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## Criminality and Corpulence: Weight Bias in the Courtroom

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Valena Elizabeth Beety\*

### INTRODUCTION

Despite being a weight-obsessed culture, the United States and other western countries are becoming heavier.<sup>1</sup> Being fat is no longer personal.<sup>2</sup> In study after study, hostility toward fat, also known as weight bias, is increasing at a rate that outpaces the rate of obesity.<sup>3</sup>

American society condemns size and weight because individuals are viewed as personally responsible for their bodies. Fat<sup>4</sup> is understood as

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\* Associate Professor of Law, West Virginia University College of Law; JD, University of Chicago; BA, University of Chicago. I am deeply appreciative of comments on earlier versions of this article by Geoffrey Stone, Mary Anne Case, Deborah Rhode, Adam Cox, Lior Strahilevitz, Jane Korn, Yofi Tirosh, Bertrall Ross, Holning Lau, Saru Matambanzo, Adam Feibelman, Marilyn Wann, Sondra Solovay, Tami Kricheli-Katz, Matthew Hall, Richard Gershon, Mercer Bullard, and Nora Niedzielski-Eichner. I am also thankful for the opportunities to present this article at the 2011 Law and Society Conference, to faculty members at the University of Chicago Law School in September 2011, and to faculty members at the University of Mississippi School of Law in October 2011.

This piece is dedicated to Jack Williams and Nina Rifkind, two admirable attorneys who represented Paul Everette Woodward in post-conviction. Woodward was a fat man on death row in Mississippi, a man who undoubtedly faced bias because of his weight, and who spent his final hours with Jack and Nina telling stories and comforting *them*. May we all be touched by such grace.

<sup>1</sup> Yofi Tirosh, *Weighty Speech: Addressing Body Size in the Classroom*, 28 REV. EDUC., PEDAGOGY & CULTURAL STUD. 267, 269 (2006).

<sup>2</sup> *But see id.* at 271 (“the thought of talking from experience about one’s weight seems fantastically personal, overly intimate, and emotionally sensitive.”).

<sup>3</sup> DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 41 (2010) (citing Tatiana Andreyeva et al., *Changes in Perceived Weight Discrimination Among Americans, 1995–1996 Through 2004–2006*, 16 OBESITY 1129, 1131–32 (2008)).

<sup>4</sup> Throughout this piece I will specifically use the term “fat,” as reclaimed by the National Association to Advance Fat Acceptance and others seeking to use fat as a positive term and end discrimination based on body size. I will also use the terms

transitional and malleable; personal choice is focused on as the cause. This focus on personal choice heightens the fear of fat—fatism—because everyone could become fat. Focusing on individual responsibility denies the roles of geography, culture, poverty, and genetics in shaping size.

Weight bias also prevails in the courtroom, although scholars have yet to address how fat adults—as victims, jurors, and defendants—are treated in the criminal justice system.<sup>5</sup> In a society that valorizes choice and freedom, fat individuals in the courtroom potentially have neither one. The focus on individual responsibility and control of size masks negative assumptions about fat and fat people as untrustworthy and nonconforming. In the criminal courtroom in particular, fact-finders associate the fat defendant with acting, living, and existing beyond social boundaries to his detriment. Thus, weight bias could strongly compromise the accuracy of our criminal justice system, particularly as a bias present not just among jurors, judges, and prosecutors, but among defense counsel as well.<sup>6</sup> This article acknowledges this problem so we can fix it—or at least ameliorate the harm it causes.

This article examines how corpulence impacts the perspective and decision-making of fact-finders, as well as the role weight bias plays in our criminal justice system as a whole. Just as an individual faces

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“corpulence” and “corpulent” rather than the more clinical term “obese.” For a discussion of the terms “overweight” and “obese,” see MARILYN WANN, *FAT!SO? BECAUSE YOU DON’T HAVE TO APOLOGIZE FOR YOUR SIZE* 19–20 (1998).

<sup>5</sup> A recent study using a simulated check fraud case shows men are more likely to find a female defendant guilty if she is corpulent than if she is slim. Schvey et al., *The Influence of a Defendant’s Body Weight on Perceptions of Guilt*, 1 INT’L J. OF OBESITY 1, 1–7 (2013). Corpulent male defendants were neither more or less likely to be thought guilty in the simulation. *See id.*

<sup>6</sup> *See* Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1038 (2009). Although some courts are taking note of weight-based hostility and actions, other courts treat defendants differently based on size. *Id.* For example, the defendant’s size may impact the ultimate sentence a judge imposes. *Id.* In simulated court proceedings, unattractive litigants receive higher sentences and lower damage awards while attractive litigants are more likely to benefit from the proceeding. *Id.* Bias against larger defendants should not be discounted in multiple aspects of court proceedings. *Id.*

discrimination in hiring and job promotion due to size—as well as more general unequal treatment due to size—this article questions whether the size of fat defendants socially connects their bodies with concepts of fault and blame. Furthermore, while jurors gaze on and critically assess the appearance of courtroom players, this article examines how that gaze is returned against potential jurors and their size. This article examines how the fat body speaks—as a juror, a defendant, or a victim.

The article begins with an introduction to Fat Studies and weight-based bias in Part I. Part II connects weight bias in other contexts to that of the criminal justice system by considering how an individual is discriminated against in hiring, job promotion, and equal treatment due to her size.<sup>7</sup> In particular, Part II discusses how size is performed: that an individual may not simply “be” fat, but is expected to perform in a way that legitimizes negative concepts of “fat” in our society. The continuing question of how negative characteristics are associated with size in the courtroom begins in Part III, which queries whether the appearance of fat defendants is used against them in the courtroom and connects them with concepts of fault and blame. This section also examines bias against fat defendants by fact-finders and by their own counsel.

