggestibility, when a witness is asked to identify the defendant.²²⁶ Objections that argue a defendant’s presence at defense counsel’s table is impermissibly suggestive are routinely dismissed.²²⁷ The Second Circuit noted, “[T]here is always the question how far in-court identification is affected by the witness’ observing the defendant at the counsel table.”²²⁸ Indeed, this in-court identification seems “perfunctory.”²²⁹ Courts are concerned with the current model of in-court identification and suggest that steps should be taken to ensure the process is fair by avoiding a procedure that amounts to a show-up.²³⁰ Although a trial court may not necessarily grant this request, the Supreme Court proposes that one method

224 *Moore v. Illinois*, 434 U.S. 220, 230 n.5 (1977).

225 *United States v. Archibald*, 734 F.2d 938, 941 (2d Cir. 1983), *modified*, 756 F.2d 223 (2d Cir. 1984).

226 *Id.*

227 *See, e.g.*, *United States v. Givens*, 767 F.2d 574, 582 (9th Cir. 1985); *People v. Solomon*, 209 N.W.2d 257, 259–60 (Mich. Ct. App. 1973).

228 *United States ex rel. Phipps v. Follette*, 428 F.2d 912, 915 (2d Cir. 1970).

229 *Brathwaite v. Manson*, 527 F.2d 363, 367 n.6 (2d Cir. 1975), *rev'd*, 432 U.S. 98 (1977).

230 *United States v. Archibald*, 734 F.2d 938, 941–42 (2d Cir.), *modified*, 756 F.2d 223 (2d Cir. 1984).

of reducing in-court identification suggestibility may be accomplished by seating the defendant with other members of the trial audience.²³¹ Many cases will exist where the audience in a courtroom is non-existent or does not resemble the defendant in any fashion. For example, the defendant may be the only black person in the courtroom.²³² In these situations, the Supreme Court's recommendation is impractical. Moreover, placing a defendant, especially in extremely violent cases, with the audience poses a threat to the public and the courtroom generally. The defendant also poses a flight risk by remaining closer to the exit.

The Double-Blind System, although subject to the flaw of suggestibility, improves upon the current method in the following ways: (1) It eliminates suggestibility by the defendant's mere propinquity to defense counsel, (2) it adds the possibility of including other defendants in the picture during identification, and (3) it allows the witness to view the defendant close-up or at distances representative of the original encounter.

There is no added suggestibility by employing the Double-Blind System, yet many possibilities exist to sharply reduce suggestibility. Although it is unlikely for the bailiff to bring a string of defendants into the courtroom who superficially resemble the defendant, it may be more easily accomplished in a room separate from the public and judge. Defendants normally are not shackled because of the prejudicial effect upon the jury and its effect on the decorum and dignity of judicial proceedings.²³³ If the defendant is not present in the courtroom, that concern is irrelevant, so multiple shackled defendants may be momentarily placed in a room at the same time without jeopardizing public safety. Thus, the eyewitness's ability to distinguish the defendant from other inmates at the time of trial will forward the State's and defense counsel's interests in ensuring the eyewitness identification is accurate. After all, eyewitness misidentification is "the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70 percent of convictions overturned through DNA testing nationwide."²³⁴ Additionally, if a defendant remains in a separate, guarded room, the flight and safety risks are virtually eliminated.

The distance at which an eyewitness sees a person can affect the reliability of the identification.²³⁵ Specifically, distance is proportional to the amount of detail one can perceive about a person, such as the person's face.²³⁶ Hence, the further away someone is, the blurrier that person will appear.²³⁷ Although this fact might be obvious, the courtroom identification procedure does not take this into account. The witness stand sits at a considerable distance from the defense table, thereby

231 Moore v. Illinois, 434 U.S. 220, 230 n.5 (1977).

232 See, e.g., United States v. Archibald, 734 F.2d 938, 940 (2d Cir. 1983), modified, 756 F.2d 223 (2d Cir. 1984).

233 Illinois v. Allen, 397 U.S. 337, 344 (1970).

234 *Eyewitness Misidentification*, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes/eyewitness-misidentification/> (last visited Mar 5, 2017).

235 Thomas A. Busey & Geoffrey R. Loftus, *Cognitive Science and the Law*, 11 TRENDS COGNITIVE SCI. 111, 113 (2007).

236 *Id.*

237 *Id.*

automatically blurring the defendant's features. Consider myopia—also known as nearsightedness—a condition that causes distant objects to appear abnormally blurry though close objects appear normal. A witness who is robbed at gunpoint and suffers from myopia may clearly identify the defendant in a photo array but may hesitate to identify the same person while on the witness stand due to her vision. Although the State may argue that more weight should be placed on the defendant's identification the night of the robbery, the jury may conclude that the witness's memory is faulty rather than her vision. Of course, the witness will look right at the defense counsel's table but may nevertheless falter because of the blurriness of the defendant. This causes needless and possibly erroneous speculation on the part of the jury, which can be exploited by either party. Alternatively, this new model can correct for this. The distance from the defendant on the night of the incident can be replicated with the camera. While hardly any court would have the eyewitness stand at arm's length from the defendant during trial to make a positive identification, the Double-Blind System could implement this method in every trial.

v. The Double-Blind System Increases Safety

The Double-Blind System will also prevent violence that occurs in courthouses by eliminating the defendant's presence. Violence that occurs in a courthouse is often committed by or against a defendant. In July 2016, a handcuffed inmate seized a gun from a sheriff and killed two bailiffs in a Michigan courthouse.²³⁸ In September 2016, a defendant appeared to pull a weapon out of his sleeve and lunged towards a prosecutor during trial.²³⁹ In 2011, a defendant punched a district attorney to the ground during a sentencing hearing in Oklahoma.²⁴⁰ Defendants have also been victims. In April 2014, a U.S. marshal shot and killed a defendant after the defendant aggressively rushed towards a witness with a pen.²⁴¹ In June 2016, a father of a slain 18-year-old woman attacked a smirking defendant during trial.²⁴² In 2015, a father punched a defendant being sentenced for the murder of his three-year-old daughter

238 *Sheriff: Michigan Inmate Who Killed Two at Courthouse Was Handcuffed*, WALL ST. J. (Jul. 12, 2016), <http://www.wsj.com/articles/sheriff-michigan-inmate-who-killed-two-at-courthouse-was-handcuffed-1468333795>.

