Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana

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I. Introduction

Recent Supreme Court jurisprudence opines that official discrimination is of a bygone era, and that the original concerns animating the post–Civil War amendments have faded along with the last vestiges of African American oppression.[1] Nevertheless, this history is alive and well in Caddo Parish, Louisiana, the site of the last capital of the Confederacy and of widespread, brutal hate crimes during the turn of the century. The supposedly bygone era of slavery and the Confederacy continues to influence the administration of justice in Louisiana, where the Confederate flag flies over the parish courthouse at which lynching once occurred and where death sentences continue to be meted out along racial lines.

Concurring in *McDonald v. City of Chicago*,[2] Justice Thomas referred to the Colfax Massacre—in which at least 150 newly-freed blacks were slaughtered by whites—suggesting that the racial attitudes of that era poisoned our Fourteenth Amendment jurisprudence.[3] Justice Thomas was correct to lament the artificial circumscription of the rights of national citizenship under the Privileges or Immunities Clause, but his opinion stops short of acknowledging a second wrong: fragmentation in the interpretation of other related clauses in the Fourteenth Amendment. The

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1. *See* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (relying on *United States v. Cruikshank*, 92 U.S. 542 (1875) (reversing convictions of some of the perpetrators of the Colfax Massacre), to reject a Privileges or Immunities challenge to the Chicago handgun ban); *cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (holding that public school districts' attempts to correct de facto segregation were unconstitutional).
2. 130 S. Ct. 3020.
3. *Id.* at 3060 (Thomas, J., concurring).

courthouse Confederate flag underscores the relationship between the clauses. Because of its history, social cognitive meaning, and influence, the flag robs Louisiana citizens of privileges "which owe their existence to the Federal government" and denies them the due process of law.[4]

Shreveport was the location of the Confederacy's last stand. Caddo Parish, which encompasses Shreveport and the surrounding smaller towns and rural areas, stretches from the Louisiana-Arkansas border, down the Louisiana-Texas border and across two bayous in the south, and is bounded on the east by the Red River. Caddo includes both the rural areas of North Louisiana, notorious for the Ku Klux Klan's omnipresence (which continues to this day), and Shreveport, a majority-black city that is the third largest in the state. Caddo's population is roughly half-black, half-white;[5] its parish council likewise has six black members and six white members.[6] The biracial composition of the Caddo Commission is deceptive. The prospect of risking position or livelihood by taking a stand that offends white interests remains paralyzing.[7]

Citizens must pass under the Confederate flag in order to enter the Caddo Parish Courthouse in downtown Shreveport. Every defendant, attorney, court employee, journalist, judge, and citizen sees this flag first before entering the halls of justice. The message is clear: The justice administered in Caddo Courthouse is not the justice of the United States Constitution and its post-war amendments that implemented the concept of equality under the law. The justice in Caddo Parish is that of the Confederate States of America, which valued the rights of the slave-owners above those of the slaves. Translated into the political narrative of the twenty-first century, it means that the white agenda is paramount, and attempts to disrupt the status quo may be met with violent hostility.

This article explores the constitutional problems associated with flying the Confederate flag at a death penalty trial in the South. Specifically, the Confederate flag at Caddo Courthouse plays a toxic role in the administration of the death penalty in Shreveport. Post-*Furman v. Georgia*,[8] Caddo Parish juries have voted to impose the death penalty on sixteen men and one woman: all but four have been black, and the combination of black defendant and white victim greatly increases the likelihood of

4. The Slaughter-House Cases, 83 U.S. 36, 78 (1872).

5. U.S. CENSUS BUREAU, 2005–2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES—CADDO PARISH, LOUSIANNA, *available at* http://factfinder.census.gov (enter "Caddo Parish" under "Get a Fact Sheet for Your Community") (last visited June 22, 2011).

6. *See Parish Commission*, CADDO PARISH, http://www.caddo.org/parish_commish.cfm (last visited June 22, 2011).

7. Black politicians in Caddo Parish have faced violent backlash from the Ku Klux Klan even in these modern times. In 1990, a black politician dared to run for mayor of Shreveport. He was abused with death threats and vandalism by the Klan. *See* Michelle McCalope, *Black Dentist Vows to Run for Mayor of Shreveport Despite Death Threats by KKK*, JET MAG., Nov. 5, 1990, at 6. In 2004, the city of Greenwood elected its first black mayor. Soon after his election, however, a "For Sale" sign was placed in his front yard. Later, his house was riddled with buckshot in a drive-by shooting. *See* Dan Berry, *Yes, the Ill Will Can Be Subtle. Then, One Day, It Isn't*, N.Y. TIMES, Jan. 21, 2007, at 16.

8. 408 U.S. 238 (1972).

aggressive prosecution.[9] And while the flying of the Confederate flag at a state capitol,[10] or the design of a state flag to include the Confederate flag,[11] is problematic, the flag's presence at this courthouse raises unique dangers. Beyond the equal protection issues generated by the government display of the flag on state property, the flag's presence at a courthouse implicates the accused's right to due process, and both the defendants' and the prospective jurors' rights to all of the privileges and immunities attendant to being a citizen of a state in the Union.

Part II of this Article recounts the history of the Confederacy and its aftermath in Caddo Parish, leading up to the death sentence of the latest capital defendant, Felton Dorsey. Part III discusses previous attempts to challenge the Confederate flag using the Equal Protection Clause. This Part highlights obstacles that can be anticipated with an equal protection challenge. Part IV addresses two new arguments particular to the courthouse scenario. The first analysis considers the social psychological implications of the flag and concludes that these pose an unacceptable risk of prejudice to the accused in his trial. The second analysis advances the argument that a state government flying the Confederate flag violates the Privileges or Immunities Clause of the Fourteenth Amendment and the Eighth Amendment's prohibition of cruel and unusual punishment. Finally, Part V addresses the flag's bearing on equal protection challenges to system-wide discrimination.

II. CADDO PARISH: A CASE STUDY

The current racial climate in Caddo Parish may be explained in part by what transpired in Louisiana during the Civil War. Shreveport was never touched by Union forces, and as a result its white residents held a unique resentment to the changes brought by the end of the war. This resentment led to bloodshed at the turn of the century, but as the violence faded, the Confederate flag remained a symbol of intimidation.

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9. *See generally* Timothy Lyman, *Comparing Homicides to Capital Cases Caddo Parish, 1988–2008* (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743712.

10. The Confederate flag was raised at the South Carolina state capitol in 1962 and still remains on capitol grounds. *See* David Firestone, *46,000 March on South Carolina Capitol to Bring Down Confederate Flag*, N.Y. TIMES, Jan. 18, 2000, at A14. In Alabama, the Confederate flag flew at the top of the capitol dome from 1956 until 1993, at which point it was moved across the street. *See Stars and Bars Gone from Alabama Capitol*, CHI. TRIB., Apr. 30, 1993, at 8.

11. The Confederate battle flag makes up about two-thirds of the Mississippi state flag. In a 2001 vote, three-quarters of the state's white voters opted to keep the Confederate emblem in the state flag. *See* David Firestone, *Mississippi Votes by Wide Margin to Keep State Flag that Includes Confederate Emblem*, N.Y. TIMES, Apr. 18, 2001, at A14. The Georgia state flag was changed to contain the Confederate battle flag in 1956. In 2003, it was changed again to replicate the first flag of the Confederacy (the "stars and bars"). *See Georgia Governor Wants Vote on Flag with Confederate Emblem*, N.Y. TIMES, Feb. 13, 2003, at A27 (quoting NAACP leader, "'If it were up to the majority of people in the state of Georgia, slavery would still be legal and lynching would still be the law of the land'").

A. The Last Bastion of the Confederacy

The Confederate cause placed white interests above the human rights of black slaves. The South was yoked to slavery; its white-owned cotton empire could not continue to pull in huge profits without forced labor. Southern leaders developed the theory of "states' rights" as a matter of self-preservation.[12] If the North were allowed to take control of the federal government, the South feared, prohibitively high tariffs and the abolition of slavery would soon follow. Secession was viewed as the only way to preserve the Southern way of life, a fundamental aspect of which was slavery:

> Slavery poisoned the whole situation. It was the issue that could not be compromised, the issue that made men so angry that they did not want to compromise. It put an edge on all arguments. It was not the only cause of the Civil War, but it was unquestionably the one cause without which the war had not taken place.[13]

Among plantation owners and public figures in Louisiana, fear ran high in late 1860 and early 1861.[14] Fear of the abolition of slavery and the economic ruin and loss of political clout that would necessarily follow. Fear of the election of a "Black Republican president."[15] Fear of the end of the very existence of the slaveholding states. Governor Thomas Overton Moore, elected in 1860, warned that the institution of slavery, which the slave-owning states "regard[ed] as a great social and political blessing," was being threatened by Northern hostility.[16] Slavery was deemed a "just cause" for war. On January 26, 1861, Louisiana seceded from the Union.[17] Only three months later, Union Admiral Glasgow Farragut captured New Orleans.[18]

When Governor Moore heard that New Orleans had surrendered, he ordered an evacuation of southeast Louisiana and the destruction of all cotton.[19] Slaves soaked bundles of cotton in whisky and lit them on fire before floating the flaming bales down the Mississippi river.[20] The wealthy plantation-owners promptly evacuated, many sending their slaves east to dig a canal to divert the river to protect Vicksburg.[21] Skirting federal forces, the state government moved first to Opelousas, then to

12. *See* BRUCE CATTON, THE CIVIL WAR 10 (1961).
13. *Id.*
14. *See* JOHN D. WINTERS, THE CIVIL WAR IN LOUISIANA 3 (1963).
15. In Governor Moore's address to the extraordinary session in December 1861, he stated that "I do not think it comports with the honor and self respect of Louisiana, as a slaveholding state to live under the government of a Black Republican President." *Id.* at 8.
16. *Id.* at 4.
17. *Id.* at 3.
18. CATTON, *supra* note 12, at 77.
19. WINTERS, *supra* note 14, at 103.
20. *Id.*
21. *Id.* at 107.

Alexandria, and finally settled in Shreveport in 1862.[22] The Caddo Courthouse now stands at the site of the 1863 Louisiana Statehouse.[23]

Thousands of white confederate refugees poured into Shreveport as federal troops inched closer to the Red River. Vicksburg and Port Hudson, the last Confederate bastions on the Mississippi river, fell to federal forces in July of 1863.[24] The Union not only held all of Louisiana east of the Mississippi, but also the Louisiana coast as far west as Berwick Bay, and all of Arkansas beyond the southwest corner.[25] Shreveport became the hub of a substantial commerce network between the last outposts of the Confederacy and Mexico.[26] During the Union's campaign to Alexandria, the Confederates successfully defended Alexandria and the surrounding area from capture, and saved all of their vital installations in Shreveport.[27]

The Confederate cause was struggling elsewhere, however. On April 9, 1865, General Robert E. Lee surrendered to Ulysses S. Grant at Appomattox in what is widely considered to be the end of the war. In Shreveport, however, the Confederacy was still going strong. The Confederate capital was briefly relocated from Danville, Virginia, to Shreveport. Jefferson Davis attempted to flee from Virginia to Shreveport, in hopes that the unconquered areas of northern Louisiana, Arkansas, and Texas would continue to fight in the face of Union victory.[28] He was captured en route and taken prisoner. But Louisiana Confederate leaders still stood ground and urged Shreveport citizens to "fight the tyrant as long as possible."[29]

Shreveport was the last point in the Confederacy to surrender. Federal troops never actually entered the area. It finally lowered the last Confederate flag, at what is now the Caddo Courthouse, nearly two months after Lee's surrender at Appomattox.[30]

B. Mob Murder in Post-Bellum Caddo

The end of the Civil War marked the beginning of mass violence in Caddo Parish. Shreveport emerged from the war undamaged and largely unoccupied. In 1865, the Freedmen's Bureau came to Caddo to assist the former slaves in securing fair-paying jobs, medical care, and education.[31] The Bureau established elementary schools for black children and negoti-

22. WRITERS' PROGRAM OF THE WORKS PROGRESS ADMINISTRATION, LOUISIANA: A GUIDE TO THE STATE 254 (1941).
23. NEIL JOHNSON, SHREVEPORT AND BOSSIER CITY 48 (1995).
24. Waldo W. Moore, *The Defense of Shreveport—The Confederacy's Last Redoubt*, 17 MILITARY AFF. 72, 73–74 (1953).
25. *Id.* at 73.
26. *Id.* at 74.
27. *Id.* at 79–80.
28. *See* Mona Strange, *Last Units of Confederate Army Were Disbanded Here*, SHREVEPORT TIMES, Oct. 14, 1951.
29. ERIC BROCK, SHREVEPORT 44 (2001).
30. Rosemary Lee Chamberlain, *The Last Flag of the Confederacy*, UNITED DAUGHTERS OF THE CONFEDERACY MAG., 1987. Simon Bolivar Buckner surrendered the Trans-Mississippi department to Union General Edward Canby on that date.
31. Solomon K. Smith, *The Freedmen's Bureau in Shreveport: The Struggle for Control of the Red River District*, 41 LA. HIST. 435 (2000).

