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Epistemic Justice and the Law

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PART 5

Case studies of epistemic injustice
In criminal law the choice of what (and who) to punish and how much to punish has consequence for the kind of activities and lives that thrive or fail to thrive in our society. Of course, this is a complicated story that must include consideration of those who make the law, enforce the law, prosecute the law, judge the law, and apply the judgments of courts. All of these actors and many more not explicitly named contribute to the social meaning of the law in our society. Testimony, by experts and laypersons, is a central ingredient in the formulation of law and the adjudication of disputes. We use it to determine the motivation and intention of those who are accused of violating the law. At many turns, opportunities for epistemic injustice abound in the practices of our legal system because our institutions and ourselves are not up to the challenges of understanding the experiences of others in difficult situations foreign to our own and because we remain unaware of the role that unexamined prejudice and bias play even in our best efforts to be impartial.

We have laws against murder, assault, and stealing but also against financial fraud, drug possession, prostitution, littering. Many of these laws are unevenly enforced. There has been almost no criminal prosecution of bankers, for example, stemming from fraudulent loans or financial misreporting antecedent to the 2008 economic collapse. When activities are made illegal, enforcement agencies sometimes pursue one side of the criminal enterprise rather than the others — drug dealers rather than users, prostitutes rather than their clients. When laws are enforced and offenders convicted, it is often hard to explain disparities in sentencing among offenders even within the same jurisdiction. These disparities in sentencing are not unrelated to issues of social power and epistemic authority.

Courts, judges, and juries

Courts are tasked with hearing contested cases and deciding their outcome. It might not be quite right to put it this way, but we often say that the courts are supposed to determine the truth of the matter. Courts make determinations regarding the contested facts in a case, and they apply the law to those facts. Often these decisions are made by juries with the assistance of judges. The United States models its court system primarily according to a theory of an adversary system. According to this theory, the two sides to a dispute make their case before a disinterested and impartial judge and/or jury. The central idea is that given fair rules, the competition between adversaries should help the truth come out. There are various depictions of the lady of justice...
sitting blind before the scales of justice. The blindness speaks to her impartiality and the scale to her task of weighing the strength of the competing sides of the case before her. When this image is interpreted in the context of the adversary system, it is said that if the two sides are given equal opportunity to present their case against each other, then the truth will emerge and tip the scales in favor of justice.

How well this theory works in practice has been the subject of extensive critical debate. There is no shortage of examples that raise questions about the impartiality of judges and juries and even about the suitability of impartiality as an ideal in light of mounting evidence that, for cognitive reasons, it may be impossible to achieve. There is great worry that differences in skill among the attorneys contesting a case does more to tip the scales than the underlying truth of the matters ever will. An issue compounded by the fact that differences in the quality of attorney representation seem often correlated to the amount of money a client is able to spend. There are also deep concerns that the rules of evidence, even when they are primarily intended to assist the discovery of truth, often do the opposite.

The rules of evidence are a complicated affair, not always geared toward prioritizing truth over other goals of the court system. We let individuals take the 5th Amendment in criminal proceedings rather than compelling them to testify against themselves. Also, in such proceedings, we let spouses invoke a special privilege to avoid testifying against their husband or wife. We exclude otherwise reliable evidence if it was collected as a result of an unlawful search and seizure. These, and other commitments, show that while determining the truth may be central, it is not the only matter of concern for constitutional, moral, and other reasons.

Yet, it is impossible to deny that our justice system is predicated on the idea that to do justice, the courts must seek the truth. Juries are asked not “who would you prefer win,” but “who did what” and, in light of that, “who is entitled to what under the law?” Some of the oldest derivations of the word justice focus upon the idea that to do justice is to give to each what they are due. In our system, answering that question requires figuring out what has and has not been done and what the law proscribes in light of those facts. For the most part, it is held that judges and juries act appropriately only in so far as they make a good faith effort to answer these questions.