239 Matt Mencarini, *Man Accused of Attacking Prosecutor Sentenced on Sexual Assault Charge*, LANSING ST. J. (Sep. 21, 2016), <http://www.lansingstatejournal.com/story/news/local/2016/09/21/man-accused-attacking-prosecutor-sentenced-sexual-assault-charge/90729038>.

240 Martha Neil, *Blindsided in Courtroom Attack, DA Fights Back, Sends Convicted Murderer to Hospital*, A.B.A. (May 4, 2011), http://www.abajournal.com/news/article/blindsided_by_convicted_murderer_in_courtroom_attack_da_fights_back.

241 *US Defendant Shot Dead by Officers in Courtroom Attack*, BBC (Apr. 22, 2014), <http://www.bbc.com/news/world-us-canada-27106445>.

242 Doug Stanglin, *Father of Slain Girl Leaps at Smirking Killer in Courtroom*, USA TODAY (Jun. 3, 2016), <http://www.usatoday.com/story/news/2016/06/03/father-slain-girl-leaps-smirking-killer-courtroom/85336284>.

in Detroit.²⁴³ These incidents highlight findings by the National Center for State Courts that violent acts in courthouses are steadily increasing, despite increased security.²⁴⁴

The Double-Blind System will increase the safety of courtroom personnel, the public, and the defendant because all of the aforementioned incidents would be impossible. The defendant will be kept in a separate room that bailiffs will oversee. Thus, the defendant is unable to physically interact with other court personnel, and, likewise, the public will be unable to interact with the defendant. Since this model incorporates two-way CCTV, victims may still address defendants during appropriate phases of trial, but neither party will physically interact.

D. Criticisms of the Double-Blind System

i. Virtual Confrontation is Unequal

Critics may argue a virtual face-to-face encounter is not tantamount to its physical, face-to-face counterpart, and thus is not a constitutional equivalent. The Eighth Circuit stated that two-way CCTV is not constitutionally equivalent to physical, face-to-face confrontation because a virtual confrontation does not “provide the same truth-inducing effect.”²⁴⁵ But its only evidence to the contrary—that virtual confrontations do not induce the same truth-inducing effect as physical confrontations—spanned merely one sentence: “Given the ubiquity of television, even children are keenly aware that a television image of a person (including a defendant in the case of a two-way system) is not the person—something is lost in the translation.”²⁴⁶ Other courts offer conclusory statements, citing opinions in a seemingly circular fashion, for this same proposition.²⁴⁷ The Eighth Circuit hypothesized that intangible elements may be lost in a virtual medium.²⁴⁸ As a result, the court concluded, “[A] defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom.”²⁴⁹

Before dissecting this concept, it is important to note that the Supreme Court rejects this notion that the truth-seeking purpose of the Confrontation Clause is

243 Elisha Anderson, *Defendant Punched During Sentencing in Detroit Courtroom*, DETROIT FREE PRESS (Aug. 28, 2015), <http://www.freep.com/story/news/local/michigan/wayne/2015/08/28/defendant-punched-sentencing-detroit/71274878>.

244 Timm Fautsko, Steve Berson & Steve Swensen, *Courthouse Security Incidents Trending Upward: The Challenges Facing State Courts Today*, FUTURE TRENDS ST. CTS. 102 (2012), <http://ncsc.contentdm.oclc.org/cdm/ref/collection/facilities/id/163>.

245 *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).

246 *Id.*

247 *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (“The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. As our sister circuits have recognized, the two are not constitutionally equivalent. *See, e.g., United States v. Bordeaux*, 400 F.3d 548, 554–55 (8th Cir. 2005). The Sixth Amendment’s guarantee of the right to confront one’s accuser is most certainly compromised when the confrontation occurs through an electronic medium.”).

248 *Bordeaux*, 400 F.3d at 554.

249 *Id.* at 554.

impermissibly voided when employing virtual confrontation, even when the witness is completely unable to see the defendant.²⁵⁰ In fact, the Court explained that both the truth-seeking functions and symbolic purposes of the Confrontation Clause are preserved with closed-circuit television if all other elements of the Confrontation Clause exist: (1) The witness competently testifies under oath; (2) “The defendant retains full opportunity for contemporaneous cross-examination; and (3) The judge, jury, and defendant are able to view . . . the demeanor (and body) of the witness as he or she testifies.”²⁵¹

Since the “truth-inducing effect” is the sole premise that the court proffers for the need of a physical, face-to-face, unmediated gaze by the witness upon the defendant, the key question is does the data support the unsubstantiated dogma?

A study from Cornell University compared four mediums—telephone, face-to-face, instant messaging, and email—and found three interdependent factors that affect one’s likelihood to deceive someone: (1) the degree to which messages are exchanged instantaneously and in real-time, (2) the degree to which the interaction is automatically documented, and (3) whether or not the speaker and listener share the same physical space.²⁵² Here, the only difference between the physical and the virtual face-to-face encounter is the third factor. The third factor is relevant only towards “topics or issues that are contradicted by the physical setting (e.g., ‘I’m working on the case report’ when in fact the speaker is surfing news on the web).”²⁵³ A witness’s testimony cannot be contradicted by the physical setting of the witness stand. Consequently, there is no difference in regard to a truth-inducing effect between a physical face-to-face conversation and a virtual face-to-face conversation. Moreover, even when the lack of shared space creates an opportunity to lie about physical setting, the study provides a clear remedy: “videoconferencing.”²⁵⁴ In sum, there is a nugatory difference in one’s ability to deceive when changing from a physical, face-to-face interaction to a virtual, face-to-face interaction.