ated labor contracts with former slave owners. In 1867, the Bureau registered black voters for an upcoming constitutional referendum, drawing a violent reaction.[32] Armed bands of angry whites began patrolling sections of Caddo Parish, kidnapping free blacks and forcing them to go back to work for their former masters.[33] The Bureau chief wrote to Washington:

> [T]he mere presence of the schools and the enfranchisement of blacks elicited a strong white backlash in the Shreveport area . . . so bitter is the feeling of whites against blacks that many of the latter are afraid to go anywhere without being armed, and many employers have forbidden their laborers from attending any political meetings without threat of being fired.[34]

Nevertheless, the Caddo Parish region voted to select two black men and a Republican white Yankee to go to the state constitutional convention in the fall of 1867.[35] In 1868, there was a referendum on the state constitution and a general election. In Caddo Parish, 1121 of 1730 blacks voted for ratification, while 1025 out of 1050 whites voted against it.[36]

The Republican triumph provided the impetus for a movement by former Confederates and other conservatives to insure a Democratic victory in the November presidential election by any means.[37] 1868 was an especially bloody year in a bloody decade for Caddo Parish, with at least 154 blacks killed almost exclusively by white perpetrators.[38] In September of 1868, white vigilantes hunted down, tortured, and killed nearly 100 freedmen in the Caddo-Bossier area, with at least fifty more believed by the Bureau to have gone unreported.[39] During the presidential election, armed bands of white men reportedly surrounded polling places to control balloting. The only Republican vote in Caddo Parish was cast by James Watson, a black parish constable who was murdered in a nearby grocery store a half-hour after leaving the polls.[40] Between the 1868 election and the next year, the number of black voters statewide fell from 130,344 to 5320. By 1940, it had sunk to 886.[41]

General lawlessness abounded in Caddo in the 1870s. A Caddo Parish judge testified before a congressional committee in 1875 that it "was not an uncommon thing for a colored man to be found dead."[42] Indeed, the killing of a black by a white was not considered murder by whites in Caddo and no local grand jury would indict a white for such a murder.[43]

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32. *Id.* at 445–46.
33. *Id.* at 439.
34. *Id.* at 450.
35. *Id.* at 452.
36. *Id.* at 455–56.
37. *See id.* at 458.
38. *See* Gilles Vandal, *The Policy of Violence in Caddo Parish, 1865–1884,* 32 LA. HIST. 159, 163–66 (1991).
39. Smith, *supra* note 31, at 458–59.
40. *Id.* at 463.
41. ADAM FAIRCLOUGH, RACE AND DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915–1972, 6 (2008).
42. *See* H.R REP. NO. 43-261, at 366 (1875).
43. *See* Vandal, supra note 38, at 163 n.13.

Between 1865 and 1876, at least 416 blacks were killed in Caddo Parish.[44] About forty percent of white men in Caddo between the ages of eighteen and forty-five were involved in these homicides.[45] Mob violence erupted in the Caledonia settlement, about twenty-five miles south of Shreveport, in 1878.[46] The riot initially involved about seventy-five blacks and twenty whites, but as most blacks were unarmed, the whites quickly drove them to the swamps and other hiding places.[47] As white reinforcements arrived, a "negro hunt" began.[48] At least twenty blacks were tortured and murdered that night.[49] Soon after, the "Black Exodus," or "Kansas Fever," originated in Caddo Parish as African Americans left the Northwest Louisiana area in droves.[50]

The culture of lynching steadied as Shreveport grew in the 1890s and early 1900s. Lynch mobs murdered at least twenty-one blacks in Caddo Parish from 1900 to 1923, at least four in the city of Shreveport.[51] Congressional commissions deemed the parish "Bloody Caddo"[52] and those who took part in the violent intimidation of blacks and Republicans the "Caddo Parish Bulldozers."[53] After five blacks were lynched in rural Caddo in December of 1914,[54] the Louisiana Prison Reform Association called the lynchings a "regression into the barbarism of the dark ages."[55] Nevertheless, the Caddo Sheriff's Office was firmly aligned with the white planters and against the "elites" who opposed the institution of lynching.[56] Caddo claimed the sinister distinction of being the lynching capital of the state from 1910 until 1929.[57] Together, Caddo and Bossier Parishes had among the highest totals of lynchings in the entire South for many decades at the end of the nineteenth century and the beginning of the twentieth.[58]

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44. *Id.* at 164.
45. *Id.* at 167.
46. *Id.* at 178.
47. *Id.* at 179.
48. *Id.*
49. *Id.* at 179–80.
50. *See generally* Morgan D. Peoples, *"Kansas Fever" in North Louisiana*, 11 LA. HIST. 121 (1970).
51. MICHAEL JAMES PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN Society, 1874–1947, 142 (2004).
52. *See generally* Gilles Vandal, *"Bloody Caddo": White Violence Against Blacks in a Louisiana Parish, 1865–1876*, 25 J. SOC. SCI. 373 (1991).
53. *The Caddo Parish Bull-Dozers*, N.Y. TIMES, Jan. 11, 1879.
54. *See, e.g.*, *Louisiana Negro Lynched*, N.Y. TIMES, May 13, 1914:

    > For three hours a mob of 1,000 men and boys stood in the rain outside the jail, hammering away with a heavy railroad iron at the steel doors. Steel saws finally were used and an entrance was gained by the mob. . . . A rope was placed about his neck and he was dragged half a block to a telephone pole opposite the [Caddo] parish court house and strung up. A knife was left sticking in the body.

55. PFIEFER, *supra* note 51, at 146.
56. *See id*.
57. STEWART EMORY TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930, 138 (1995).
58. PFEIFER, *supra* note 51, at 39–40, 200.

Historians have attempted to explain why Caddo Parish had such a massive amount of violence directed against blacks during the time following the Civil War. There was a sizeable black community in Caddo—over seventy percent of the population—and so whites toiled to maintain their social control. Whites in Caddo refused to accept the end of slavery and the beginning of black suffrage and citizenship. "[V]iolence in Caddo has to be understood in a racist and white supremacy perspective, as a reactionary fear of a large segment of the white population, as a desperate attempt to regain the rights they had once enjoyed over the lands and the black population."[59] Caddo whites were determined to maintain their parish as "white country" regardless of the fact that whites were a minority.[60] Caddo had evaded federal forces in the Civil War and its white citizens felt that the political and social changes wrought by the end of the war were invalid as applied to them.[61]

C. Lest We Forget

Intimidation of Caddo Parish blacks was attempted in non-violent ways as well. On June 18, 1903, the Police Jury of Caddo Parish unanimously voted to "reserve" the front plot of the courthouse square for a Confederate Monument.[62] The Caddo Parish budget of 1903 included $1000 donated to the Daughters of the Confederacy[63] for the commission and construction of this monument.[64] (Six months later, a mob of 1200 hung three black men from the same tree in Shreveport.[65])

Pursuant to these official actions, a towering monument was built on the courthouse lawn. At the front, Clio, the muse of history, points to a

59. Vandal, *supra* note 52, at 376–77.
60. *See, e.g.*, *Five Webster Men Cleared by Federal Jury*, WEBSTER REV., Mar. 4, 1947, at A1 (quoting Shreveport defense counsel at lynching trial as imploring the all-white jury not to allow the Shreveport court to become "a colored court").
61. "[T]he situation in Caddo was particularly difficult as the parish came out of the war undamaged, without suffering any devastation. As a result, whites there did not feel vanquished and resented more strongly the changes brought by the war." Vandal, *supra* note 52, at 381.
62. *Police Jury*, SHREVEPORT CAUCASIAN, June 21, 1903, at A1.
63. The Daughters of the Confederacy ("U.D.C") is an all-female Neo-Confederate group with close ties to the Ku Klux Klan. KAREN L. COX, DIXIE'S DAUGHTERS: THE UNITED DAUGHTERS OF THE CONFEDERACY AND THE PRESERVATION OF CONFEDERATE CULTURE 171 n.19 (2003). The U.D.C. uses indoctrination of white Southern youth to "instill into the descendants of the people of the South a proper respect for the . . . 'True History' of the confederacy." *Id.* at 20; *see also* UNITED DAUGHTERS OF THE CONFEDERACY, http://www.hqudc.org (last visited June 22, 2011) (stating that one of the organization's primary objectives is "to assist descendants of worthy Confederates in securing a proper education"). The group has written and endorsed countless propaganda textbooks and periodicals glorifying the Klan and revising civil war history. *See, e.g.*, S.E.F. Rose, *The Ku Klux Klan and the Birth of a Nation*, 24 CONFEDERATE VETERAN 157 (1916) ("The Ku-Klux Klan was organized to . . . resist lawlessness, to defend justice, to preserve the integrity of the white race, and to enforce civil and racial law. No braver men were ever banded together, no grander brotherhood ever existed, than the original Ku-Klux Klan.").
64. Budget for 1903, Caddo Parish Police Jury (on file at the Louisiana State University—Shreveport Library).
65. *Three Negroes Lynched*, N.Y. TIMES, Dec. 1, 1903.

giant book beneath the words "LEST WE FORGET." At each corner of the monument is a bust of a Confederate leader. Stonewall Jackson stares to the north. P.G.T. Beauregard looks east. Henry Watkins Allen stands guard to the west. And Robert E. Lee watches south. The rear is inscribed with a dedication "To The Just Cause, 1861–1865." A confederate soldier stands alone with his rifle at the top of the monument.

At the time the Confederate monument was dedicated in 1906, no flag flew from its steps. Nor was there a flag when the new courthouse was constructed and unveiled to much fanfare in 1928.[66] It was not until October 17, 1951, that the parish government decided to erect a flagpole and fly the Confederate flag at Caddo Courthouse.[67]

It is clear why the flag was raised in 1951, rather than in 1906.[68] In 1906, the most useful intimidation tool for the Caddo Parish white supremacist was lynching and other violence. The Confederate flag, at that point, stood for nostalgia and heartbreak for the lost cause. "By the 1920s or '30s, Confederate symbols had been pretty much drained of their ideological content."[69] But then came the Civil Rights movement, when the Ku Klux Klan and other white supremacist groups made the flag part of their arsenal of symbols. "In the '50s, the Confederate flag ceased to be benign; we lost it to the segregationist movement."[70] The flag "came to mean defiance of the national will and Southern white insistence upon

66. In 1936, a new element was added to the monument: a plaque commemorating the reunion of the Confederate Veterans held that year in Shreveport. This new component came at the heels of a substantial population boom in Shreveport. Between 1920 and 1930, Shreveport's population grew by seventy-four percent, moving sixty places up on the list of the nation's biggest cities. *Ford's City Jumps into 50,000 Class*, N.Y. TIMES, May 19, 1930. In 1930, oil was discovered in nearby Rodessa, and Shreveport quickly became an oil boom town that rivaled Dallas. WPA Writer's Program, *supra* note 22, at 672. As the population mushroomed, new blacks flowed in—between 1930 and 1940, the black population in Caddo went from 57,041 to 68,793. U.S. CENSUS BUREAU, 1940 CENSUS, *available at* http://www.census.gov/prod/www/abs/decennial/1940.html.

67. Minutes, Caddo Parish Police Jury (Oct. 17, 1951) (on file at the Louisiana State University—Shreveport Library).

68. Shreveport historian Eric Brock wrote in a 2002 report to the Caddo Commission:

> The present flagpole was erected on the monument site in 1951. This was done during the wave of defiance that swept the establishment South during the period following World War II to the mid-1960s. During this time many southern cities and towns hoisted Confederate banners in reaction to federal legislation dealing especially with, though not exclusively with, civil rights, integration, and African-American voting rights. There appears to be no reason to have placed the flagpole and Confederate flag on this monument and, hence, on the Courthouse Square at this time except as part of Shreveport's own role in resistance to the above-mentioned social changes then sweeping the region. This is quite consistent with the city's and parish's position, both officially and unofficially, at the time.

Eric J. Brock, Confederate Flag and Monument, Caddo Courthouse Square, Shreveport 2 (Jan. 16, 2002) (unpublished report presented to the Caddo Commission); *see* Eric J. Brock, *Courthouse Monument First Public Sculpture*, F. NEWS, Apr. 17, 2002, at 17.

69. Christopher Rose, *Confederate Banner Still a Call to Arms*, TIMES PICAYUNE, Nov. 13, 1989, at A1.

70. *Id.*

political, economic, and social domination over the Negro."[71] Moving into the 1950s, when the Southern white man stood ground against the "assaults of the judicial, legislative, and executive branches of the Federal Government," the flag was "debased by many into a harsh summons to racial hate."[72]

At this point, the movement for racial equality was beginning to make inroads in the South, though Shreveport remained a bastion of intimidation. Following a decision holding segregation of interstate motor buses unconstitutional,[73] the Congress of Racial Equality (CORE) began its freedom rides into the South in April of 1947.[74] The original plan, publicized in the *Louisiana Weekly*, called for a racially-mixed group to ride together from Washington, D.C., to New Orleans.[75] A month earlier, a federal jury in Shreveport had acquitted five white men of civil rights charges stemming from a fatal beating of two black men abducted from a jailhouse.[76]

The year 1948 brought President Truman's order establishing racial integration of the armed forces.[77] That year, the NAACP's Shreveport chapter boasted over fourteen hundred members.[78] Headed by A.P. Tureaud, the Louisiana NAACP sought equality in public teacher pay, educational opportunities, and access to government and public programs and facilities. Then, in a series of lawsuits culminating in *Brown v. Board of Education*,[79] the organization succeeded in forcing nationwide integration. Tureaud successfully argued a case to equalize salaries in the Orleans Parish school district in 1941;[80] in 1947, a federal judge ruled that the Iberville Parish school district salaries were discriminatory.[81] In 1946, the Fifth Circuit subjected decisions of the voting registrar, rejecting black applicants, to judicial review.[82] In 1950, a federal court in New Orleans held that Louisiana State University Law School must admit African Americans.[83] Two days before the flag was raised, a federal judge ordered integration

71. Hodding Carter, *Furl That Banner?*, N.Y. TIMES MAG., July 25, 1965.

72. *Id.*

73. *See* Morgan v. Virginia, 328 U.S. 373 (1946).

74. RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 33, 42 (2006).

75. *Id.* at 35. After several members warned of "wholesale slaughter" if the freedom riders entered the Deep South, the plan was changed to restrict the ride to the "Upper South." *Id.*

76. *Freed in Flogging Case*, N.Y. TIMES, Mar. 2, 1947. "Lewd photos of white women" were allegedly found on the victim's body. *Negro in Louisiana is Beaten to Death*, N.Y. TIMES, Aug. 16, 1946.

77. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

78. ADAM FAIRCLOUGH, RACE AND DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915–1972, 218 (2008).

79. 347 U.S. 483 (1954).

80. McKelpin v. Orleans Parish School Board (1941) (settled, unpublished); *see* DONALD DEVORE & JOSEPH LOGSDON, CRESCENT CITY SCHOOLS: PUBLIC EDUCATION IN NEW ORLEANS, 1841–1991, 210, 226 (1991).

81. *See* FAIRCLOUGH, *supra* note 78, at 107.

82. Hall v. Nagel, 154 F.2d 931 (5th Cir. 1946); *see also* Mitchell v. Wright, 154 F.2d 924 (5th Cir. 1946).

83. Wilson v. Bd. of Supervisors of LSU, 92 F. Supp. 986 (E.D. La. 1950).

of the LSU nursing school.[84] In 1951, the structure of white supremacy, maintained by the violence of the years following the Civil War, was crumbling. Lynching was down. Nevertheless, the Confederate flag became the new symbol in Caddo Parish.[85] Shreveport, at that point, was the "most oppressive city in the South."[86]

In 1949, the Ku Klux Klan staged a "third re-activation" in the South. The Klan targeted Shreveport and Northwest Louisiana to become a central hub of Klan activities, as its chapters quietly multiplied in the area throughout the 1950s and into the 1960s. Shreveport also became a favorite visiting place of the national "imperial wizard," R.E. Davis of Dallas. The *Shreveport Times* reported in 1961 that there were at least four chapters of the Klan in the Shreveport area, totaling over 1,000 members, with three additional chapters about to be chartered.[87]

During the 1950s, Shreveport whites became fervent in their opposition to integration of any kind. In 1956, after voting against a proposed bill exempting the Sugar Bowl from a new law prohibiting interracial activities, State Representative Wellborn Jack of Shreveport promised that "the Shreveport Citizens Council can always depend on me to take a stand 100% for segregation and 100% against integration."[88] In response to a 1958 bill requiring labeling of blood with the race of the donor, Jack commented, "I don't want any Negro blood in me. I guess it wouldn't hurt me like they say, but I find it repulsive."[89] As school integration in Louisiana drew closer, Jack and his Shreveport colleagues resorted to spreading hysterical rumors. A pamphlet entitled "Integration today means racial and national suicide tomorrow!" included a faux press release alleging that in an integrated school, "13 little negro girls—6 years old and under—were treated for gonorrhea in 1955 . . . Reports of attempted rape, assaults, chasing girls, and even teachers, Negro girls soliciting boys at school, sex talk, and suggestive talking . . . were reported by school personnel."[90] In another flyer, a headline reported that a white boy in an integrated school was blinded by lye hurled by a black classmate: "The Negro was enraged because the white boy would not join him

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84. *Negro Files Suit for LSU Admittance*, SHREVEPORT TIMES, Oct. 9, 1951, at 13; *Court Rules Negro Nurse May Enter LSU*, SHREVEPORT TIMES, Oct. 16, 1951.

85. "Shreveport furnished some of the most determined defenders of white supremacy. In the 1920s it was the Klan's most fertile recruiting ground; during the 1950s and 1960s it became the bastion of the segregationist Citizens Council movement." FAIRCLOUGH, *supra* note 78, at 8.

86. *Id*. at 285.

> "Shreveport is hermetically sealed," stated attorney John R. Martzell. "No ideas get in or out." Whites in Shreveport found it difficult to identify with the rest of Louisiana; they considered themselves as part of "Ark-La-Tex" rather than the Pelican State. Residents were far more likely to visit Dallas than New Orleans . . . . But unlike Dallas, another city dominated by oil money, Shreveport had Old South roots that reinforced its attachment to white supremacy.

Id. at 286.

87. *Ku Klux Klan Active in Shreveport, Area*, SHREVEPORT TIMES, Feb. 10, 1961, at A1.

88. *Blood Bill Approved in Committee*, SHREVEPORT TIMES, July 2, 1958, at D1.

89. *Id.*

90. *Id.*

in a disgusting unnatural sexual act."[91] In 1963, Shreveport politician Roy H. Odom, Sr., wrote and illustrated a book entitled *History of the Moment*, in which the "history" of the civil rights movement is recounted; the last page lists recommendations promoting a national caste system and apartheid.[92] That year, after the four little girls were killed in Birmingham, citizens attempted to hold a memorial march at the Little Union Baptist Church in Shreveport. Shreveport Public Safety Commissioner George D'Artois had denied a permit for the demonstration, publicly declaring that the demonstrators "want to destroy our American way of life."[93] On the day of the memorial, hundreds of helmeted police officers arrived at the church, armed with shotguns, tear-gas, and Billy-clubs, and cordoned off the area. As people left the church after the memorial service, officers drew their guns and severely beat dozens of demonstrators and clergymen; D'Artois himself joined in.[94]

The next day, students at Booker T. Washington High School attempted to march downtown but were met by police officers firing tear gas grenades and kicking and beating them back inside the school.[95] A day after that, D'Artois called officers to surround the J.S. Clark Junior High School, where several hundred students held a lunchtime rally. When the students yelled "freedom" at the police, D'Artois sent officers into the schoolyard to silence the protest.[96] Following the beating of the NAACP branch president and the suppression of every planned demonstration, CORE and the Southern Christian Leadership Conference pulled out of Shreveport, and the city saw little public protest for the remainder of the decade.[97]

In the 1970s, Shreveport citizens began speaking out against the courthouse Confederate flag.[98] One citizen wrote a letter to the *Times* explaining that, "To the Mexican Americans of Texas, when they see the Lone Star State Flag flying, they are reminded of a free people fighting to stay free. To the black Americans of Shreveport, when we see the Confederate Flag flying over the courthouse, we are reminded of our slave masters fighting to keep us slaves."[99] African American members of the Caddo Police Jury sought to discuss removing the flag in 1976, but another member prematurely adjourned the meeting to prevent consideration of the matter.[100] After the meeting, Wellborn Jack claimed: "It's not a racist thing."[101]

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91. *Id.*
92. ROY H. ODOM, HISTORY OF THE MOMENT: THE FACTS BEHIND THE CIVIL RIGHTS CONTROVERSY (1963).
93. *Planned Memorial March Broken Up By Officers Here*, SHREVEPORT TIMES, Sept. 23, 1963, at A1.
94. *See id.*
95. *See* FAIRCLOUGH, *supra* note 78, at 331.
96. *Id*. at 332.
97. *Id*.
98. *Group Hits Flying of Flag Here*, SHREVEPORT TIMES, Aug. 10, 1976, at A11.
99. Letter to the Editor, *Differences in Flags*, SHREVEPORT TIMES, Sept. 28, 1976.
100. Susan Stoler, *Confederate Flag Still Flying Here*, SHREVEPORT J., Sept. 1, 1987, at D1.
101. *Id.*

In 1987, the *Shreveport Journal* interviewed individuals at the courthouse regarding attitudes about the flag:

> Some people are so offended by what they see that they refuse to enter the courthouse on that side. "Any black person knows what that flag means," said Sarah Walker, a native Shreveporter who was home for the holidays from Detroit. "It is the symbol of white supremacy. It is to black people what a swastika is to Jews."
>
> Others are more inclined to salute the flag and shake their heads in disgust at any suggestion that it be removed.
>
> "I just don't see what the issue is. Is it the coloreds again?" said Charles Moore, past commander of the Sons of the Confederacy. "Anybody who says that flag stands for racism is a hypocrite. If that was the case, then those Ole Miss rebels would run all of those Negroes off of the football team."[102]

D. The Blood-Stained Banner

Since *Furman v. Georgia*,[103] Caddo Parish has sentenced thirteen black men to death under the Confederate flag, all but four for killing a white victim. Felton Dejuan Dorsey was the latest citizen of Caddo Parish to be sentenced to death. He is black, and was convicted by a jury of eleven whites and one black of killing a white firefighter in Greenwood, a white suburb of Shreveport. During jury selection, a prospective juror spoke out against holding criminal trials at a courthouse that flies the Confederate flag. He was promptly removed for this reason by the prosecution; white defense counsel had no objection.

Now, one hundred and forty-five years after the flag was lowered after the war, seventy years after the mass murder of black citizens, fifty years after the violent resistance to integration, the Confederate flag in its "blood-stained"[104] glory flies over capital trials in Caddo Parish. If the flag was the new lynching in 1951, the administration of the death penalty under the flag is the new lynching today.

III. THE CONFEDERATE FLAG AND THE CONSTITUTION

The flag's impact on the justice system is as invisible as it is invidious. Indeed, the "impact" requirement of the Supreme Court's equal protection jurisprudence has been the Achilles' heel of constitutional challenges to state displays of the Confederate flag. But the threat of constitutional harm in a criminal case—and a fortiori in a capital case—is far more tan-

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102. Courtland Milloy, Jr., *Rebel Flag Evokes Range of Emotions*, SHREVEPORT J., Jan. 1, 1987, at A20.
103. 408 U.S. 238 (1972).
104. The flag that flies at Caddo Courthouse is an incarnation of the Third National Flag of the Confederacy—the "blood-stained banner." This flag was developed during the last throes of the Confederacy as a way to incorporate the battle flag with a red stripe running down the edge to symbolize the Confederates' willingness to die for their cause.

gible than that posed by, for example, a flag at the state legislature. While the legislature may have a pro-Confederate agenda, it is or should be the people's right to remove offending legislators. In the judicial system, where there are numerous parties involved, it is not so simple. The judicial system as a whole must satisfy not only justice, but also the appearance of justice.

A. Overview of Prior Legal Challenges

The flying of the Confederate flag at the trial of a black defendant would seem antithetical to the constitutional principles of equal protection. There are enormous barriers, however, that a litigant must overcome to establish a constitutional violation caused by the Confederate flag, and still more for capital defendants to prove racially discriminatory application of the death penalty. The unfortunate fact is that courts have turned a blind eye to racism where it is not overt and explicit.[105]

After Alabama Governor George Wallace promised to physically block black students from entering the University of Alabama, Robert F. Kennedy travelled to Montgomery to warn him that federal troops would enforce integration.[106] That morning, the Confederate battle flag was raised above the state capitol dome, as an "act of defiance" against the federal government's attempts to integrate the public schools of Alabama.[107] Weeks later, Governor Wallace made good on his promise and stood in the doorway of the University of Alabama in a feeble attempt to maintain segregation. Although the schools have integrated, the flag flew from that date in 1963 until 1993, when the governor ordered it removed and relocated across the street.[108] A towering Confederate monument inscribed with a tribute to "the knightliest of the knightly race" still remains on the Alabama state capitol grounds.[109]

In 1988, the NAACP filed suit for a declaratory judgment that the flying of the flag atop the Alabama capitol dome violated the First, Thirteenth, and Fourteenth Amendments.[110] The Eleventh Circuit held that the suit was barred by res judicata stemming out of a similar 1975 challenge, but the court nevertheless proceeded to "la[y] to rest" the merits as well.[111] In a terse opinion, the court held that "it is not certain that the flag was hoisted for racially discriminatory reasons."[112] The only problem with the flag, the court opined, was the plaintiff's "own emotions."[113]

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105. *See, e.g.*, Ash v. Hinton, No. 08-16135, slip op. (11th Cir. Aug. 17, 2010) (holding that a white supervisor calling black men "boy" is not evidence of racial animus). *See generally* Anthony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).
106. *See* NAACP v. Hunt, 891 F.2d 1555, 1558 (11th Cir. 1990).
107. Claude Sitton, *Robert Kennedy Unable to Budge Alabama Governor on Race Issue*, N.Y. TIMES, Apr. 26, 1963.
108. *Confederate Flag Removed in Alabama*, WASH. POST, Apr. 30, 1993, at A47.
109. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 180 (2008).
110. *See Hunt*, 891 F.2d at 1555.
111. *Id.* at 1561–62.
112. *Id.* at 1565.
113. *Id.*