Truth and epistemic justice

Getting at the truth of contested facts is at the heart of our court system. It is and must be, at least prima facie, a central goal and value, perhaps the central one. To say this is not in any way to deny the salience of many excellent critiques of our justice system that highlight the ways in which appeals to truth mask systematic features that illegitimately privilege some groups and individuals rather than others. And yet, part of the reason such critiques are trenchant is precisely because our court system does, and must, claim that the verdicts it reaches are, given the tools available to it and qualified at times by the need to curtail the fact finding process to protect individual rights, good faith efforts motivated by a desire to get to the truth.

Accordingly, recent attention to epistemic injustice is of special interest to those concerned with the law. The discourse around epistemic injustice is connected with several authors, but especially to Miranda Fricker’s (2007) book, Epistemic Injustice: Power and the Ethics of Knowing. Fricker focuses principally on two injustices that she views as epistemic in nature: first, testimonial injustice wherein a speaker’s credibility is undermined improperly because of prejudice, and second, hermeneutical injustice “when a gap in collective interpretive resources puts someone at an unfair advantage when it comes to making sense of their social experience” (1). Hermeneutical injustice is a complicated affair, but it also impacts the intelligibility of marginalized speakers. On Fricker’s view, it is not a harm perpetrated by an agent (159) but “the injustice of having some
significant area of one’s social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource” (155).

In *The Epistemology of Resistance*, José Medina contributes to the discussion and debate started by Fricker. He argues that, in some ways, the kind of harms that Fricker characterizes as hermeneutic are harms for which some agents deserve to be blamed. He notes that there are several epistemic vices, often possessed by subjects in positions of social power, that have the effect of *actively* perpetuating their ignorance. These vices include arrogance, laziness, and close-mindedness, and they lead to the production of active ignorance. This approach wants to hold people accountable for what it sees as creating and maintaining an active ignorance with respect to the lives of others. Epistemic laziness manifests itself in a lack of curiosity about the contexts of the lives of others. Epistemic arrogance is often possessed by those who become accustomed to having their speech recognized socially as authoritative, whose speech is seldom challenged or treated as marginal. Imagine the difficulties involved when the conduct of someone in a marginal social position is assessed primarily by those in social positions at high risk of epistemic arrogance.

The debate over how best to think about the deficiencies that are described as forms of epistemic injustice is robust and far from settled. However, even as key issues continue to be vigorously debated, the general trajectory of the discourse surrounding epistemic injustice broadly speaking can be read as a call to raise critical consciousness regarding the shortcomings of our truth finding and legal practices along with some suggestions for improving them. Here are four ways we might combat epistemic injustice in trials: (1) Identify and establish structures, practices, and procedures that can mitigate the effect of such biases and maximize the truth-seeking power of trials. In particular, increase the collection and disclosure of more evidence to support testimony, such as the footage from police and city surveillance cameras. (2) Increase efforts to make judges and juries more representative of our democratic community and cognizant of its diversity. (3) Increase efforts to make judges and juries more self-aware of the role of implicit bias in judgment, and importantly but especially difficult. (4) Increase efforts to make judges and juries more aware of the assumptions they bring to their interpretation of the meaning of our social practices, the grounds for competing interpretations, and the ways that what appear to be judgments of common sense factual matters can look otherwise when different aspects of our contested social history and practices are highlighted.

(1) Encourage collection and use of evidence that will help throw light on testimonial bias and hermeneutic capacities. The point is increasing the availability and disclosure of the kinds of information that help establish broader consensus on what occurred in particular cases, which taken together shine light on what is occurring more generally, and which compel recognition of facts at odds with readymade narratives that all too often serve as the grounds upon which present power structures remain complacent with respect to serious harm.