A study by the University of Michigan supports this notion that virtual face-to-face meetings are tantamount to physical face-to-face meetings for the purposes of a truth-inducing effect. The research team studied 121 truthful and deceptive video clips from real court trials, including those involving Jodi Arias and Donna Scrivo, along with testimonies obtained from the Innocence Project website.²⁵⁵ The study developed an algorithm that correctly identified lying with a 60–75 percent success rate, which outperformed humans who “perform slightly above the chance level.”²⁵⁶

250 *Maryland v. Craig*, 497 U.S. 836, 852 (1990).

251 *Id.* at 851.

252 Jeffrey T. Hancock, Jennifer Thom-Santelli & Thompson Ritchie, *Deception and Design: The Impact of Communication Technology on Lying Behavior*, 2004 PROC. SIGCHI CONF. HUM. FACTORS COMPUTING SYS. 131, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.86.9768&rep=rep1&type=pdf>.

253 *Id.*

254 *Id.* at 135.

255 Verónica Pérez-Rosas, Mohamed Abouelenien, Rada Mihalcea & Mihai Burzo, *Deception Detection Using Real-Life Trial Data*, 2015 PROC. 2015 ACM INT’L CONF. MULTIMODAL INTERACTION 59-61.

256 *Id.* at 60. On a side note, a camera in the witness stand may facilitate the use of such a truth-telling algorithm, which jurors may use or disregard, in the future.

The following behaviors were more often associated with lying: (1) grimacing of the whole face, (2) looking directly at the questioner, (3) gesturing with both hands, (4) speaking with more vocal fill such as “um,” (5) distancing themselves from the action with words such as “he” or “she” rather than “I” or “we,” and (6) using phrases that reflected certainty.²⁵⁷ Remember, it is not the defendant who weighs the credibility of the witness, rather that is the factfinder’s function. If the witness has a virtual face-to-face meeting with the defendant—while sitting in the witness stand as is required by the Double-Blind System—then the jury is able to observe all of those behaviors that indicate when one is lying. Ultimately, the witness, the defendant, and the jury retain all capacities to weigh behaviors that indicate deception under the Double-Blind System.

One question remains: Assuming *arguendo* that the truth-telling effect is triggered by a physical face-to-face interaction, is it also triggered by a virtual face-to-face interaction? There is no research on point for such a precise question, but we can analogize from the medical context, which compares physical face-to-face therapy with virtual face-to-face therapy. According to a systematic review in 2010 that compared videoconferencing with physical, face-to-face sessions, “[T]here is a strong hypothesis that videoconference-based treatment produces the same results as face-to-face therapy”²⁵⁸ A study that compared videoconferencing with face-to-face mental health sessions for American veterans found identical assessments of soft variables such as rapport and empathy.²⁵⁹ Another study found virtually equivalent clinical outcomes and measures for process variables such as satisfaction between patients who used virtual meetings or physical face-to-face meetings.²⁶⁰ Even Blue Cross and Blue Shield of Alabama (“Blue Cross”)—an insurance company that consistently resisted covering video telehealth services due to concerns of effectiveness—began covering virtual face-to-face visits as of December 2015.²⁶¹ Ultimately, the mounting research convinced Blue Cross that virtual health visits were “indistinguishable from a [physical] face-to-face visit.”²⁶² This realization is aligned with the industry standard that offers “almost universal” coverage of live video telehealth services by entities such as Aetna, Anthem, and UnitedHealthcare.²⁶³ Consequently, if insurance companies and studies overwhelmingly agree that virtual

257 Nicole Casal, *New Lie-Detecting Software from U-M Uses Real Court Case Data*, THE U. REC. (Dec. 10, 2015), <https://record.umich.edu/articles/new-lie-detecting-software-u-m-uses-real-court-case-data>.

258 Francisca García-Lizana & Ingrid Muñoz-Mayorga, *What About Telepsychiatry? A Systemic Review*, PRIMARY CARE COMPANION TO J. CLINICAL PSYCHIATRY 1, 5, 7 (2010).

259 See B. Christopher Frueh, Jeanine Monnier, Anouk L. Grubaugh, Jon D. Elhai, Eunsil Yim & Rebecca Knapp, *Therapist Adherence and Competence with Manualized Cognitive-Behavioral Therapy for PTSD Delivered Via Videoconferencing Technology*, 31 BEHAV. MODIFICATION 856, 864 (2007).

260 See Daniel F. Gros, Leslie A. Morland, Carolyn J. Greene, Ron Acierno, Martha Strachan, Leonard E. Egede, Peter W. Tuerk, Hugh Myrick & B. Christopher Frueh, *Delivery of Evidence-Based Psychotherapy Via Video Telehealth*, 35 J. PSYCHOPATHOLOGY BEHAV. ASSESSMENT 506, 518–19 (2013).

261 More insurers are embracing telehealth, but Medicare adoption is still low. See Bob Herman, *Virtual Reality: More Insurers Are Embracing Telehealth*, MOD. HEALTHCARE (Feb. 20, 2016), <http://www.modernhealthcare.com/article/20160220/magazine/302209980>.

262 *Id.*

263 *Id.*

face-to-face visits are tantamount to physical face-to-face visits in virtually every aspect, then it is hard to imagine that any meaningful intangible elements that concerned the Eighth Circuit are lost in translation.