Seven years later, the Eleventh Circuit was called upon to decide the issue again. The challenged Confederate flag in *Coleman v. Miller*[114] was the Georgia state flag, which at the time of the lawsuit consisted of two-thirds Confederate battle flag, one-third Georgia state seal.[115] James Coleman, an African American, brought suit to remove the flag, alleging that it violated his rights to equal protection and free expression. He testified in the district court that the "Confederate symbol, which is often used by and associated with hate groups such as the Ku Klux Klan, inspires in him fear of violence, causes him to devalue himself as a person, and sends an exclusionary message to Georgia's African-American citizens."[116]

The Eleventh Circuit, quoting its own decision in *Hunt*, held that the district court had properly granted summary judgment in favor of the state. It concluded that Mr. Coleman's evidence of personal harm caused by the flag was insufficient to prove disproportionate impact on members of his race as a whole.[117] The Mississippi state flag also contains the Confederate battle flag, and has also been the subject of unsuccessful litigation in which the court gave short shrift to the claims of equal protection violations.[118]

The Eleventh Circuit's appraisal of contemporary race relations in the south has been widely assailed[119] as a regression to the discriminatory

114. 117 F.3d 527 (11th Cir. 1997). The Georgia flag had been redesigned in 1956 to include the Confederate battle flag during a period of racial hostility and violent opposition to the federal desegregation rulings. *Id.*
115. *Id.* at 528.
116. *Id.* at 529.
117. *Id.* at 531.
118. In *Daniels v. Harrison County Board of Supervisors*, 722 So. 2d 136 (Miss. 1998), the plaintiffs challenged the county's decision to fly the Confederate battle flag at a public beach. The Mississippi Supreme Court relied on *Hunt* and *Coleman* in holding that there was no evidence that any constitutionally protected rights had been violated. *Id.* at 138. Similarly, in *Mississippi Division of the Sons of Confederate Veterans v. Mississippi Conference of the NAACP*, 774 So. 2d 388 (Miss. 2000), the court summarily held that "[n]either the flying of the State Flag, nor the flag itself, causes any constitutionally recognizable injury." *Id.* at 390.
119. *See* I. Bennett Capers, *Flags*, 48 HOW. L. J. 121, 140–41 (2004) ("The Eleventh Circuit offered no empirical support for this supposition; and indeed, their conclusion runs contrary to polls reflecting the public's responses to the flag . . . it would be irrational for a non-minority to fear physical assault from an approaching group waving Confederate flags. By contrast, given the history of violence associated with the Confederate flag, it would be entirely rational for a member of a historically oppressed class, in the face of the same approaching group, to fear for his safety."); L. Darnell Weeden, *How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause*, 34 AKRON L. REV. 521, 551 (2001) ("Because of its appeal to a prurient interest in race relations, the Confederate flag is 'the most inflammatory symbol that the South has.'" (quoting Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897, 921 (1998))); James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 515 (1991) ("[I]n light of the historic message the Confederate flag conveys, its current use as a symbol of white supremacy by racial hate groups, and its elevation above the capitol buildings in opposition to demands for black equality, constitutes government endorsement of discrimination by private parties. The Supreme Court has rejected such government approval of private discrimination.").

legacy of *Plessy v. Ferguson*,[120] *United States v. Cruikshank*,[121] and *Pace v. Alabama*.[122] Although the reasoning in the Eleventh Circuit cases has been undermined,[123] it is worth considering a different way to frame challenges to state displays of the Confederate flag. While the courthouse flag, like other displays of the Confederate flag, threatens basic African American equality before the law, it also raises distinct concerns that are specific to the courthouse scenario. It affects the rights of the accused as he stands trial and of those whose presence may be compelled for jury service. As an alternative to equal protection challenges to the flag, the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment may be called into action.

B. The Accused's Right to Due Process

As the Court stated most recently in *Caperton v. A.T. Massey Coal Co., Inc.*,[124] "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"[125] The Due Process Clause prohibits a state practice wherever "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."[126] There is no single test for determining whether a practice is inherently prejudicial.[127] Rather, when making an inherent prejudice determination, "[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience."[128] In light of the flag's demonstrated effects on the subconscious mind and human behavior, reason and principle dictate that it should be removed prior to the trial of an African American as an inherently prejudicial symbol.

The Confederate flag impermissibly primes the expression of negative views towards African Americans. A recent study found that exposure to the Confederate flag increased the expression of negative attitudes to-

120. 163 U.S. 537 (1896) (upholding racially segregated railroad cars).
121. 92 U.S. 542 (1875) (reversing convictions of the perpetrators of the Colfax Massacre).
122. 106 U.S. 583 (1883) (affirming Alabama's anti-miscegenation statute).
123. *See* Adarand Constrs., Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all allegations of group-based racial discrimination "should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." (emphasis in original)); Mack v. ST Mobile Aerospace Eng'g, Inc., 195 Fed. Appx. 829, 837–38 (11th Cir. 2006) (holding that, in employment discrimination case, the display of Confederate flags created a hostile work environment for African American employee).
124. 129 S. Ct. 2252 (2009).
125. *Id.* at 2259 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).
126. Estes v. Texas, 381 U.S. 532, 542–43 (1965); *see also* Holbrook v. Flynn, 475 U.S. 560, 572 (1986) ("All a federal court may do in such a situation is look at the scene presented to juror and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial.").
127. *See* 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.").
128. Estelle v. Williams, 425 U.S. 501, 504 (1976).

ward African Americans among whites.[129] Specifically, the study found white participants exposed to the Confederate flag to be more prone to negatively evaluating a hypothetical African American male.[130] After receiving either the control or the Confederate flag priming stimulus, participants were asked to read a story about a hypothetical black male engaged in ambiguously negative and aggressive behavior.[131] Participants then evaluated his behavior by indicating their agreement to several positive and negative trait attributions.[132] White participants primed with the Confederate flag agreed more strongly with negative characterizations of the hypothetical subject—specifically, as aggressive and selfish—than those in the control group.[133] The study's authors concluded that prominent displays of the Confederate flag may activate greater negativity toward blacks amongst those exposed to them.[134]

The negative views measured in the study are damning in their own right; no influence that causes trial participants to view the accused or his witnesses as aggressive or selfish should be allowed near the courtroom. However, the impact of the Confederate flag is not limited to making the accused appear more aggressive or selfish. Racial priming functions by increasing the accessibility of culturally associated biases to the subconscious mind.[135] Once the racial category is implicated, the prime makes the full complement of associated biases more accessible to the mind.[136] For African Americans, implicitly associated traits extend well beyond aggression and selfishness. Race is implicitly associated with a person's guilt,[137] criminality,[138] and dangerousness.[139]

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129. *See* Joyce Ehrlinger et al., *How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama*, 32 POL. PSYCHOL. 131 (2011).

130. *Id.* at 143.

131. *Id.* at 142.

132. *Id.*

133. *Id.* at 142–43. The Confederate flag was able to evoke these biases in study participants, regardless of the subjective meaning they gave to the flag. *Id.*

134. *Id.* at 144. Some may be tempted to question the external validity of this kind of study. After all, in the experiment, subjects are exposed to the Confederate flag for a period of milliseconds. Inferences regarding the effect of seeing the flag on a flagpole may thus seem unwarranted. However, this method of testing the subconscious effects of conventional displays of flags is well-accepted in the cognitive and social psychological communities. *See, e.g.*, Ran R. Hassin et al., *Précis of Implicit Nationalism*, 1167 ANNALS N.Y. ACAD. SCI. 135 (2009); Ran R. Hassin et al., *Subliminal Exposure to National Flags Affects Political Thought and Behavior*, 104 PROC. NAT'L ACAD. SCI. 19757 (2007).

135. Ehrlinger et al., *supra* note 129, at 143.

136. David M. Amodio & Patricia G. Devine, *Stereotyping and Evaluation in Implicit Race Bias: Evidence for Independent Constructs and Unique Effects on Behavior*, 91 J. PERSONALITY & SOC. PSYCHOL. 652 (2006); Ehrlinger et al., *supra* note 129, at 143; Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297, 313 (2003).

137. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010).

138. Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 619 (2009).

139. *Id.*

Moreover, implicit racial bias has both cognitive components, like stereotypes, and affective components.[140] The cognitive components once activated affect how people remember and process information.[141] The affective components can do this as well,[142] but they also affect basic nonverbal human behavior. These nonverbal behaviors, expressed during interpersonal interactions, can reduce the quality of interaction and render more negative each party's appraisal of the interaction.[143]

Psychological research demonstrates that the flag creates an unacceptable risk that implicit racial bias will impact the jury and defense counsel to the detriment of the accused. The flag should be removed as inherently prejudicial in light of its official character, the prolonged nature of its exposure to those involved with a trial, and the practical difficulty of detecting and spelling out its prejudicial effects. Finally, the special due process significance of race argues strongly in favor of removing the flag.

1. The Flag's Impact on the Jury

The accused's right to a fair trial protects him from the biases and interests of judges,[144] juries,[145] and any other relevant decisionmakers[146] in his case. While the Due Process Clause requires impartiality of each member of the tribunal before they hear a case, it also contemplates the special sensitivity of the jury to sources of bias existing and emerging during the trial itself.[147] As Justice Thurgood Marshall wrote: "Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute . . . ."[148] For this reason, the Supreme Court has held that the due process prohibits practices that un-

140. David M. Amodio & Saaid A. Mendoza, *Implicit Intergroup Bias: Cognitive, Affective, and Motivational Underpinnings*, *in* HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS 353 (B. Gawronski & B.K. Payne eds., 2010), *available at* http://www.psych.nyu.edu/amodiolab/Publications_files/Amodio_Mendoza_Implicit_Intergroup_Bias.pdf; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1500–01 (2005).

141. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347 (2007).

142. *See, e.g.*, Weslie G. Moons & Diane M. Mackey, *Thinking Straight While Seeing Red: The Influence of Anger on Information Processing*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 706 (2007).

143. John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002), *available at* http://www.psych.yorku.ca/kawakami/documents/ImplicitandExplicitprejudice_000.pdf.

144. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2260–62 (2009) (summarizing cases).

145. *See, e.g*, Rideau v. Louisiana, 373 U.S. 723, 726–27 (1963).

146. *See* Winthrow v. Larkin, 421 U.S. 35, 46–50 (1975); Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

147. *Cf.* Holbrook v. Flynn, 475 U.S. 560, 570 (1986) ("Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial.").

148. *Id.* at 568; *see also* Illinois v. Allen, 397 U.S. 337, 344 (1970) (noting "the sight of shackles and gags might have a significant effect on the jury's feelings about the

dermine the jurors' ability to adhere to its Constitutional imperatives after the trial has begun. These imperatives include impartiality, the presumption of innocence, and reliable sentencing, all of which are threatened by the Confederate flag's presence.

a. Impartiality

Early cases addressing sources of prejudice on the jury focused primarily on the jury's duty to be impartial. The Court has long recognized the significance to due process of this concept. Even as early as *Irvin v. Dowd*,[149] the Court recognized that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."[150] The due process requirement of impartiality applies to the juror's assessment of guilt or innocence,[151] as well as their assessment of the probative value of evidence.[152] It further applies to capital sentence determinations.[153] As the Supreme Court stated, impartiality entails the principle that "a verdict must be based upon evidence developed at the trial."[154] Thus, an impartial jury is defined as one that is "free from outside influences."[155] Partiality is not necessarily fatal to a proceeding where a juror can lay aside his outside impressions on relevant issues.[156]

The activation of implicit bias caused by the Confederate flag predisposes the juror to subconscious belief in the guilt and aggression of the accused and in the probative value of evidence against him. Professor Justin Levinson and his colleagues have conducted a series of studies on implicit bias and juror decisionmaking. These studies find a significant implicit association between African Americans and guilt.[157] Professor Joyce Ehrlinger's study, addressed above, demonstrates the increased attribution of aggressive character traits to African Americans following ex-

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defendant"); Estes v. Texas, 381 U.S. 532, 545 (1965) ("The potential impact of television on the jurors is perhaps of the greatest significance.").

149. 366 U.S. 717, 722 (1961).

150. *See id.* at 722 (noting that pervasive opinions of guilt demonstrate "a pattern of deep and bitter prejudice" (citing Stroble v. California, 343 U.S. 181 (1961))).

151. *See Estes*, 381 U.S. at 545 ("[I]t is not only possible but highly probable that [television broadcasts] will have a direct bearing on [the juror's] vote as to guilt or innocence.").

152. In *Turner v. Louisiana*, 379 U.S. 466 (1965), the Court found the practice of placing jurors in the protective custody of deputies who were also state witnesses impaired the ability of jurors to impartially evaluate testimony. *Id.* at 474. As the Justices observed, the fate of the accused "depended upon how much confidence the jury placed in these two witnesses." *Id.*

153. Morgan v. Illinois, 504 U.S. 719, 739 (1992).

154. *Irvin*, 366 U.S. at 722 (citing Thompson v. City of Louisville, 362 U.S. 199 (1960)).

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

156. *See Irvin*, 366 U.S. at 723 ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."). Though *Irvin* was addressing the juror's impartiality as they "[stood] unsworne," *id.* at 722, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), applied a similar understanding to potential prejudice arising during the trial itself. *See Donnelly*, 416 U.S. at 644 (finding no due process violation where "the trial court took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence").