It is extremely hard to defend the court process as good even in individual cases when it becomes obvious that truth has been ignored, and it is clearly impossible to do so if one seeks to judge the system as a whole. Such cases rightly provoke outrage in the larger community. However, the key qualifier here is “obvious.” When it is not obvious that truth has been frustrated, when it is at least possible that the system performed well, red flags are not raised, and our larger democratic community tends to give the system a pass, which is another way of saying that we defer to dominant narratives. Intense scrutiny by smaller subsets of the community are read as either sour grapes from those in some way connected to the losing parties, or as strategic efforts on behalf of narrow interest groups to craft a narrative that serves their mission.
Rodney King, a black man, was beaten by baton wielding officers of the Los Angeles Police department in the course of an arrest in 1991. The arrest was videotaped by a man from a nearby apartment who later released that video to a local television station. Although King resisted arrest, giving the officer some cause to use force, the video shows the officers continuing to beat King as he lay on the ground. In a state trial, three of the four officers charged were acquitted on all charges. The remaining officer was acquitted on the charge of assault with deadly force, but the jury deadlocked on the charge of using excessive force, meaning he could go free for the time being. The incongruity between the acquittals and the video tape showing King being beaten as he lay on the ground made it impossible for a great many people not to reach the conclusion that something had gone terribly wrong in this trial’s quest to get to the truth.

This is not to say that there weren’t other views, or that there was universal support for the idea that the officers should have been convicted. Far from it, and yet there can be little doubt that the fact of the video evidence in this case was the reason why this case received such widespread publicity and why the officers were tried for crimes arising out of the same incident at the federal level, this time successfully. Without that tape, of course, the case would not have received national publicity. And even if it had, the public would have heard two sides to the story, perhaps producing strong convictions in those inclined to either believe or doubt police officer testimony, but it would not have produced the sense of outrage among that community that was produced when they struggled to square the verdict of acquittal with the image of officers beating a helpless suspect on the ground.

To this end, increasing the use of police body cams is a good idea. The Department of Justice reports that about 25% of 17000 police agencies use such devices as of 2014. The devices may help keep police accountable. They may also help police to defend their actions among communities that are highly skeptical of police testimony. Importantly, they provide context in which to assess often significantly different first-person testimony.

In a recent Op-Ed for the New York Times, John McWhorter, a black linguist at Columbia, reflects back on his disappointment that the jury at OJ Simpson's trial, a jury composed of nine black members, acquitted Simpson. He was disappointed because he thought it unlikely that Simpson was innocent. Upon reflection, however, he came to see that: “The case was about much more than bloody gloves and bloody footprints. It was about the centrality of police brutality to black Americans’ very sense of self.” He observes, however, with a somewhat hopeful eye toward the future that:

Amid the round-the-clock cable coverage of the Simpson case, America learned the difference between what the cops mean to black people versus what they mean to most others. Too few got the message at the time. But after the killings of Walter Scott, Eric Garner, Tamir Rice, Freddie Gray and other unarmed blacks by the police over the past two years, the conversation has changed. Many non-black Americans who were disgusted by the Simpson verdict have become more aware of the ubiquity of police brutality in black lives.

One of the key factors, however, in producing the shift in the conversation that McWhorter acknowledges is the existence in many of these cases of video evidence. The point is not that such evidence is dispositive, or that absent such evidence there is nothing of value to rely on. Rather, the existence of such evidence helps to draw attention to the ways that testimonial and hermeneutic injustices have likely operated in the absence of such evidence and to add this awareness to our deliberations going forward. Video evidence can provide the larger public useful information about what kind of things are going on in law enforcement. This helps the fight against epistemic injustice.
Epistemic justice and the law

not only be buttressing testimony of individuals that otherwise can be improperly deflated, but also by providing context for understanding why different groups see matters so differently.

(2) We should increase efforts to make judges and juries more representative of our democratic community and cognizant of its diversity. Our judges should not only better represent the diversity of the larger democratic community but also insure that this diversity informs the interpretive and meaning making tasks they undertake.