Finally, one court provided another distinct rationale for why virtual face-to-face confrontation is not constitutionally equivalent to its physical counterpart:

“Even the most cutting-edge technology cannot wholly replace the weight of in-court testimony, for the electronic delivery of that testimony—no matter how clearly depicted and crisply heard—is isolated from the solemn atmosphere of the courtroom and compromises human connection to emotions like fear, apprehension, or confusion.”²⁶⁴

Importantly, the Double-Blind System never substitutes in-court testimony. Accordingly, this concern is a moot point because the witness, regardless of age or crime, will always testify in court.

ii. Defendant’s Right to Assist in Trial is Diminished

A criminal defendant has “a due process right ‘to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’”²⁶⁵ This right is not absolute and is not guaranteed “when presence would be useless, or the benefit but a shadow.”²⁶⁶ Thus, the defendant is allowed to be present only “to the extent that a fair and just hearing would be thwarted by his absence.”²⁶⁷

The benefits of a defendant’s in-court physical presence may protect individual and institutional interests. At an individual level, the right may ensure the defendant’s ability to communicate with counsel, to participate in trial strategy, to assist in presenting a defense, and to aid with cross-examination.²⁶⁸ One rarely cited concern also includes the ability to “influence the jury psychologically by [the] defendant’s presence.”²⁶⁹ At the institutional level, the defendant’s presence may ensure public confidence in the courts by establishing the appearance of fairness in the execution of justice.²⁷⁰

In the Double-Blind System, the defendant retains the absolute ability to communicate with counsel, to participate in trial strategy, and to aid with cross-examination because the defendant will hear and see the evidence, albeit through a monitor. Moreover, the defendant will have constant communication with defense counsel through a telephone or an earpiece setup. In a sense, this setup occurs in

264 *White v. State*, 116 A.3d 520, 544 (Md. Ct. Spec. App. 2015).

265 *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

266 *Id.*

267 *Id.*

268 *E.g.*, *State v. Kaulia*, 291 P.3d 377, 393 (Haw. 2013).

269 *State v. Reevey*, 8 A.3d 831, 842 (N.J. Super. Ct. App. Div. 2010).

270 *Pinkney v. State*, 711 A.2d 205, 209 (Md. 1998).

professional leagues such as the National Football League every day, and many coaches swear by it: many play callers prefer strategizing from an upstairs booth to being on the sideline because it provides a more complete view.²⁷¹ In court, the defendant may be freed from worrying about showing emotions, or lack thereof, that may be misinterpreted by a jury. Likewise, a psychological influence on the jury may not benefit the defendant and certainly has no basis in law: jurors have a “duty to base [their] verdict solely upon the evidence, without prejudice or sympathy” and reaching a verdict based on psychological influences from a defendant contradicts the oath that every juror takes.²⁷² Institutionally, the appearance of justice is furthered because jurors will observe the precautions taken to ensure bias is removed from the judicial system. Moreover, jurors will be aware the defendant is present, although virtually.

Courts acknowledge that the right to be present may be accomplished virtually, in addition to physically.²⁷³ One might argue those cases arise when the defendant forfeits his or her Sixth Amendment rights due to disruptive behavior and, therefore, are not analogous to this system. Yet, courts are not required to employ virtual arrangements for those defendants.²⁷⁴ Hence, it is notable that courts acknowledge that a defendant’s presence is preserved by employing digital arrangements such as CCTV. Courts focus on the following arrangements, which are guaranteed in the Double-Blind System, as indicators that no violation of the Sixth Amendment or abuse of discretion has occurred: the ability of the defendant to view and hear proceedings via closed circuit television and the ability to communicate with counsel.²⁷⁵ Thus, courts have considered situations similar to what the Double-Blind System proposes and found no material curtailment of the defendant’s right to assist in his or her own trial.

E. The Double-Blind System’s Limitations

i. A Defendant Has the Right to Testify

271 See Thomas George, *Are NFL Play Callers Better in the Booth or on the Sideline? That Depends*, SBNATION (Nov. 23, 2016 12:15 PM), <http://www.sbnation.com/2016/11/23/13730592/2016-nfl-season-falcons-chargers-eagles-coaches-kyle-shanahan>.

272 DIST. JUDGES ASSOC. FIFTH CIR, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) §1.04 (2015).

273 See, e.g., *United States v. Keiser*, 319 Fed. Appx. 457, 458 (9th Cir. 2008) (“[the defendant] was removed he was able to be present by video”); *United States v. Washington*, 705 F.2d 489 (2d Cir. 1983) (illustrating defendant’s right to be present during jury *voir dire* can be satisfied by use of closed circuit television and opportunity to consult with counsel); *State v. Driskill*, 459 S.W.3d 412 (Mont. 2015) (defendant had the opportunity to remain present via closed-circuit television); *State v. Williams*, 501 P.2d 328, 329 (Or. Ct. App. 1972) (“[T]rial court had taken appropriate measures to preserve defendant’s right to be present at proceedings and to confer with counsel” by arranging to have courtroom proceedings transmitted via a closed-circuit television system.).

274 See *Bell v. Evatt*, 72 F.3d 421, 431 (4th Cir. 1995); *People v. Smith*, 784 N.Y.S.2d 530 (N.Y. App. Div. 2004).

275 See *State v. Starcevich*, 678 P.2d 959, 960 (Ariz. Ct. App. 1983); *People v. Davis*, 851 P.2d 239, 243 (Colo. App. 1993); *State v. Potter*, 712 P.2d 668, 672 (Idaho Ct. App. 1985); *People v. Hendrix*, 883 N.Y.S.2d 534, 535 (N.Y. App. Div. 2009).