157. Levinson, Cai & Young, *supra* note 137, at 207.

posure to the flag.[158] Finally, Levinson, collecting other empirical research, has also argued that ambiguous racial priming leads to the perceptions of aggression in African American behavior and, more importantly, that people so affected by the prime attribute this aggression to dispositional factors, like violent personality.[159] Increased activation of these kinds of implicit bias makes the accused seem not only guiltier but also more deserving of the death penalty.[160]

Moreover, these subconscious preconceptions about guilt and aggression cannot be consciously set aside. This is true especially because these initial trait attributions and predispositions influence subsequent recall and processing of case-relevant information. It is not merely that perpetrator skin tone predicts tendency to associate African Americans with factual guilt; perpetrator skin tone predicts juror tendency to interpret ambiguous evidence as indicative of guilt.[161] Levinson and colleagues have also found that, independent of the race of the accused, the implicit association between African Americans and guilt predicts juror tendency to evaluate evidence to the detriment of the accused.[162] Another study revealed significant implicit racial bias in juror recall of case relevant facts.[163] This study demonstrated stereotype-consistent failures to recall mitigating information and falsely remembered aggravating facts.[164] Because the Confederate flag is able to increase the activation of the aforementioned cognitive processes, it seriously impairs the jurors' ability to hear a case impartially.

b. The Presumption of Innocence

The presumption of innocence is another constitutionally mandated component of the right to a fair trial. In the words of Chief Justice Burger, "[t]he presumption of innocence, although not articulated in the Constitution, is a component of a basic fair trial under our system of criminal justice."[165] The difference between the Sixth Amendment's impartiality requirement and the presumption of innocence is subtle but important.

158. *See supra* notes 129–135 and accompanying text.
159. Levinson, *supra* note 138.
160. As the Court observed in *Deck v. Missouri*, 544 U.S. 622 (2005), danger to the community is often a statutory and nearly always a relevant consideration of the capital jury. *Id.* at 633.
161. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 337 (2010).
162. Levinson, Cai & Young, *supra* note 137, at 207.
163. Levinson, *supra* note 138.
164. *Id.* at 399–402.
165. Estelle v. Williams, 425 U.S. 501, 503 (1976). In *Holbrook*, the Court further expanded on the constitutional imprimatur of the presumption of innocence:

> To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained.

Id. at 567–68; *see also* Deck v. Missouri, 544 U.S. 622 (2005) (addressing whether the practice of shackling violates due process despite the absence of a presumption of innocence).

While the latter entails the former's emphasis on decisions based in trial evidence, it also requires jurors to be mindful of the prosecution's burden to establish guilt beyond a reasonable doubt.[166] As Levinson has argued, subconscious biases in processing and memory lead jurors to presume the guilt of African Americans.[167] Further, this presumption resists conscious correction.[168] By priming these thoughts, the flag creates a great risk of subconscious appeal to this presumption in the case of an African American.

c. Reliability

Finally, just as the Due Process Clause imposes restrictions on the way that the jury determines guilt and innocence, it incorporates the Eighth Amendment's restrictions on the way that the capital jury determines sentence.[169] These restrictions address "the 'acute need' for reliable decisionmaking when the death penalty is at issue."[170] The Court has held that this acute need constitutes a concern "similarly weighty" to the presumption of innocence.[171] The "need for reliability in the determination that

166. "To implement the presumption, courts must be alert to factors that may undermine the fairness of the factfinding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle*, 425 U.S. at 503.

167. Levinson, Cai & Young, *supra* note 137, at 207.

168. *Id.*

169. *See Deck*, 544 U.S. at 622. In *Deck*, the Court considered whether the practice of shackling a defendant without justification offends due process in the penalty phase of a capital trial, where the presumption of innocence does not apply. The Court held that three factors justified extending due process protection against the practice of shackling to the penalty phase of a capital trial. *Id.* at 630–33. One such factor was "the 'acute need' for reliable decisionmaking when the death penalty is at issue." *Id.* at 632. The other two factors, impact on the right to counsel and impact on court decorum and integrity, *id.* at 632, are addressed *infra.*

170. *Id.* at 632.

171. *Id.* at 633. The Supreme Court has repeatedly held that capital sentencing is a unique process that creates the unique need for additional procedural safeguards for the rights of defendants. The Court has recognized that the death penalty is "unique in its severity and irrevocability." Gregg v. Georgia, 428 U. S. 153, 187 (1976) (joint opinion of Stewart, Powell & Stevens, JJ.). Owing to this unique quality alone, the Court has been willing to extend additional protection to defendants facing capital sentence. For instance, the death penalty has occasioned the most "extensive application" of the Eighth Amendment's narrow proportionality principle by the Supreme Court. Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (opinion of Kennedy, J.). However, the death penalty is not merely unique in its severity and irrevocability; rather, the Court has repeatedly recognized that the death penalty is unique in the process by which it is often imposed—the capital jury. Even in concluding that unlimited sentencing discretion did not violate the Due Process Clause, the Court recognized "the truly awesome responsibility of decreeing death for a fellow human." McGautha v. California, 402 U.S. 183, 207 (1971). The Eighth Amendment proscribes the "unacceptable risk that 'the death penalty [is] meted out arbitrarily or capriciously,' or through 'whim . . . or mistake,' . . . ." Caldwell v. Mississippi, 472 U.S. 320, 343 (1985) (quoting California v. Ramos, 463 U.S. 992, 999 (1983); Eddings v. Oklahoma, 455 U.S. 104, 118 (1982)). For this reason, the Court has, under the Eighth Amendment, shielded juries from sources of bias that "minimize the jury's sense of responsibility for determining the appropriateness of death." *Id.* at 341.

death is the appropriate punishment in a specific case" encompasses the requirement of "consideration of the character and record of the individual offender and the circumstances of the particular offense."[172] Thus, under the Due Process Clause, the Court has proscribed practices that impair the jury's ability to "weigh accurately all relevant considerations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death."[173]

The Confederate flag runs afoul of the acute need for reliable decisionmaking in capital sentencing. As a majority of Justices recognized in *Turner v. Murray*,[174] the "risk of racial prejudice infecting a capital sentencing proceeding" violates the requirement.[175] Implicit racial bias necessarily inhibits the jurors' ability to perceive the defendant as an individual. The Confederate flag, in triggering that bias, encourages the jury to see the defendant in group terms and to attribute to him characteristics associated with the group. This cognitive process alone denies the defendant the opportunity for meaningful individual consideration to which he is entitled under the Eighth Amendment. However, the problem is not just that racial bias deindividualizes the defendant; a constitutional issue also arises because the racial associations the juror is likely to make are uniformly negative and argue in favor of death. As the Justices in *Turner v. Murray* recognized:

> [A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[176]

In the modern capital sentencing scheme, the need for reliable decisionmaking also requires that the basis for the death sentence be relevant and accurate.[177] The Confederate flag violates this command in two

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172. Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976). The link between reliability and individualized determinations can be confusing, as the two virtues seem to conflict. However, reliability in the Eighth Amendment sense refers to procedural fairness and gives the Court license to impose greater uniformity in the procedures used to determine death sentences than it has in other contexts. *See* California v. Ramos, 463 U.S. 992, 998–99 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); Turner v. Murray, 476 U.S. 28, 33–34 (1986) (plurality opinion) ("[T[he jury is called upon to make a . . . 'unique, individualized judgment regarding the punishment that a particular person deserves.'").
173. *Deck*, 544 U.S. at 633.
174. 476 U.S. 28 (1986).
175. *Id.* at 35.
176. *Id.*
177. As Justice O'Connor explained, the Court has held that the need to "minimize the risk of wholly arbitrary and capricious action" by the jury can be satisfied by "pro-

senses. To be certain, racial prejudice injects an arbitrary and irrelevant basis for the imposition of capital sentence—the defendant's race. Further, as cognitive science demonstrates, reliance on racial schemas renders the recall and interpretation of relevant bases for capital sentence less accurate. Because exposure to the flag increases subconscious appeals to these schemas, it creates an unreasonable risk of unreliable, arbitrary sentences.

2. The Right to Counsel

The Court has given added scrutiny to sources of prejudice that impair the accused's other fundamental trial rights. Among those fundamental rights the Court has sought to shield from collateral harm is the right to counsel. This factor weighed prominently in the Court's finding that the presentation of the accused in shackles violated his due process rights in *Deck v. Missouri*.[178] The Court observed that shackling of the accused diminishes his right to counsel because it interferes with his "ability to communicate" with counsel.[179]

The Confederate flag is apt to breed conscious distrust among African American clients that perceive their white defense attorneys to be part of the system seeking to deprive them of life and liberty. The subconscious processes activated by the flag can amplify this conscious distrust or, where it does not exist, replicate its impact on attorney-client relationships.

Psychological experiments establish that racial priming can lead to nonverbal behaviors, which, in turn, cause persistent breakdowns in interracial communications and relationships. Numerous studies have probed how implicit bias, once activated, can "influence the quality of [human] social interactions."[180] One study demonstrated that racial priming leads to increased hostility between pairs engaged in collaborative activity.[181] Another study found high levels of implicit bias among whites to be connected with unfriendly nonverbal behavior toward African Americans.[182] The unfriendly nonverbal behaviors associated with in-

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cedural safeguards 'suitably directed and limited' the jury's discretion." *Ramos*, 463 U.S. at 999 (quoting *Gregg*, 482 U.S. at 189 (joint opinion by Stewart, Powell & Stevens, JJ.)) (internal quotation marks omitted). The state exercises some leeway on the substantive considerations it mandates the jury to consider in the exercise of its discretion. *Id.* However, "the Court has imposed . . . substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate." *Id.* at 1000; *see, e.g.*, *Caldwell*, 472 U.S. 320 (reversing sentence where the prosecutor assured the jury that error would be corrected on appeal).

178. 544 U.S. 622 (2005).

179. *Id.* at 631 (internal quotation marks omitted).

180. Kang, *supra* note 140, at 1524. For an overview of these studies, see *id.* at 1523–26.

181. Mark Chen & John A. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 554–55 (1997); *see also* Kang, *supra* note 140, at 1524 (interpreting Chen and Bargh's study).

182. Dovidio, Kawakami & Gaertner, *supra* note 143, at 62. In these studies, both the African American participants and white observers tended to rate the behavior of white participants toward the African American participants as unfriendly. *Id.*

creased activation of implicit bias include blinking, lack of eye-contact/averted gaze, speech hesitations and errors, less frequent smiling, and more physical distance.[183] These nonverbal cues are not trivial. In addition to unfriendliness, they lead to perceptions of conscious racism, deceit, and manipulation among African American conversation partners.[184] The resulting unfriendly or even hostile behavior creates a "positive feedback loop," which leads to even greater communication failures.[185]

The likelihood that increased activation of these non-verbal behaviors, such as can be expected with the Confederate flag, will impoverish interracial attorney-client relationships is unacceptably high. Contrary to the greatest aspirations of the *Gideon* Court, capital defense attorneys have been shown to possess significant implicit own-race preferences that increase the unfriendly and hostile behavior when primed.[186] These concerns are especially urgent in Caddo Parish, where interracial attorney-client relationships are the rule for an accused African American, as opposed to the exception. This research demonstrates that the risk of substantial deprivation of the right to counsel posed by the flag exceeds that which is acceptable under the Due Process Clause. The flag should therefore be removed as inherently prejudicial.

3. Practical Considerations

The flag's impact on the jury and on the accused's right to counsel provides a basis for its removal under settled due process principles. However, in addition to the fundamental rights threatened, the Court has taken several practical considerations into account when deciding whether a practice is inherently prejudicial. These considerations include: the authority imbued in the source of prejudice, the nature of the trial participant's exposure to the source of prejudice, and the feasibility of detecting and remedying the impact of the source of prejudice. Each of these factors weighs in favor of finding the flag inherently prejudicial.

a. Hidden Nature of Actual Prejudice

The Due Process Clause prohibits sources of prejudice especially when their impact is difficult to detect and understand and is therefore difficult to address after the fact. In *Deck v. Missouri*, the Supreme Court

183. Amodio & Devine, *supra* note 136, at 654; Dana R. Carney & Greg Willard, Racial Prejudice is Contagious (unpublished manuscript), *available at* http://www.columbia.edu/~dc2534/Contagion.pdf (summarizing research).