In 1987 the Supreme Court reviewed the case of Warren McCleskey, a black man who had been convicted of murdering a white police officer. He had been sentenced to death by a Georgia jury composed of eleven white jurors and one black juror. On appeal, his defense team argued that a charging and sentencing study by Iowa Law Professor David Baldus should compel the court to make a finding of discriminatory intent on the part of the jury. The Baldus study examined 2484 homicide cases in Georgia and concluded that the death penalty was given in cases with white victims eleven times more often than in cases with black victims, and that when the defendant was black and the victim white, over 21% of the time the defendant received the death penalty compared to only 8% of the time when both victim and defendant were white. On the bases of this significant racial disparity, McCleskey’s lawyers sought to have his death penalty overturned. The Supreme Court denied his appeal. The majority decision noted that even if they accepted the Baldus study at face value, its finding could not give rise to the inference that the particular Georgia jury in question acted with discriminatory purpose:

To prevail under that Clause, the petitioner must prove that the decisionmakers in his case acted with discriminatory purpose. Petitioner offered no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence, and the Baldus study is insufficient to support an inference that any of the decisionmakers in his case acted with discriminatory purpose.

(McCleskey v. Kemp, 481 US 279 (1987), 280)

It would be wrong, the Court says, to attribute discriminatory purpose to any members of the jury absent specific evidence. This finding makes sense if one starts from the presumption that juries are sufficiently fair and impartial and then one asks what kind of evidence would be needed to rebut this presumption in the case of a particular jury. So everything depends on the way the burdens of proof get set up. It is assumed that McCleskey’s jury did not racially discriminate unless shown otherwise. The law that McCleskey needs to overturn his sentence requires him to show conscious discriminatory purpose on the part of his particular jury, but the Baldus study doesn’t do that. First, it just shows there are disturbing racial disparities in sentencing, but it doesn’t show conclusively what the cause of these disparities are. It raises the disturbing possibility that racism could be responsible, and it investigates and controls for many other variables, but like all social science, it is unable to exclude with certainty all other possible non-racist explanations. Second, even if one were to embrace the conclusion that racism is the best explanation for the sentencing disparity, that still doesn’t show that the jurors intended to be racist. But to get his sentence overturned, that is precisely the burden that McCleskey must meet as the majority of the Court saw it. The Baldus study just doesn’t talk about McCleskey’s particular jury, so given the presumptions of fairness and impartiality, it is not sufficient to rebut them.

However, perhaps the Baldus study should be read as grounds not for rejecting McCleskey’s sentence in particular, but for rejecting the presumptions of the possibility for sufficiently fair and impartial juries in general, or at least in death penalty sentencing cases in Georgia. If these
disturbing disparities are taken to show unfairness sufficient for overturning McCleskey, it is because the jury system in general, or at least in Georgia, does not deserve the presumption that juries can behave fair and impartially. Seen in this light, and coupled with the history of Supreme Court jurisprudence, it’s not difficult to anticipate that the Court would resist such a conclusion. Indeed, the effect of reaching it, by analogy, would be to put the entire jury system under a deep cloud of suspicion that would require immediate and substantial change. But one has to wonder if the binary that the McCleskey decision commits us to is complicit with a kind of epistemic injustice.

The traditional framing of the issue is that McCleskey didn’t meet his burden of proof in demonstrating that his right to a fair trial was violated. It doesn’t follow logically from this that he did get a fair trial but, all things considered, that’s precisely what it encourages us to imagine. The decision effectively says that no matter how many Baldus type studies the Court gets, no matter how well documented general racial disparity in sentencing is, the Court will not do anything about it in any particular case unless there is evidence of discriminatory purpose.

Imagine if we told victims of car accidents that injurers were only responsible for harm that resulted from purpose or intention and not from negligence, and absent such purpose let the cost of accidents fall entirely on the victims. Victims would rightly point out that their injuries are no less injuries for having been caused unintentionally, and they would wonder why the cost is left to fall entirely upon them simply because the injurer didn’t mean to cause harm. The victim didn’t mean to be injured either. But the injury and harm from the accident is obvious and recognized. It doesn’t disappear if we decide that the injurer didn’t intend to cause it. However, in the absence of finding discriminatory purpose on the part of the jury, the McCleskey decision invites us to imagine that there was no harm.