This is a feature, rather than a flaw of the system. One prosecutor explained, “I never had a case where taking the stand worked for the defendant.”²⁷⁶ This sentiment is reflected by the fact that defendants rarely choose to take the stand. Nevertheless, defendants always have a right to testify in criminal trials.²⁷⁷ Jurors are normally instructed that “they should not hold the decision not to testify against a defendant,” but some undoubtedly may speculate why a defendant sits in a court silently as countless accusers come before him or her.²⁷⁸ Under this system, this speculation may be significantly reduced because the absence of the defendant will become normalized. This enhances the tactical choice to bring a defendant on the stand since, up to that point, the jurors are unable to hold prejudice against the defendant. Under the Double-Blind System, if the defendant does choose to testify, he or she would testify just as he or she would today.

a. Homogenous Juries and Groupthink

Juries, like all groups, are susceptible to a basic principle: “If the observers share a bias, the aggregation of judgments will not reduce it.”²⁷⁹ Accordingly, a homogenous pool may be biased against a defendant due to biases including overconfidence and groupthink. The Framers, albeit in different words, likely understood this concept. In 1774, British parliament feared British soldiers accused of killing American colonists might face biased juries when tried by Americans, so the Administration of Justice Act (AJA) mandated that all British soldiers were to be tried exclusively in England.²⁸⁰ The Declaration of Independence criticized this action as one of the “Intolerable Acts.”²⁸¹ In response, our Framers wrote the eternal words: “[T]he accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed”²⁸² The Supreme Court later elaborated, “[S]election of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.”²⁸³ The purpose of this selection is threefold:

(1) [to guard] “against the exercise of arbitrary power” and [ensure] that the “commonsense judgment of the community” will act as “a hedge against the overzealous or mistaken prosecutor, ” (2) [to preserve] “public confidence in the fairness of the criminal justice system,” and (3) [to implement] our belief that “sharing in the administration of justice is a phase of civic responsibility.”²⁸⁴

276 Jonathan D. Glater, *For Defendants, Testifying Can Be a Big Gamble*, N.Y. TIMES (Apr. 28, 2005), <http://www.nytimes.com/2005/04/28/business/for-defendants-testifying-can-be-a-big-gamble.html>.

277 See MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2010).

278 Glater, *supra* note 275.

279 KAHNEMAN, *supra* note 70, at 84.

280 Washburn, *supra* note 214, at 742.

281 *Id.*

282 U.S. CONST. amend. VI.

283 Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

284 Lockhart v. McCree, 476 U.S. 162, 174–75 (1986).

To avoid delving too deeply into a separate constitutional discussion involving the Sixth Amendment, Equal Protection Clause, and a string of recent decisions—namely *Batson v. Kentucky*—this Paper simply argues that the current practice of jury selection clashes with the purpose and history of American jury selection. The use of peremptory challenges has led to a perverse system foreshadowed by Justice Marshall: “Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons . . . [i]f such easily generated explanations are sufficient to discharge the prosecutor’s obligation to justify his strikes on nonracial grounds, then the protection erected by the Court . . . may be illusory.”²⁸⁵ Marshall argued that peremptory challenges should be eliminated because they may be rooted in a prosecutor’s “own conscious or unconscious racism” that may be mirrored by the judge, who accepts the explanation due to the judge’s own “conscious or unconscious racism.”²⁸⁶ Marshall noted, an “instruction book used by the prosecutor’s office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate ‘any member of a minority group.’”²⁸⁷ Another treatise for prosecutors read, “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.”²⁸⁸

The consequences on jury diversity are far-ranging. Dahlia Lithwick laments, “Study after study reflects the fact that black jurors are struck far more frequently than white ones.”²⁸⁹ Historical evidence indicates the persistence of this issue. From 1983–1984, the “chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white” juror in Dallas County.²⁹⁰

It may be more appropriate to restate Marshall’s concern of unconscious racism as the idea of implicit biases today. Yet, this Paper offers an alternative to Marshall’s proposal to eliminate peremptory challenges. First, we should keep peremptory challenges. Second, we should mandate a heterogeneous pool at the petit jury stage, rather than only requiring it at the venire stage. Currently, petit juries actually chosen are not required to “mirror the community and reflect the various distinctive groups in the population,” even though they “must be drawn from a source fairly representative of the community.”²⁹¹ The jury petit need not mirror the precise demographics of the county. Indeed it is impossible to have twelve jurors perfectly reflect the ethnic diversity of a region. Yet, the jury pool should never contain one hundred percent of one ethnicity, just as it should never contain exclusively males at the expense of females. As mentioned earlier, a study by Duke University found

285 *Batson v. Kentucky*, 476 U.S. 79, 106 (1986).

286 *See id.*

287 *Id.* at 104.

288 *Id.* at 104 n.3.

289 Dahlia Lithwick, *Peremptory Prejudice*, SLATE (May 23, 2016),

http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/john_roberts_s_court_sees_racism_in_foster_v_chatman.html

290 *Batson*, 476 U.S. at 104.

291 *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

significant disparities in conviction rates by all-white juries were practically eliminated when just one member of the out group deliberated with the majority.²⁹² If peremptory challenges struck all minorities, then we should simply draw from another venire pool until minimum diversity is met. In a decision that decided the merits of reducing the minimum number of jurors from twelve to six, the court explained, “[T]he number [of jurors] should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.”²⁹³ “The Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does).”²⁹⁴ If we fail to ensure juror diversity, we may be outsourcing our trials to pockets of communities, rather than including a cross-section, in contravention of the underlying policies our Founders sought to cement into our Constitution.

b. Eyewitness Bias and Scalia’s “False Accuser”

Although the judge and jury may not see the defendant, certain eyewitnesses must inevitably view and identify the suspect at trial. The Double-Blind System, however, is not intended to correct for eyewitness biases. As an aside, consider the following true story in the context of Scalia’s notion of the “false accuser.”

A lost, drunk passerby asking for directions, within moments, morphed into Toni Gustus’s rapist.²⁹⁵ She immediately memorialized his features: white, early twenties, a little black cross on one arm, dark blond hair that was parted in the middle, long nose, blue and narrow eyes, and a tapered jaw.²⁹⁶ After identifying the suspect through police lineups and gaining composure through church, she was ready to testify at trial.²⁹⁷ She saw her assailant for at least an hour in broad daylight, noted his key features, and conveyed to the jury she was one hundred percent sure the defendant present at trial raped her.²⁹⁸ There was only one problem: fourteen years later, the previously untested rape kit definitively exonerated the incarcerated defendant, who in fact had been falsely accused by Toni Gustus.²⁹⁹

“Toni Gustus made a mistake, but it was not an error based in malice or hatred. It was an unintentional error of the mind. Her testimony and her confidence that she had identified the right person were truly powerful” for the jury.³⁰⁰ Only after agreeing to speak with the falsely accused defendant years later did she realize her

292 Hartsoe, *supra* note 215.

293 *Williams v. Florida*, 399 U.S. 78, 100 (1970).