184. John F. Dovidio et al., *Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88, 98–99 (2002).

185. Kang, *supra* note 140, at 1524.

186. Professors Theodore Eisenberg and Sheri Lynn Johnson's study of capital defense attorneys revealed that this occupational group displays implicit biases consistent with those of the general population. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1551–52 (2004). That is, capital trial attorneys more easily associated their own race with good, but white attorneys' implicit own-race preference was stronger than that of African American attorneys. *See id.* at 1552. This study measured implicit bias through a response latency test, which is most highly correlated with leaked hostility and unfriendliness. Dovidio, Kawakami & Gaertner, *supra* note 143, at 66.

recognized that the finding of inherent prejudice is "rooted in [the Court's] belief that the practice will often have negative effects, but—like 'the consequences of compelling a defendant to wear prison clothing' or of forcing him to stand trial while medicated—those effects 'cannot be shown from a trial transcript.'"[187] Older due process prejudice cases reflect a similar sensibility. In *Estes v. Texas*,[188] the Court proscribed videotaping of trial proceedings in light of the fact that the practice "might cause actual unfairness—some so subtle as to defy detection by the accused or control by the judge."[189]

Implicit racial bias presents this kind of situation. On the one hand, some kind of impact is not only possible but highly probable; on the other hand, the bias is impossible to detect or control once it occurs. The Court emphasized that the videotaping, even the announcement that videotaping would occur, would have both "conscious" and "unconscious effect" on the jurors' judgment, both of which could not be evaluated.[190] Implicit racial bias, like videotaping, operates at a subconscious level. A majority of the Court has already acknowledged this in *Turner v. Murray*.[191] The impact of implicit racial bias, though well understood scientifically, is impossible to detect in non-experimental settings. It impacts the way the jurors perceive, interpret, and recall stimuli they receive throughout the trial.[192] The subconscious level at which implicit racial bias operates and the fact that it cannot be detected forecloses conventional remedies.[193] This fact strengthens the argument that the flag should be removed. By contrast, the ease of the proposed remedy of removing the flag cannot be ignored in interpreting whether the flag presents an unacceptable risk of a biased and arbitrary outcome.[194]

b. Official Nature of the Display

Biasing influences imbued with official authority increase the risk of prejudice sufficiently to be considered inherently prejudicial. In *Turner v.*

187. Deck v. Missouri, 544 U.S. 622, 635 (2005) (quoting Riggins v. Nevada, 504 U.S. 127, 137 (1992)); *see also* Peters v. Kiff, 407 U.S. 493, 504 (1972) (plurality opinion) (requiring no showing of harm where African Americans were systematically excluded from the jury because harm is virtually impossible to adduce where an entire perspective has been eliminated from the jury).

188. 381 U.S. 532 (1965).

189. *Id.* at 544–45.

190. *Id.* at 545.

191. *See* Turner v. Murray, 476 U.S. 28, 35 (1986) ("More subtle, less consciously held racial attitudes could also influence a juror's decision in this case."); *id.* at 42 (Brennan, J., concurring in part, dissenting in part) ("[I]t is similarly incontestable that subconscious, as well as express, racial fears and hatreds operate to deny fairness to the person despised.").

192. See *supra* section III.B.1. on the flag's impact on implicit bias in the jury.

193. *Cf. Donnelly*, 416 U.S. 637, 644 (1974) (finding no due process violation where "the trial court took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence").

194. *See* Turner, 476 U.S. at 36 ("[T]he risk that racial prejudice may have infected petitioner's capital sentencing [is] unacceptable *in light of the ease with which that risk could have been minimized*." (emphasis added)).

Louisiana,[195] the Court found that placing a sequestered jury in the care of sheriff's deputies who testified for the state violated due process.[196] The Court noted that this practice would have "undermined the basic guarantees of a trial by jury" even if the state witnesses had not been deputies.[197] However, the practice was particularly offensive in light of the deputies' position as the jury's "official guardians."[198] The Court made a similar observation in *Parker v. Gladden*.[199] There, the Court ordered a new trial in a case where the bailiff escorting the sequestered jury told one juror that he thought the accused was guilty and told another juror that the Supreme Court would correct any error in the trial.[200] Relevant to this ruling was the fact that "the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury which he had been shepherding for eight days and nights."[201]

The Court in *Turner v. Louisiana* and *Parker v. Gladden* addressed the impact of perceived authority on the *conscious* decisionmaking processes of the jury. The court officers in both cases had been cloaked in the official authority of the court, thereby raising an inference of prejudice from their conduct. Displays that impact decisionmaking through *subconscious* channels should likewise be treated as inherently prejudicial where their effect is heightened by authoritative status.

The flag's physical location and orientation give it an "official character" in the subconscious mind of observers that heightens its impact on decisionmaking. Professor Robert Shanafelt has argued that evolved social intelligence makes human beings sensitive to "topographic features of flag displays that signal relationships of subordination and dominance."[202] Shanafelt found that, unlike other displays of the flag, the raised flag is a display of dominance that naturally implies authority.[203] He further argued that the raised flag prompts the in-group to submit to the power structure represented by the flag and to subordinate those whom the flag does not represent.[204]

Our evolved cognitive process interprets the flag as an assertion of Confederate dominance, which in turn divides the community along racial lines. This increases the accessibility of racial schemas, increasing the potency of the prime. The suggestion is that both are equally relevant to the activities occurring in the courthouse—both supply tone and moral content to the judicial activity. In this way, the flag makes the activities in the courthouse more race salient, thereby increasing activation of implicit bias and its behavioral consequences.

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195. 379 U.S. 466 (1965).
196. *Id.* at 471–74.
197. *Id.* at 474.
198. *Id.*
199. 385 U.S. 363 (1966).
200. *Id.* at 363–64.
201. *Id.* at 365.
202. Robert Shanafelt, *The Nature of Flag Power: How Flags Entail Dominance, Subordination, and Social Solidarity*, 27 POL. & LIFE SCI. 13, 13 (2009), *available at* http://personal.georgiasouthern.edu/~robshan/flag%20power%20(Shanafelt).pdf.
203. *Id.* at 16.
204. *See id.*

c. Nature of Exposure

The Supreme Court has taken special steps to protect against sources of prejudice where they are continually or frequently exposed to the jury.[205] The presence of the Confederate flag is a regular and frequent visual stimulus for the jurors. Members of the jury must pass the flag in order to enter the First Judicial District courthouse. Thus, during trial, the jurors necessarily encounter the flag at least once every day. The jurors likely also encounter the flag as they leave the courthouse and each time they go to eat lunch. The capital trial of Felton Dorsey lasted for ten days. His jurors also attended jury selection over the course of a weeklong period. By the time they voted on sentence, each juror had seen the memorial at least a dozen, and likely two or three dozen times. This aspect of the jury's exposure to the flag argues further in favor of its removal under due process principles.

4. The Due Process Significance of Race Bias

The foregoing analysis has considered whether the psychological impact of the flag creates an unacceptable risk of prejudice to the accused in a criminal trial. To this point, the analysis has treated the due process issue presented by the Confederate flag like any other source of potential prejudice. However, the Supreme Court has treated sources of racial bias that arise during the trial with heightened vigilance under its due process precedents. Due process cases concerning voir dire on racial bias provide evidence of this particular concern. *Turner v. Murray*, discussed above, obviously supports the significance of race bias in the capital sentencing context. In *Ham v. South Carolina*[206] and *Ristaino v. Ross*,[207] the Court grappled with whether the Due Process Clause entitles an African American defendant to voir dire regarding the prospective jurors' racial biases. Though, under these precedents, the issue of whether a case merits race bias voir dire is subject to case-by-case determination,[208] the Court has found the accused entitled to voir dire on racial prejudice where aspects of the trial rendered race "inextricably bound up with the conduct of the trial" and were "likely to *intensify* any prejudice that individual members

205. In *Turner v. Louisiana*, one of the more troublesome aspects of the jurors' contact with the deputies was its "continuous" nature. *Turner*, 379 U.S. at 468, 473. Similarly, in *Donnelly v. DeCristoforo*, the Court made much of the fleeting nature of the prosecutor's illicit comments about the trial strategy of the accused. For instance, the Court observed that "the prosecutor's remark here, admittedly an ambiguous one, was but *one moment in an extended trial* . . . ." *Donnelly*, 416 U.S. at 645. Finally, in determining that forcing the accused to appear in prison garb violates due process, the Court observed that "[t]he defendant's clothing is so likely to be a *continuing* influence throughout the trial . . . ." Estelle v. Williams, 525 U.S. 501, 505 (1976) (emphasis added).

206. 409 U.S. 524 (1973).

207. 424 U.S. 589 (1976).

208. In each case, the court must determine "whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as (they stand) unsworne.'" *Id.* at 596 (citations omitted).

of the jury might harbor."[209] These cases thus establish a general principle that the accused is entitled to additional due process protection where the issue of race is injected into his proceeding.

This additional protection is justified by the Court's inattention to race bias in the interpretation of other clauses. In denying Warren McCleskey's Eighth Amendment claim, the Court stated "[b]ecause of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system."[210] The Court thus shifted the burden of preventing racial prejudice in death cases from the prohibition on cruel and unusual punishment to other provisions of the Constitution such as the Due Process Clause.

Moreover, additional vigilance against racial bias advances not only actual justice, but also the appearance of it.[211] The appearance of justice is a necessary component of the decorum and integrity of the courtroom that the Court has sought to preserve in its due process jurisprudence.[212] The presence of racial bias mars the integrity of proceedings.[213] Thus, a

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209. *Id.* at 597 (emphasis added). In *Ham*, the accused himself put race directly at issue. *Id.* Therefore, eliminating the thing that injected race into the proceedings was not an option. In Caddo, however, eliminating the source of racial prejudice is a viable option.

210. McCleskey v. Kemp, 481 U.S. 279, 309 (1987) (citing Batson v. Kentucky, 476 U.S. 79, 85 (1986)). This passage is famously laden with many ironies. *See* Craig Haney, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15 L. & HUM. BEHAV. 183, 200 (1991).

211. This reasoning is most prominent in the realm of jury selection. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 175–76 (1986) (noting that systematic exclusion of blacks and Mexican-Americans creates the appearance of unfairness); *Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

212. Decorum, dignity, and integrity are paramount due process concerns. In *Deck*, the Court included these factors among its reasons for extending due process prohibition to shackling during the penalty phase of trial. Deck v. Missouri, 544 U.S. 622, 631 (2005); *see also* Illinois v. Allen, 397 U.S.337, 344 (1970) ("[T]he use of [shackling] is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."); Estes v. Texas, 381 U.S. 532, 574 (1965) ("The sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization."). As the Court stated in *Estes*:

> [T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process.

Id. at 561.

The Court has repeatedly recognized that these notions of dignity and integrity hinge in part upon the appearance of fairness. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2266 (2009) (noting the connection between the integrity of the judiciary and public confidence in fairness and integrity).

213. *See* Edmondson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) ("Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."); Sawyer v. Smith, 497 U.S. 227, 248 (1990) (Marshall, J., dissenting) (observing that the *Batson* rule has a fundamental impact on the integrity of the criminal process, as opposed to its accuracy); Peters v. Kiff, 407 U.S. 493, 502–03 (1972) (plurality opinion) ("Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the

court has ample reason to ensure that a prejudicial symbol like the flag is removed and to appeal to due process to do it. The psychological impact of the flag must lead to the conclusion that it is inherently prejudicial to an African American defendant. Ehrlinger's study has demonstrated that the flag creates an unacceptable risk that implicit racial bias will impact the jury and defense counsel to the detriment of the accused. An array of other experimentation has shown us what the consequences of this heightened implicit bias are. These behavioral consequences severely undermine the integrity of adjudication and continue a legacy of African American oppression through the criminal justice system.

C. A New Assessment under the Privileges or Immunities Clause

Justice Thomas, in his concurring opinion in *McDonald v. City of Chicago*, advocated for a fundamental reorganizing of the Court's Fourteenth Amendment jurisprudence. *The Slaughter-House Cases*, Justice Thomas opined, "left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship."[214] Post-*Slaughter-House* decisions that narrowly construed its holding were based on shaky—and racially prejudiced—ground. Justice Thomas implies that a case in which the Court reversed the convictions of "members of a white militia who had brutally murdered as many as 165 black Louisianians" should not be followed—at least because of its "circular reasoning."[215]

1. General Principles

The key to a challenge under the Privileges or Immunities Clause lies in the designation of a "privilege or immunity" as one that is conferred by virtue of federal citizenship to the Union.[216] *The Slaughter-House Cases*,[217] decided five years after the ratification of the Fourteenth Amendment, held that the Privileges or Immunities Clause protects only rights of United States citizenship and not those of state citizenship. Before coming to its conclusion, however, the Court undertook a detailed examination of the purpose and meaning of the Reconstruction Amendments. The "one pervading purpose" that lay "at the root" of the Privileges or Immunities Clause, was "the freedom of the slave race, the security and firm establishment of that freedom, and the *protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him*."[218]

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appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.").

214. McDonald v. City of Chicago, 130 S. Ct. 3020, 3060 (2010) (Thomas, J., concurring).
215. *Id*. (citing LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008)).
216. *See* Saenz v. Roe, 526 U.S. 489, 503–04 (1999); *see also* Washington v. Glucksburg, 521 U.S. 702, 759 n.6 (1997) (Souter, J., concurring); The Slaughter-House Cases, 83 U.S. 36, 75 (1873).
217. 83 U.S. 36 (1873).
218. *Id.* at 71 (emphasis added).

The Court indicated that the most important right of federal citizenship is freedom from racial oppression, as made possible by the Union's victory in the Civil War:

> The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.[219]

A citizen of the southern portion of the United States must therefore owe his privilege of living in a nation governed by the principles of the victors of the Civil War to the federal government, and not to the individual state in which he lives. Quite literally, a state's action in flying the Confederate flag over its halls of justice "abridge[s] the privileges"[220] vested in its citizens by virtue of the federal government. Caddo Parish citizens have just as much of a right to national citizenship as citizens of northern states, or places actually conquered by Union troops. The Confederate flag, as a symbol of a set of values that are altogether inconsistent with the purpose of the Privileges or Immunities Clause as laid out in *The Slaughter-House Cases*, infringes upon the privileges of being a citizen of the United States.