We should reject this invitation. Indeed, in some ways the more disturbing question is not whether the members of the jury intentionally discriminated but whether they discriminated unintentionally. What if they acted in good faith, putting forth their best efforts to be fair and impartial, but were guided in their reasoning by implicit biases that operate unconsciously in ways that skew testimonial and hermeneutical sensibilities despite those efforts?

(3) **We should increase efforts to make judges and juries more self-aware of implicit bias in judgment.**

Beyond bias in juries, there has been a tremendous amount of work on the role of implicit bias generally. Do implicit racial stereotypes and attitudes, of which individuals are not consciously aware, impact their judgment? UCLA Law Professor Jerry Kang and his co-authors, Kristin Lane and Mahzarin Banaji, have summarized the findings:

> [S]everal aspects of the nature of implicit social cognition are now regarded as well established. Such results primarily include the pervasive and robust implicit favoritism for one’s own groups and socially dominant groups . . . Legal scholarship and judicial opinions are beginning to consider how the law can and should adapt to such findings, in particular how they call into question existing assumptions regarding the notion of intent. 12

There have been many inquiries into prejudice in general and jury bias in particular since McCleskey. According to Sommers and Marotta, both mock jury data and actual cases “have identified a significant, but small, relationship between race and trial outcomes.”13 If we conjoin evidence of racial disparity in trial outcomes with the implicit bias research on how subconscous stereotypes
impact judgment, then even in the absence of discriminatory intent, we should begin with the presumption that there is a problem of unfairness in our jury system.

I am aware, of course, that such a recommendation may hurt rather than help the cause it is intended to recognize. As Medina points out with reference to the work of Iris Marion Young:

Claims that many of us participate in producing injustices and we ought to stop (or try to change our ways) are often misheard because they are understood under the conception of responsibility as blame or liability; and thus, instead of producing any fruitful dialogue, such claims typically provoke blame-shifting and excusing responses. (Medina, 161)\textsuperscript{14}

This mishearing is especially acute if two other conditions obtain. First, when the group being blamed is both powerful and privileged by the putatively unjust regime. In Hollywood most bad characters are presented as knowing they’re evil, but in the everyday world nobody admits they’re evil, even to themselves (because that’s not how they see themselves). If recognizing the claims of injustice entail affirming one’s responsibility for it, the odds of that recognition diminish accordingly. Second, when the means of addressing the problem that gives rise to the injustice are in doubt or appear to be of high cost, then there is added incentive to ignore or otherwise dismiss the problem. On this analysis, claims of injustice stemming from judgment biased unintentionally by reliance on implicit racist stereotyping or attitudes are ripe for mishearing.

How are they misheard? They are heard as demanding too much, as guided by unrealistic standards for fairness. We can’t ask jurors to do more than make their best efforts to be fair. As Kant remarked, ought implies can. So if the standards of impartiality are too high, if we can’t meet them, then they can’t be morally obligatory. If people made their best efforts, then they don’t deserve to be blamed. Bias may be regrettable, but it is, alas, inevitable in human judgment, and we have, at least so far, failed to come up with anything better. The alternative would seem to be to decline to pass judgment altogether thereby leaving “criminals” free to inflict harm as they wish. But while we can’t ask jurors to do more than their best, maybe we can help to make their best better.

What does it mean to say of a juror that they tried to be fair? It means in our present practice that they didn’t try to be unfair. They didn’t intentionally ignore evidence or defer to improper motives or preferences in formulating their conclusions. Although jurors are repeatedly cautioned that matters are serious and instructed they must be fair, and although they can be struck for cause during the voir dire process, the structural message sent to the impanelled jury is affirmative: the community trusts your judgment. You were asked if you could be fair, you said yes, and you have been placed on the jury. In other words, welcome to the jury, we take you as you are: representative, fair, and reasonable member of the community. Even if one doesn’t typically occupy a position of social authority or privilege, this institutional design encourages the kind of epistemic arrogance that Medina worries about. And if one does typically occupy such privileged position, this approach reinforces it.