294 *Holland v. Illinois*, 493 U.S. 474, 480 (1990).

295 VEDANTAM, *supra* note 24, at 9.

296 *See id.* at 10.

297 *Id.* at 11–12.

298 *Id.* at 12–13.

299 *Id.* at 13.

300 *Id.* at 14.

mistake: by focusing on providing distinctive routine details to the police, she failed to notice the defendant's crooked teeth, which could not have been those of her attacker who had straight teeth.³⁰¹ "The one physical feature that could have distinguished the rapist from [the defendant]—his teeth—was discarded not because it was hidden from view but because it was too ordinary to mention."³⁰² Here, cognitive biases such as confirmation bias or focusing effects, along with the effect of mood states on memory and judgment, directly contributed to the defendant's false imprisonment.³⁰³

Scalia's reliance on face-to-face confrontations derived, in part, from his belief that it is "always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"³⁰⁴ Scalia believed the fact-finder's ability to observe jurors, who make determinations based on weighing credibility of a witness, ensured the integrity of the fact-finding process.³⁰⁵ Scalia acknowledged the emotional costs of such face-to-face interactions on victims, but emphasized the procedure may "undo the *false accuser*."³⁰⁶ Yet, Scalia failed to account for the unwitting false accuser vis-à-vis the "false accuser," by propounding individuals as fully capable of separating truth from misperceptions. These situations are eerily insidious because, as Toni Gustus's case showed, "[e]veryone was wrong, but no one felt anything was wrong."³⁰⁷ By overlooking unconscious biases and their effect on memory and judgment, Scalia may have enabled the *unwitting* false accuser who confidently accuses a guilty mirage while staring face-to-face with an innocent defendant: a performance that any jury will be swayed by. As of 2013, conclusive DNA tests exonerated 250 prisoners: nearly seventy-five percent of those cases were decided on mistaken eyewitness accounts.³⁰⁸ We must rethink age-old reasoning in light of the scientific evidence on bias. Scalia's procedure is futile against an unwitting "false accuser," whose harm on the fact-finding process is tantamount to the false accuser who knowingly tells a lie to incarcerate the innocent.

c. Characteristics that Are Necessary for Charges or Defenses May Be Revealed.

In a few situations, the defendant may not remain completely anonymous due to the charges or defenses raised. Such charges may include hate crimes or other discriminatory charges, including age or racial discrimination. Cultural characteristics of the defendant may be relevant for some courts in even rarer cases when determining the reasonable person standard, the defendant's *mens rea*, or

301 *Id.*

302 *Id.* at 15.

303 *See id.* at 15–16.

304 *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988).

305 *Id.* at 1019–20.

306 *Id.*

307 VEDANTAM, *supra* note 24, at 15.

308 BANAJI & GREENWALD, *supra* note 21, at 10–11.

relevant degrees of homicide.³⁰⁹ Defense counsel may attack the credibility of the witness by identifying flaws in cross-racial eyewitness identification as well. In these cases, the defendant will remain invisible, but the parties may stipulate that the defendant falls into a certain class, or alternatively, is not of the same class as the victim.

d. Indirect Indicators of Class May be Revealed

Jurors or judges may form conjectures about a defendant's characteristics—whether consciously or subconsciously, correctly or incorrectly—through circumstantial evidence. Someone's name can indicate race, sex, religion, and even birthplace in general. In all likelihood, you will classify names—Tyrone, Brett, Emily, Precious, Mohamed, Jesus, Jose, Cho—into certain ethnic groups automatically. Hence, the Double-Blind System suggests substituting the defendant's name with initials.

Nevertheless, witnesses, either as groups or individuals, may signal a defendant's characteristics. For example, if a white female came to testify as an alibi witness for her son, a juror may conclude the defendant is also white. Alternatively, homogenous classes of witnesses may also indicate a defendant's race. If defense counsel calls two friends, a girlfriend, and a pastor—all of whom are black—the judge and jury may conclude the defendant is also black. Likewise, if defense counsel calls witnesses who only speak Spanish, the jury or judge may conclude the defendant is Latino.

Qualifications may also suggest a defendant's background. Someone with a BA in Physics from Harvard and a PhD in Astrophysics from Columbia may conjure up an image of certain ethnicities more readily than others.

Sites of crimes may also suggest the ethnicity of a defendant. Areas such as Chinatown may indicate a defendant is Asian. Cities such as Detroit, Michigan, or neighborhoods such as Watts, Los Angeles, California, may indicate a black defendant because they generally contain a greater percentage of black residents. Likewise, Little Haiti in Miami or Washington Heights in New York may indicate Haitian or Dominican defendants.

Coded language may also uncover traits. For instance, parlance such as “super-predators” or “thugs” may be commonly interpreted as referring to black males by an audience.³¹⁰ A witness may conceivably use other terms or descriptions, for example, the perpetrator had a “thick accent” to convey the defendant is an immigrant. Notably, these words on their own have no association to classes such as religion or race, but society, and thus a jury, might interpret these terms, correctly or erroneously, to mean the defendant is of a particular group.

309 See, e.g., *People v. Wu*, 286 Cal. Rptr. 868, 883 (Ct. App. 1991) (“Evidence of defendant's cultural background was clearly relevant on the issue of premeditation and deliberation Second, the evidence of defendant's cultural background was also relevant on the issue of malice aforethought and the existence of heat of passion at the time of the killing.”).