A challenge under the Privileges or Immunities Clause would therefore be a viable option in the civil context. In the criminal context, and even more fundamentally where the death penalty is involved, a challenge to the flag under this framework presents a stronger case. The interest at stake is exponentially higher, as is the appearance of "oppressions of those who had formerly exercised unlimited dominion"—formerly slave owner, now judge and prosecutor. A Louisiana capital defendant has the privilege not to be tried under the flag of the illegal Confederate States of America and immunity against the influence of race in his capital sentencing proceeding. To try a black citizen of the United States under the Confederate flag is patently inconsistent with the Privileges or Immunities Clause.

2. *Jurors' Rights*

A criminal defendant in Louisiana who is accused of a felony has a right to a jury trial; this right stems not from his citizenship in the state of Louisiana, but from his federal citizenship. Indeed, under the civil law of pre-purchase Louisiana, juries were not a part of the criminal justice system.[221] As a condition of the Louisiana Purchase, President Jefferson re-

219. *Id.* at 68.
220. U.S. CONST. amend. XIV § 1.
221. *See* Shael Herman, *The Code of Practice of 1825: The Adaptation of Common Law Institutions*, 24 TUL. EUR. & CIV. L.F. 207, 226–27 (2009).

quired the new state of Louisiana to apply the United States Constitution, in particular the writ of habeas corpus and the right to a jury trial.[222] The Louisiana Cession Act specifically provided that:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, *to the enjoyments of all the rights, advantages and immunities of citizens of the United States* . . . .[223]

Nevertheless, Louisiana was loath to embrace the right to a jury trial until it was compelled to do so in *Duncan v. Louisiana*.[224] And as demonstrated by cases such as *Campbell v. Louisiana*[225] and *Snyder v. Louisiana*,[226] Louisiana has also resisted both the defendant's right to a jury selected pursuant to nondiscriminatory criteria and the juror's right not to be struck on the basis of race. Given this history, these rights may be fairly considered—in Louisiana at least—"rights of United States citizens against the States."[227]

It is well established that race-based exclusion from jury service violates the prospective juror's right to participate in civic life.[228] Under *Batson v. Kentucky*[229] and its progeny, a prospective juror's right to equal protection is violated when he is peremptorily struck on account of his race.[230] At the same time, the state violates the juror's right to

> participate in the administration of the law, as juror[ ]. [It] is practically a brand upon [him], affixed by the law, an assertion of . . . inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[231]

A Louisiana citizen called for jury service must be entitled to the privilege of serving on a jury without being removed on the basis of race, and the immunity from being compelled to serve under the Confederate flag and its attendant values and associations. A black prospective juror has the right, under the Privileges or Immunities Clause, not to be forced to choose between serving under the flag of those who would reduce his ancestors to chattel slavery and giving up the opportunity to participate

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222. Jeremiah E. Goulka, *The First Constitutional Right to Criminal Appeal: Louisiana's Constitution of 1845 and the Clash of Common Law and Natural Law Traditions*, 17 TUL. EUR. & CIV. L.F. 151, 161–63 (2002).
223. Treaty Between the United States of America and the French Republic, art. III, Apr. 30, 1803, 8 Stat. 202, T.S. No. 86 (emphasis added).
224. 391 U.S. 145 (1968) (holding that the Sixth Amendment right to a jury trial is applicable to the states).
225. 523 U.S. 392 (1998) (remanding where, for the prior 16 1/2 years, no black person had served as grand jury foreperson even though more than 20 percent of the registered voters were black).
226. 552 U.S. 472 (2008) (holding that the prosecution's use of peremptory challenges was racially discriminatory).
227. McDonald v. City of Chicago, 130 S. Ct. 3020, 3073 (2010) (Thomas, J., concurring).
228. *See* Powers v. Ohio, 499 U.S. 400, 406–07 (1991).
229. 476 U.S. 79 (1986).
230. *Id.* at 87; *see* Holland v. Illinois, 493 U.S. 474, 489 (1990) (Kennedy, J., concurring).
231. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

in the jury system. This right is violated every day in Caddo Parish. In the recent Caddo Parish case of *State v. Felton Dorsey*,[232] it was violated on the record.

On May 14, 2009, Carl Staples was summoned for jury duty for the first time after thirty years of living in Caddo Parish. Knowing that the courthouse flies a Confederate flag, he called the clerk's office to state his objection to serving under the flag. The clerk told him that if he did not show up for jury duty, a warrant would be put out for his arrest. So he swallowed his pride and walked beneath the Confederate flag and past the hulking monument to the confederacy into Caddo Parish court, where a jury was being chosen for the capital trial of Felton Dejuan Dorsey.

When called for individual examination, Staples made his position known:

> "[The flag] is a symbol of one of the most . . . heinous crimes ever committed to another member of the human race, and I just don't see how you could say that, I mean, you're here for justice, and then again you overlook this great injustice by continuing to fly this flag which . . . put[s] salt in the wounds of . . . people of color. I don't buy it."[233]

The State promptly removed him for cause, and then proceeded to strike five out of the remaining seven qualified black prospective jurors. The trial judge found no prima facie case of discrimination when defense counsel raised a *Batson* challenge. Dorsey, a black man accused of killing a white victim, was convicted and sentenced to death by a jury of eleven whites and one black juror. While the noose that for years adorned the halls of the Caddo Courthouse has been removed, the climate of lynching is alive and well in Caddo Parish and the Confederate flag preserves that climate.

Carl Staples' courageous stand against the flag was an aberration in the Caddo Parish jury system. It is not an everyday occurrence that a prospective juror who is offended by the courthouse flag shows up for service, and then moreover speaks out against the flag on record. It is much more likely that those black jurors who find the flag offensive and demeaning simply avoid jury service. This is oppression. And while not everyone who finds the flag offensive is black, the fact that blacks are offended by a flag that celebrates the regime of black slavery is no coincidence. Nor is the fact that "bloody" Caddo Parish, which once boasted the highest lynching rate in the South, has become one of the most death-penalty prone parishes in Louisiana—at least when the defendant is black. It is time for the flag to come down in Caddo Parish.

IV. THE REPRESENTATIVE CHARACTER OF THE JURY

As Mr. Staples' statements demonstrate, the placement of the Confederate flag in front of the courthouse undermines the legitimacy of the entire system of justice. Because of the flag's adoption by white supremacist

232. No. 251,406 (La. Dist. Ct. 2009).

233. Transcript of the Proceedings on May 14, 2009, State v. Felton Dorsey, No. 251,406 (La. Dist Ct. 2009) (on file with author).

groups and segregationists, its presence outside the courthouse is most apt to undermine the justice system's legitimacy among African American members of the community.[234]

Mr. Staples' decision to opt out of the jury selection process had a direct impact on the racial composition of Mr. Dorsey's jury venire, which implicates the Sixth Amendment's fair cross-section requirement. In order to establish a prima facie case of a fair cross-section violation, the accused must demonstrate (1) that the allegedly excluded group is a distinctive group in the community, (2) that representation of that group in the jury venire is not fair or reasonable in relation to the number of such persons in the community, and (3) that the underrepresentation is caused by systematic exclusion of the group.[235] While African Americans are a distinctive group for fair cross-section purposes,[236] the absence of a single juror, like Mr. Staples, would not create the disparity in representation needed to establish a prima facie case.[237] However, it does not take much creativity to imagine the impact of Mr. Staples' decision were it multiplied by hundreds of African American venire members called to serve in tens of dozens of capital cases that have taken place in the parish since the flag was erected.

This possibility is far from remote or speculative. It is a live risk that continues to threaten the democratic virtue of the jury.[238] This fact is apparent when one considers how much a potential juror's desire to serve factors into the jury selection process and how fundamentally the perceived legitimacy of the system impacts the potential juror's desire to serve. Regarding the latter, the relationship between legitimacy and willingness to participate in risky or burdensome government processes has been studied extensively in the context of policing. Scholars have concluded that the perception of legitimacy is necessary to producing minority willingness to cooperate with police by undertaking the risk of

234. Over the course of debates involving the Confederate flag, many have objected to this line of argument. *See, e.g.*, NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990). Professor I. Bennett Capers has stated that a greater response from African Americans is rational, though not established by empirical observation. Capers, *supra* note 119, at 140–41. While Capers' response raises a good point, it also appears that the flag disproportionately offends African Americans, at least in Shreveport. The most recent attempt by African American legislators to put the decision to remove the flag to popular vote broke down squarely along racial lines. Kerry Benefield, *Debate Resumes Over Controversial Flag*, TIMES (Shreveport), May 10, 2002, at 1B.

235. Duren v. Missouri, 439 U.S. 357, 364 (1979).

236. Lockhart v. McCree, 476 U.S. 162, 175 (1986).

237. Though the Supreme Court has never required a disparity of any particular size, lower courts have set their own standards. The Fifth and Eleventh Circuits, for instance, have adopted a ten percent disparity—that is representation in the jury pool that is ten percentage points less than representation in the jury-eligible community—as their benchmark. United States v. Butler, 611 F.2d 1066, 1070 (5th Cir. 1980); United States v. Grisham, 63 F.3d 1074, 1078–79 (11th Cir. 1995). In a venire of 100 or 150 jurors, one less African American potential juror would fall shy of ten percent disparity mark.

238. *See* Taylor v. Louisianna, 419 U.S. 522, 527 (1975) ("To exclude racial groups from jury service was said to be 'at war with our basic concepts of a democratic society and a representative government'" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940))).

assisting in investigation and the burden of collectively producing security.[239]

Like cooperation with the police, participation in jury service imposes risks and burdens on those who report for jury duty and ultimately serve on juries. Because of sequestration,[240] the length of capital voir dire, and the polarizing nature of the death penalty, jury service in a capital case can require jurors to sacrifice significant amounts of time, money, personal and familial obligations, religious observances, and sincerely held beliefs. Moreover, jurors may perceive a risk of retaliation from the accused and community backlash from a controversial verdict. The individual juror's desire to serve must overcome these risks and burdens in order for the juror to be willing to serve.[241] Research has shown that the perception of legitimacy is essential to producing this willingness.[242]

An individual jurors' willingness to serve will either directly or indirectly determine whether he or she serves. For this reason, it is possible for jurors to be excluded in ways far less dramatic than Carl Staples. For instance, an African American juror may feel less inclined to embrace jury duty as a civic duty in the face of a surmountable personal hardship, as a result of the presence of the Confederate flag. Because judges in Louisiana exercise wide latitude to excuse jurors for hardship reasons,[243] that juror would in all likelihood be excused from service. Similarly, an Afri-

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239. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 262–63 (2008). Professor Tom Tyler has suggested that "[P]eople's willingness to buy into and voluntarily accept decisions that may require them to accept outcomes that they do not want, or to engage in self-control over their actions, is enhanced by the judgment that one has been treated fairly by the police." Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 92 (2004). Perception of fair treatment, in turn, leads to a perception of legitimacy.

240. LA. CODE CRIM. PROC. ANN. art. 791(B) (2010) (providing for sequestration of jurors after swearing of the oath).

241. *Cf.* Tyler & Fagan, *supra* note 239, at 262.

242. *Id.*

243. *See* LA. CODE CRIM. PROC. ANN. art. 783(B) (providing for the court's ability to excuse a person from jury service "on its own initiative or on recommendation of an official or employee designated by the court," where jury service "would result in undue hardship or extreme inconvenience"). Louisiana has repeatedly emphasized the robust nature of the judge's discretion to excuse for hardship reasons. The State's jurisprudence allows "the trial judge, within his sound discretion, to release prospective jurors in advance of voir dire examination; the trial judge's decision in this matter is not to be disturbed unless there is a showing of fraud or collusion resulting in prejudice to the accused." State v. Gomez, 319 So. 2d 424, 425 (1975) (citations omitted). The trial court's discretion to grant excuses for hardship is thought to be so vital to the conduct of trial, that it has been interpreted to qualify the right of the accused to examine potential jurors under Article I, section 17 of the Louisiana Constitution. *See id.* at 426. As the official revision comment to Article 783 states:

> [T]here is some conflict between the defendant's right to have at hand the entire venire, and the court's authority to excuse a large part of the venire in advance. However, the right of the judge to excuse in advance is essential, since many persons chosen for the venire have valid reasons for being excused. The discretion of the judge must be relied upon to avoid abuse, and abuse is reversible error.

LA. CODE CRIM. PROC. ANN. art. 783, Official Revision Comment (b).

can American potential juror may feel less inclined to set his or her personal opposition to the death penalty aside in a capital case, if that potential juror perceives the entire justice system as illegitimate. This juror could be dismissed for cause under state law,[244] and a prosecutor seeking the death penalty would have an incentive to seek to remove such a person. Finally, an African American potential juror may opt out at the earliest possible stage by declining to respond to a jury summons. Though state law provides that the juror can be subjected to contempt proceedings for failing to comply with such a summons, the procedures for doing so are rarely invoked by trial courts.[245]

This kind of opting out is particularly problematic because it is difficult to track and nearly impossible to defend against. Mr. Staples made a conscious decision to avoid jury service and made the court aware of his reasons for doing so. However, it would be naïve to assume that society will be aware each time a potential African American juror opts out because of the flag. Not all jurors possess the introspective awareness to know why they do not want to serve and the courage to voice an objection to the flag. A potential juror may have a sense that the criminal justice system is flawed, but not know the extent to which the flag factors into that feeling. As the examples above demonstrate, potential jurors may opt out in subtle ways, leveraging the flag as conscious or subconscious motivation for that decision. A criminal defense attorney cannot be expected to deconstruct these complex feelings during voir dire. Thus, the magnitude of this problem could go undetected for quite some time.