The prosecution and defense will now wage an all-out war to secure the judgment of the jury. They will do their best to frame their arguments in such a way as to find favor with the jury. In many cases, they will spend a lot of time with various jury experts, demographically representative mock juries, and focus groups in an effort to determine how to persuade the jury. Which words will resonate with the jury? How should the events be described? What kind of arguments will this jury find appealing? How should the lawyers dress, nod, smile, and wink to build rapport? The lawyers will not ask themselves “what arguments do I find compelling,” but...
rather “what language, arguments, or other behavior, will help me get this jury to judge in my client’s favor?” They will subordinate their entire strategy to the goal of convincing not some abstract rational decision maker, but that particular jury with all of the biases and predispositions that their experience and consultants help them identify.

(4) Increase efforts to make judges and juries more aware of the assumptions they bring to their interpretation of the meaning of our social practices.

But in the interest of fighting epistemic injustice, why not ask the jury to do something beyond taking up the posture of a passive judge? Why not ask them before they judge to actively think about themselves as judges. In light of the evidence that casts doubt on the jury’s ability to be impartial, we shouldn’t send such an entirely affirmative message to them encouraging excessive self-confidence. Why don’t we tell them when they show up for jury duty that our whole justice system depends on juries, that we haven’t found any better way to serve the community’s needs, but that nonetheless there are deeply concerning racial disparities in sentencing. We should have them all take an anonymous implicit association test. There is evidence that people made aware of their implicit biases are able to correct for them to some degree. Let the jury know that in making their good faith judgments they should also judge themselves as judges; they should consider the possibility that given their life experiences they could have a tendency to undervalue or overvalue particular testimony. Obviously, much work would have to be done to investigate the particulars and assess how this could work in practice. Calls for self-monitoring alone will surely prove inadequate absent introducing other structural changes into the practice of jury deliberation that reinforce the goals that such monitoring seeks, but the idea of trying to help jurors become aware of their own cognitive challenges deserves attention. The point is not to reproach the jurors, or single them out for criticism, but to encourage more critical self-awareness.

This is often done in an implicit structural way when there are efforts to ensure a demographically diverse jury. Of course, it is a crucial strategy in democracy to let representational bodies deal with issues that deeply divide the community. If we don’t all agree on a decision, at least we can say that we were all represented. And this scheme is also at work to some degree when we reflect upon the need for diverse juries. But, as Sommers and Marotta point out, “beyond perceived legitimacy, racial composition can also affect a jury’s actual performance . . .” Once more, the pressing question is why. A straightforward explanation is that jurors of different racial backgrounds often have different life experiences, perspectives about crime and policing, and other viewpoints that shape deliberations and a jury’s final verdict. It’s not just that members of a jury judge differently because they bring different life experiences with them into the jury room, it’s that those difference make for more robust discussions and deliberations. One explanation for this is that it is precisely because those differences play a key role in producing different epistemic sensibilities. There is some evidence for this in mock jury studies:

Awareness that they were on a racially heterogeneous jury led White mock jurors to be more skeptical of a Black defendant’s guilt, to make fewer factually inaccurate statements when discussing the case, and to be less resistant to talking about controversial issues during deliberations (compared with Whites on all-White mock juries).

Diverse juries are not just important to counteract the tendency to deflate testimony by offsetting the biases among members, they are important because they can also help members become aware of some of the background experience and assumptions that inform their judgment precisely by the way they see some things differently from other members.
This is achieved structurally when diverse juries engage one another in the jury room, but it might be profitably pursued much earlier. At present, juries are questioned by lawyers during *voir dire* when they can be struck for cause; this is usually some aspect of their background or answers that suggest they cannot be fair and impartial in the case at hand, or they can be struck by peremptory challenges for which the lawyers need give no reason. If they are not excluded after *voir dire*, they are impanelled and instructed not to discuss any aspects of the case with each other until the trial is concluded. Again, this approach encourages them not to have any self-critical thoughts about their own role as a judge, and it doesn’t expose them to the question of how some of the key narratives upon which their social understanding rest have been formed. If we put them in group discussions, not necessarily with the future jurors they would serve with, but with other future jurors, and facilitated robust discussions around topics that would get them thinking about how they came to hold some of their core beliefs, that may change the confidence level with which they hold the conclusions they reach on the basis of those beliefs. The point is to emphasize their role not just as members of a jury who bring to the jury in their person the community’s belief, and not just as diverse persons who taken together contribute to the collective judgment of the jury, itself a small community, but also as members of the community who bring judgment about their role as a judge to their act of judging.