310 Ronda Lee, *Why Hillary's Super-Predator Comment Matters*, HUFFINGTON POST (Apr. 11, 2016, 1:37 PM), http://www.huffingtonpost.com/ronda-lee/hillarys-superpredator-comment_b_9655052.html.

e. Poor Transmission of Image or Audio May Disrupt Proceedings

Technical malfunctions are foreseeable with any technology. In *Sewell*, the appellant argued that distortions in a witness's live testimony via interactive television precluded effective cross-examination and impaired the jury's ability to observe the witness.³¹¹ Appellant's second point of error is irrelevant here, as the witness testifies only in court, creating an immediate improvement on current models. Effective cross-examination is less concerning, again, because the witness will be testifying in court in the physical presence of both attorneys. The harm occurs when the defendant is momentarily unable to view proceedings, hear proceedings, or communicate with defense counsel.

The court in *Sewell* distinguished between minor distortions—occasional transitory and insignificant static-type interference with the video image and very slight time delays between questions and answers—and major technical deficiencies that could reasonably be viewed as impairing the right to cross-examination.³¹² The court also noted that time delays that may allow a witness to answer a question before a court rules on an objection may occur with live in-court testimony, thus minor technological delays do not negate one's right to cross-examination.³¹³

In the Double-Blind System, courts may similarly distinguish between minor technological deficiencies that do not run afoul of a defendant's constitutional rights and major deficiencies that do. Minor deficiencies may include static; occasional visual distortions, such as dropped signals or pixelated images; or occasional drops in transmissions including video, audio, or communicative signals. Major deficiencies might include a broken microphone, uninterrupted loss of audio or visual signals, or a malfunction of defense counsel's headset throughout trial. If all else fails, the court can resort to bringing the defendant back into the courtroom or continuing the trial to the next day. If we can communicate with a man on the moon, it seems unlikely that such hiccups would prove to be insurmountable.

f. Other Biases

Undoubtedly, other biases will remain. Adjudication is just one of the many phases of the criminal justice system. The criminal justice system encompasses biases that affect arrests, eyewitness line-ups, discretionary choices in prosecutions, and several other situations. This Double-Blind System only reaches a fraction, albeit an important part, of the entire criminal justice sequence.

311 *Minnesota v. Sewell*, 595 N.W.2d 207, 212 (Minn. Ct. App. 1999).

312 *Id.*

313 *Id.*

IV. WHY SCIENCE BECAME BLIND

The double-blind procedure is the foundation of science and medicine: it is a requirement for FDA approval of new drugs, scientists who seek federal grants for new studies, and publication in academic journals.³¹⁴ This procedure likely impacts you or a close family member, considering roughly sixty percent of Americans take some form of a prescription drug.³¹⁵

This procedure became intrinsic to our health and scientific research simply because the procedure is shown to eliminate the same problems that pervade our courts: biases.³¹⁶

During the late eighteenth century, Americans used blind assessment to test treatments associated with bias.³¹⁷ In turn, blind assessments bolstered claims of legitimacy and scientific respectability.³¹⁸ Blind assessment—in this case actual blindfolds on subjects claiming to be mesmerized—definitively proved mesmerism did not exist.³¹⁹ It also showed the human mind may irrationally act on information that, in reality, has no causal meaning.³²⁰ Consequently, blind assessment has been a proven technique to *eliminate* bias in medicine, rather than simply mitigate its effects.³²¹ Historically, patients also held biases towards certain treatments because of their knowledge of or expectation of the treatment; today we call this the placebo effect.³²²

Biases also affect researchers.³²³ In the nineteenth century, these biases were shown across all scientific disciplines.³²⁴ An editorialist at the Journal of the American Medical Association (JAMA) in 1909 succinctly explained researcher bias:

The theory of medicine, as of all other sciences, has often been affected by the personal equation—that constant error to which each individual is subject to a greater or lesser degree. Each observer, though he may be able to see facts clearly and even to trace the relation of cause and effect

314 CHRISTOPHER T. ROBERTSON & AARON KESSELHEIM, *BLINDING AS A SOLUTION TO BIAS: STRENGTHENING BIOMEDICAL SCIENCE, FORENSIC SCIENCE, AND LAW* 173 (2016).

315 Brady Dennis, *Nearly 60 Percent of Americans—the Highest Ever—Are Taking Prescription Drugs*, WASH. POST (Nov. 3, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/11/03/more-americans-than-ever-are-taking-prescription-drugs/>.

316 See Ted J. Kaptchuk, *Intentional Ignorance: A History of Blind Assessment and Placebo Controls in Medicine*, 72 BULL. HIST. MED. 389, 390–91, 393 (1998).

317 *Id.* at 393.

318 *Id.* at 394.

319 *Id.* at 396.

320 See *id.* at 396, 398 (“The perceived effect of mesmerism was the result of illusions created by the human mind.”) For example, a patient fell into a somnambulistic trance based on the drop of scissors, the prearranged signal for a mesmerist to “emit” magnetic fluid, even though the mesmerist was not present.

321 ROBERTSON & KESSELHEIM, *supra* note 314, at 46.

322 *Id.*

323 *Id.*

324 *Id.* at 50.

among them to some extent, is liable to error in the interpretation of these facts in proportion to the degree of his fixed personal bias³²⁵

A member of the American Medical Association added, “In order to obtain trustworthy data, it is necessary . . . [to] eliminate personal bias”³²⁶

V. OTHER APPLICATIONS FOR THE DOUBLE-BLIND SYSTEM

A. *Voir Dire*

Although not the scope of this Paper, a separate and distinct solution for biases that arise during voir dire may also entail an offshoot of the Double-Blind System: a *voir dire* app. As generations become increasingly fluent with technology, this method may show extended benefits of blinding attorneys in the courtroom. The app could work as follows: first, jurors who have a smartphone may download the app and login using encrypted credentials. Jurors who do not have a smart phone may be provided a tablet or simple smartphone temporarily by the court. Second, attorneys may conduct voir dire as usual, with a few modifications.