Though the Supreme Court has given approval to "death qualification,"[246] hardship exclusion,[247] and the failure to enforce juror summonses,[248] it has not approved of influences that might create or exacerbate a racially disproportionate impact of these processes. If anything, members of the Court have signaled disapproval. Justice Stevens

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244. LA. CODE CRIM. PROC. ANN. art. 798(2). The U.S. Supreme Court has stated that the state may exclude for cause any juror whose "views [on the death penalty] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The state's power to exclude does not extend to jurors who "state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176 (1986). *But see* John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS, Dec. 13, 2010, *available at* http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/?pagination=false ("Whereas [*Witherspoon v. Illinois*] made clear that opposition to the death penalty is not a permissible basis upon which to disqualify or exclude prospective jurors willing to set aside their beliefs in deference to the rule of law, later cases—most notably the 5–4 decision three years ago in *Uttecht v. Brown*—allow such opposition to be treated as disqualifying because it may substantially impair a juror's ability to follow the trial judge's instructions.").

245. Most summonses arrive via regular mail. In order to obtain a contempt citation for the failure to appear for jury duty, personal service or service via regular or certified mail with return receipt requested are necessary. LA. CODE CRIM. PROC. ANN. art. 417(C)(2)(d).

246. Lockhart v. McCree, 476 U.S. 162 (1986)

247. *See* Berghuis v. Smith, 130 S. Ct. 1382 1395–96 (2010).

248. *See id*.

expressed "special concern" over the use of death-qualification to obtain juries predisposed to conviction and death sentence in violation of the fair cross-section requirement.[249] He would be equally disturbed by underrepresentation of African Americans on a jury venire caused by a combination of death qualification and the Confederate flag.

The flag creates an impermissible threat to the basic precept that the jury must be drawn from a fair cross-section of the community. It is no answer to say that the African American potential jurors ultimately have equal power to serve if they want and are able, or that the reason for their exclusion is internal to them. This is true in some sense, but it does not resolve the salient constitutional issues. The fair cross-section requirement is premised on the juror's right of shared responsibility and inclusion in political life, not her power to determine whether she ultimately participates.[250] Moreover, the fair cross-section requirement is also premised on the defendant's right to an impartial jury—that is, a jury that is impartial in an individual case but also possessed of "diffused impartiality."[251] This cannot be satisfied with an unrepresentative jury venire, regardless of whether the sources of underrepresentation are entirely external to the juror or not. Most importantly, the Supreme Court has never required that the sources of exclusion be entirely external to the juror. *Duren v. Missouri*[252] involved an automatic exemption for women selected for jury duty that existed in five states at the time.[253] The provision of these exemptions was deemed impermissibly to exclude women in spite of the fact that the juror herself had to request the exemption.[254] Thus, under the Sixth and Fourteenth Amendments and in recognition of the fair cross-section requirement, the Confederate flag should be removed from the Shreveport courthouse.

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249. Justice Stevens wrote:

> Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a "death qualified jury" is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.

Baze v. Rees, 553 U.S. 35, 84 (2008) (Stevens, J., concurring); *see also* Uttecht v. Brown, 551 U.S. 1, 35–36 (2007) (Stevens, J., dissenting) (explaining that "[m]illions of Americans oppose the death penalty," and that "[a] cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases").

250. *See* Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975) ("'[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.'" (quoting Thiel v. S. Pac. Co., 328 U. S. 217, 227 (1946) (Frankfurter, J., dissenting))).

251. *See id*.

252. 439 U.S. 357 (1979).

253. *Id.* at 359–60.

254. *Id.*

V. THE CONFEDERATE FLAG, *MCCLESKEY,* AND SYSTEM-WIDE RACIAL BIAS

This Article has thus far sought to demonstrate why the existence of a Confederate flag at a courthouse violates well-established principles of the Due Process and Privileges or Immunities Clauses of the United States Constitution. It now turns to examine the implications of the flag for how courts evaluate evidence of systemic racial bias in sentencing. The starting and ending points for this question is *McCleskey v. Kemp*.[255]

The Supreme Court's equal protection jurisprudence in the context of the criminal justice system has fixated on the intent prong of the analysis. Almost never do we see a criminal law containing an explicit race classification.[256] The burden is thus heavy on criminal defendants to prove both discriminatory intent and impact. Although certain cases seemingly leave the door open for equal protection claims made solely upon the impact prong, in criminal cases the Court has virtually closed that door.

When Warren McCleskey attempted to make a claim of race discrimination in his case based on clear statistical evidence of discriminatory impact—but no evidence of discriminatory intent—the Court held that he failed to carry his burden.[257] McCleskey had presented evidence that a defendant in Georgia accused of killing a white victim was eleven times more likely to be sentenced to death than if he had been accused of killing a black victim. Further, a black defendant convicted of killing a white victim was twenty-two times more likely to be sentenced to death than if the victim had been black. Clearly there was a "dual system" at work in the Georgia capital sentencing scheme: one for those accused of killing white victims and one for those accused of killing black victims.[258] The Supreme Court was not satisfied with Warren McCleskey's claim. The Court held that while "stark" discriminatory impact may obviate the need to prove discriminatory intent,[259] McCleskey needed far more powerful proof.[260] Because each capital jury is "unique in its composition"

255. 481 U.S. 279 (1987).

256. *But see* Miller-El v. Cockrell, 537 U.S. 322, 334–35 (2003) ("A manual entitled 'Jury Selection in a Criminal Case' was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service.").

257. McCleskey was a young black man convicted of killing a white police officer in the course of a robbery of a furniture store in Fulton County, Georgia. His jury, eleven whites and one black juror, returned a death sentence.

258. Brief of Petitioner-Appellant at 15, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811).

259. *McCleskey*, 481 U.S. at 294 n.12.

260. In a memorandum to Justice Powell, however, Justice Scalia wrote:

> I plan to join Lewis [Powell]'s opinion in this case, with two reservations. I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury deliberations and (hence) prosecutorial decisions is real, acknowledged in the decisions of his court, and

and called upon to consider "innumerable factors,"[261] a capital defendant must be armed with evidence of racial animus at work in his case.[262]

Since *McCleskey v. Kemp* was decided in 1987, many courts have rendered decisions denying claims of race discrimination in capital cases. Commentators and jurists have condemned the *McCleskey* standard as impossible for a criminal defendant to meet.[263] It is highly unlikely that in a given case there will be actual evidence of racially discriminatory intent on the part of the state.

Enter the Confederate flag. In a case where the state tries a black defendant for the murder of a white victim under the shadow of the Confederate flag, the inference of discriminatory intent is plainly evident to some but invisible to many.[264] Caddo is its own case study in the discriminatory application of the death penalty. Even despite the presence of the Confederate flag and the historical context surrounding its placement at the courthouse, capital defendants in Caddo may find themselves, like Warren McCleskey, unable to adduce sufficient evidence of discriminatory purpose under existing case law. While the flag may not satisfy the *McCleskey* standard, it provides a better context for understanding system-wide race disparities in sentencing. This context argues in favor of reconsidering *McCleskey*'s onerous intent requirements.

First, the flag's demonstrated impact on the subconscious mind renders more credible the claim that "discrimination extends to every actor in [a given] capital sentencing process."[265] Cognitive psychology has

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ineradicable, I cannot honestly say that all I need is more proof. Sincerely, Nino.

Re: No. 84-6811, McCleskey v. Kemp, Memorandum to the Conference from Justice Antonin Scalia (Jan. 6, 1987) (on file with the Thurgood Marshall Papers in the Library of Congress, Washington, D.C.). Justice Powell admitted after he retired that he wished he would have sided with Justice Brennan in *McCleskey*. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY (1994).

261. *McCleskey*, 481 U.S. at 294. The Baldus study in fact controlled for hundreds of variables. *See* David Baldus, et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 365 (1994).

262. *McCleskey*, 481 U.S. at 292–93.

263. *See, e.g.*, Andrews v. Shulsen, 802 F.2d 1256, 1267 n.10 (10th Cir. 1990) ("[W]e believe that the standard adopted by the majority in McCleskey is too stringent. While intent is difficult enough to prove, intent that permeates an entire sentencing system is practically beyond proof."); Chaka M. Patterson, *Race and the Death Penalty: The Tension Between Individualized Sentencing and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 84 n.236 ("The Court imposed an impossible task on McCleskey in setting forth his burden of proving discriminatory intent on the part of the actors in his case. This would involve proving that jury members were prejudiced and that they discriminated against him. The Court, however, claimed the jury could not be called to testify as to their motives.").

264. *See* Minutes, Shreveport Biracial Commission (Nov. 28, 1988) ("[One member of the audience said] Shreveport is a racist city. You must face that fact. [He] recommends the Commission remove the profane rebel flag from the Courthouse. . . . Mrs. Kohlbacher (from the audience) said she thought that the southern community had respect for the rebel flag because it embodied the spirit of states [sic] rights. The flag has always stood for spirit. *She said she will fight to the death for a person's freedoms*." (emphasis added)).

265. *McCleskey*, 481 U.S. at 292.

shown that there is common ground in the way that people think and process information. The flag makes race a bigger factor in all of these processes. Therefore, the Court's assumption that, for instance, the uniqueness of each jury forecloses a finding that race impacted the outcome of sentencing is unwarranted. Admittedly, the flag does not present evidence of a decisionmaker's conscious discriminatory purpose, as *McCleskey* requires. The real question is: if we can point to a specific factor that has been demonstrated to increase race-based decisionmaking, why should lack of a specific discriminatory purpose be a barrier to judicial scrutiny and appropriate relief?

More importantly, the flag and the history it represents undermine the central theme in *McCleskey*'s equal protection analysis—that the *procedures* in place for trying cases and challenging discrimination in those cases are sufficient to allow courts to ignore discriminatory patterns in sentencing. Carl Staples' statements totally refute the Court's assumptions about individual sentences handed down by "properly constituted" juries.[266] Any system of jury selection which engenders conscientious objectors like Carl Staples cannot be said to be functioning properly. Moreover, there are no procedures currently in place to catch subconscious acts of racial discrimination. Even in situations where someone has consciously discriminated, however, the existing corrective procedures are insufficient because they rely on oversight by actors influenced by subconscious stereotyping. How can a judge engaged in subconscious stereotyping be expected to effectively scrutinize the justification for a pretextual peremptory strike that is based on the same stereotype?[267] These factors suggest that the current way of looking at racial patterns under *McCleskey* is incorrect and likely to perpetuate massive injustice.

VI. CONCLUSION

The Confederate flag has important implications for how we think about race disparities in the criminal justice system. The flag exposes just how unfounded many of *McCleskey v. Kemp*'s central premises can be in a given situation. While the Caddo flag is in a sense exceptional, it nevertheless has nationwide implications. What is captured by the Confederate flag in front of the courthouse in Shreveport operates elsewhere under the cloak of official race neutrality. This analysis of the flag will hopefully inform future discussions and jurisprudence on manifest racial disparities and injustice. However, the main goal of this article has been to educate about the depths of injustice reflected in the courthouse flag itself.

The flag threatens the criminal defendant's rights, as well as those of jurors and prospective jurors, and serves as a symbol of the ongoing oppression of African American citizens. A system of justice that guarantees equal protection cannot operate fairly under a symbol of government favoritism of one race over another. The risk of race influencing any as-

266. *Id.*

267. Equally disconcerting are the common sense and demeanor based judgments that judges are expected to bring to rulings on challenges for cause. *See* Uttecht v. Brown, 551 U.S. 1, 7 (2007).

pect of a capital case—the charging decision, whether the death penalty is sought, which jurors are chosen, which arguments are made, what language is used[268]—is too great, and too elusive, for the Confederate flag to be allowed to remain at the steps of a courthouse where capital cases are tried.

A system of justice that allows race to play a role cannot satisfy the basic requirements of the Constitution. What is the Confederate flag, then, if not a reference to race?[269] It is a "shortcut from mind to mind"[270] that celebrates the regime of black slavery. Further, with its inscription "LEST WE FORGET," the monument at Caddo Courthouse instills in black criminal defendants the message that "we"—the white political and economic power in Caddo—were the slave masters. "We" were the soldiers that fought and died for the right of plantation owners to enslave black people. "We" were the Democrats of the late nineteenth and early twentieth century that passed the Jim Crow laws and constitutional amendments. Then, "we" were the segregationists of the civil rights era. It is impossible to extinguish race from the message of the courthouse Confederate flag. To say that there is no chance that the flag "might cause prejudice" would be to view the flag in a vacuum and overlook the past 150 years of U.S. history. And, as the monument commands, we must not forget.

268. *See generally* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1991).

269. *See* Ehrlinger et al., *supra* note 129, at 13 ("We argue that the cultural associations between the Confederate flag and racial bias led to greater negativity toward Blacks after exposure to this meaningful symbol.").

270. W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).