The retraining and wide-ranging dialogue needed for an assessment of the objectivity of our beliefs would require a significant investment of time and energy. But that doesn’t mean that smaller gains might not be reached by beginning to tweak our institutional designs. If we are to rely upon the good faith of jurors, let us rely upon them and develop structures to assist them in confronting the possibility of implicit bias in their judgments. Let us tell them not that we call them to the jury because we have unwavering faith in their fairness and ability to discern the truth but because we have faith in their willingness to undertake the responsibility of judging and confront some of the epistemic risks and challenges that underlie that task. Following the evolving debate and discussion on epistemic injustice, we should begin to take seriously the notion that as ignorance of law is so often no excuse from the binds of law, active ignorance of our own ignorance and the epistemic lives of others should be no excuse from the demands of objectivity, fairness, and justice that making good law requires.

**Related chapters:** 1, 2, 3, 22, 26, 34

**Notes**

1 I would like to thank Jonathan Gray, a distinguished graduate of Emory University with a major in philosophy and a JD candidate at the Yale Law School, for valuable research assistance.

2 For a more detailed discussion of the cognitive roadblocks to impartiality, see Saul (2017).

3 Paul Feyerabend (1975) notes a similar problem for the conduct of science: principles and methods adopted to advance progress in science will at times actually inhibit progress instead.

4 The exception that proves the rule is the practice of jury nullification, when the jury acquits a defendant even though they believe beyond a reasonable doubt that the defendant committed the crime charged. The usual reason given is because the jury believed that the state acted unjustly in criminalizing the activity for which the defendant was charged. For an account of the deficiencies on both sides of this debate, in support of and against the legality of jury nullification, see Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N.D. L. REV. 409 (2012).

5 See Fricker (2007).

6 Medina (2012).

7 McWhorter (2016).

8 McWhorter (2016).


The Study is usefully summarized on various death penalty information websites: www.capitalpunishmentincontext.org/issues/race:

Fewer than 40% of Georgia homicide cases involve white victims, but in 87% of the cases in which a death sentence is imposed the victim is white. White-victim cases are roughly eleven times more likely than black-victim cases to result in a sentence of death.

When the race of the defendant is added to the analysis, the following pattern appears: 22% of black defendants who kill white victims are sentenced to death; 8% of white defendants who kill white victims are sentenced to death; 1% of black defendants who kill black victims are sentenced to death; and 3% of white defendants who kill black victims are sentenced to death. (Only 64 of the approximately 2500 homicide cases studied involved killings of blacks by whites, so the 3% figure in this category represents a total of two death sentences over a six-year period. Thus, the reason why a bias against black defendants is not even more apparent is that most black defendants have killed black victims; almost no cases are found of white defendants who have killed black victims; and virtually no defendant convicted of killing a black victim gets the death penalty.)


Two of the country’s foremost researchers on race and capital punishment, law professor David Baldus and statistician George Woodworth, along with colleagues in Philadelphia, have conducted a careful analysis of race and the death penalty in Philadelphia which reveals that the odds of receiving a death sentence are nearly four times (3.9) higher if the defendant is black. These results were obtained after analyzing and controlling for case differences such as the severity of the crime and the background of the defendant. The data were subjected to various forms of analysis, but the conclusion was clear: blacks were being sentenced to death far in excess of other defendants for similar crimes.

References