For example, say the first question is, “Have you been a victim of a crime?” On the app, a list of crimes will populate and jurors may select an appropriate key, such as “A” for assault. A list of responses, anonymous to the attorneys but nevertheless certified under oath and recorded by the clerk, will show on a projector or individual screens. Attorneys may follow up and ask, “Did you contact the police or did you feel the police acted professionally?” Jurors may then use a key indicating “yes” or “no.” These explanations will then broadcast to the projector or screens, and attorneys may expand the discussion to other jurors by asking, “Does anyone else feel that police always act professionally in this encounter?” Jurors may then respond “yes” or “no.”

Importantly, this will ensure the privacy of the juror and blind the attorneys to the physical characteristics of jurors through responses that are not directly traced. Jurors will receive randomized numbers or letters that each juror maintains throughout voir dire. Attorneys can take corresponding notes, for example, noting juror “C” or juror “23” responded, “I wouldn’t trust a police officer if the officer said the sky was blue.” Accordingly, the attorney could use a peremptory strike or strike that juror for cause. Of course, if attorneys wish to peremptorily strike a juror because of behavioral cues, such as lack of eye contact or apparent disinterestedness, the attorney may do so. Those behavioral reasons, however, will be entirely divorced from responses to questions. This method may ameliorate the concerns of Justice Marshall voiced in *Batson* by blinding attorneys to immutable characteristics that are irrelevant in the *voir dire* process.

325 *Id.*

326 *Id.* at 51.

VI. RECOMMENDATIONS

The Double-Blind System is a versatile procedure that may be implemented in various ways. This Paper recommends two potential methods of immediate implementation, though it lays the groundwork for wider application in the courtroom. In either framework, the Double-Blind System should be used at the outset to blind jurors only, not judges. It also should not be used in capital murder cases yet, since they involve a balance under the Eighth Amendment that is not addressed here.

First, defendants may opt in and assert their right to use the Double-Blind System through a motion. This setup would be accomplished through knowing and intelligent waiver, and may be performed today.

Second, the Double-Blind System may be proposed through legislation as a bright-line rule that is mandatory in most cases. The legislature may designate cases, such as capital murder, where the system is not appropriate.

CONCLUSION

The Double-Blind System will eliminate many biases that currently percolate through the criminal courtroom: namely concealed and implicit biases. The system is radically different, yet radically simple. In more than one way, the Double-Blind System may act as a seatbelt on our often imperceptible and unavoidable biases.

In the 1950s, the rate of deaths per mile driven was five times higher than it is today.³²⁷ Scholars offered countless explanations, including faulty cars, poorly designed roads, and careless drivers.³²⁸ Initially, Ford responded by implementing safer steering wheels and padded instrument panels, before realizing “the best fix . . . was also the simplest one”: a seatbelt.³²⁹ A Ford employee calculated the benefits of countless saved lives at relatively no cost and relatively no penalty for drivers who wore them.³³⁰ Although consumers initially were offended by seatbelts as they considered it a criticism of their driving, nudges gradually resulted in 80 percent compliance for wearing seatbelts and reduction in the risk of death by roughly 70 percent for car passengers.³³¹

Similarly, the Double-Blind System confronts a broken criminal justice system. The product is a prison system in America that ranks as the world’s largest with roughly 2.2 million prisoners.³³² Although African Americans constitute just 13 percent of the nation’s population, they represent 42 percent of those 2.2 million

327 STEVEN D. LEVITT & STEPHEN J. DUBNER, *SUPERFREAKONOMICS: GLOBAL COOLING, PATRIOTIC PROSTITUTES AND WHY SUICIDE BOMBERS SHOULD BUY LIFE INSURANCE* 146–50 (2009).

328 *Id.*

329 *Id.*

330 *Id.*

331 *Id.* at 349.

332 *Mass Incarceration*, EJI.ORG, <http://eji.org/mass-incarceration> (last visited Feb 20, 2017).

prisoners and 42 percent of the death row population.³³³ Although disparate treatment abounds in the criminal justice system, countless scholars offer more and more complex and costly solutions. Yet, again, the best fix may also be the simplest. The Double-Blind System will not eliminate all biases in the criminal justice system, nor will it eliminate all biases within the courtroom. But it will significantly reduce them, if given the chance. Similarly, judges or jurors may take offense and consider the system a criticism on their fairness, but small nudges may indeed significantly reduce the habits of acting on implicit bias. This approach is not focused at reducing specifically racial or gender bias, but rather it focuses on all biases: current and future, concealed and implicit, acceptable and inappropriate. It is a blunt instrument that seeks to eradicate all biases, in contrast to other complicated solutions that myopically focus on trendy issues such as race.

Today, more than four out of ten Democrats and Republicans believe the other party's policies pose a threat to the nation.³³⁴ Nearly ninety percent of African Americans believe they are lacking in equal rights, whereas only roughly half of whites agreed.³³⁵ Fear of the other led to the relocation of all Japanese Americans in 1941, anger led to a 1,700% increase of hate crimes against Muslim Americans immediately after 9/11,³³⁶ and today, distrust is reaching unprecedented levels.³³⁷ Today, we need a seatbelt more than ever in the one place that serves as a refuge for impartiality, fairness, and integrity: the criminal courtroom. That seatbelt is the Double-Blind System.

333 *Presumption of Guilt*, EJI.ORG, <http://eji.org/racial-justice/presumption-guilt> (last visited Feb 20, 2017).

334 Joel Achenbach & Scott Clement, *America Really is More Divided Than Ever*, WASH. POST (Jul. 16, 2016), https://www.washingtonpost.com/national/america-really-is-more-divided-than-ever/2016/07/17/fbfebee6-49d8-11e6-90a8-fb84201e0645_story.html?utm_term=.65edb6d29abd.

335 *Id.*

336 Mussarat Khan & Kathryn Ecklund, *Attitudes Toward Muslim Americans Post-9/11*, 7 J. MUSLIM MENTAL HEALTH, no. 1, 2012, at 1.

337 Achenbach & Clement, *supra* note 335.