The size of the victim may also influence whether the defendant is perceived as culpable. Part IV considers how the corpulent victim is twice the victim: not only has she suffered a crime committed against her, the fact-finder may also view her with pity because of her size and shape. This double victimization reflects negatively on the defendant, showing him as a violator of legal and ethical standards of behavior, as well as social mores. In this view, the defendant has committed a crime against someone perceived as marginalized by society, someone whose body exceeds mainstream social acceptance, a victim who under general stereotypes

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<sup>7</sup> See *id.*; RHODE, *supra* note 3; see also SONDRÁ SOLOVAY, TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION (2000).

cannot run away or fight back. The victim's weight, then, may impact the defendant no matter his own size.

The size of the corpulent victim only negatively affects the defendant if the victim is believed. Part IV also addresses the considerable hurdles fat victims face in making claims in the criminal justice system: with the police, the prosecution, and the jury.

Part V continues the analysis of weight bias with whether fat jurors are struck from the jury because of their size and shape. This section examines how weight, race, and gender often combine to obscure a strong equal protection claim. Part V also continues the discussion of performance of size, noting a prevalent prosecutorial expectation of shame from fat jurors.

Part VI examines the body's speech: how the fat body nonverbally communicates messages of unreliability and lack of control, and how prosecutors may use these associations to convey the defendant's guilt. This communication is relevant to all courtroom players, and this article examines how weight bias impacts the fat defendant and the fat victim. The jury may perceive the fat defendant as unable to control his body and resist his urges; the fat victim, contrarily, cannot control her body to protect herself. The fat victim, if a woman, may struggle to be believed and she will face increased weight-based hostility from male jurors.

This article concludes in Part VII with recommendations for decreasing the impact of weight-based bias in the courtroom. These recommendations include jury instructions on weight bias, state procedural rules that bar attorneys from striking potential jurors based on size, and greater awareness of weight bias on the part of defense attorneys and prosecutors.

## I. FAT STUDIES AND WEIGHT BIAS

For fat individuals and people with nonconforming bodies, society antagonistically condemns and belittles them as "responsible" for their

sizes.<sup>8</sup> Corpulent individuals are blamed for their shapes.<sup>9</sup> This enhanced criticism derives from a social view that fat is malleable, can be changed, and *should* be changed. If fat is considered a transitional experience or identity, then the fear of fat becomes widespread—because everyone could become fat.<sup>10</sup> Individuals even feel pressure to maintain or achieve a particular weight number. Many individuals, no matter their size in relation to their weight, feel condemned and, in turn, condemn themselves for being fat or simply having fat on their bodies.

The pervasive fear and hostility to fat hides how many people experience and inhabit a nonconforming body at some point in their lives. Indeed, a 2005 report documented that two-thirds of Americans have a body mass index<sup>11</sup> of twenty-five or higher, which classifies them as “overweight,” and approximately one-third of those individuals have a body mass index over thirty, which classifies them as “obese.”<sup>12</sup> As Linda McDowell suggests, “[f]ew women’s or men’s bodies fit idealized representations of desired bodies at different life stages and this ‘coming to terms’ is a widespread phenomenon that affects our sense of ourselves.”<sup>13</sup> At various points in life,

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<sup>8</sup> See generally BODIES OUT OF BOUNDS: FATNESS AND TRANSGRESSION (Jane Evans Braziel & Kathleen LeBesco eds., 2001) [hereinafter BODIES OUT OF BOUNDS]. Some scholars have referred to our society as a “fat-phobic culture.” See, e.g., *id.* at 50–51. “Fat people consistently report strangers calling them names and making negative comments to them as they purchase food in the supermarket. For some, offensive names and comments yelled from passing cars is an almost daily experience.” SOLOVAY, *supra* note 7, at 79.

<sup>9</sup> Our colloquialisms “in shape” and “out of shape” may further reveal society’s determination of a “right” body size and a “wrong” body size.

<sup>10</sup> See, e.g., Robyn Longhurst, *Fat Bodies: Developing Geographical Research Agendas*, 29 PROGRESS IN HUM. GEOGRAPHY 247, 250–51 (2005). Scholarship commonly refers to this fear as “fat-phobia.” *Id.*

<sup>11</sup> Traditionally, obesity has been standardized and classified in terms of body mass index (BMI), which measures the ratio of weight to height.

<sup>12</sup> Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL’Y & L. 839, 842 (2005) (“Over 65 percent of all Americans are overweight and 31 percent are clinically obese.”).

<sup>13</sup> LINDA MCDOWELL, GENDER, IDENTITY, AND PLACE: UNDERSTANDING FEMINIST GEOGRAPHIES 61 (1999).

people are different shapes and sizes—sometimes fat, sometimes thin.<sup>14</sup>

Fat Studies addresses assumed weight norms and body-shaping practices.<sup>15</sup> These practices, ranging from diet to surgery, derive from cultural images of normative bodies.<sup>16</sup> Society naturalizes certain bodies as “normal,” giving smaller size a higher value and desirability.<sup>17</sup> This value appears neutral, in part, because weight is judged through a lens of health or attractiveness. This value system is a hierarchy of size that is often oppressive to those within it.<sup>18</sup> Through such a value system, individuals are blamed or held responsible for their body types.<sup>19</sup> This focus on personal choice denies the roles of geography, culture, poverty, and genetics in shaping size.<sup>20</sup>

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<sup>14</sup> RHODE, *supra* note 3, at 151–52 (citing epidemiological research demonstrating that the main increase in rates of obesity and overweight are from relatively small gains by individuals who are just below the BMI cutoff).

<sup>15</sup> See Marilyn Wann, *Foreword* to THE FAT STUDIES READER, at ix (Esther Rothblum & Sondra Solovay eds., 2009) [hereinafter, Wann, *Foreword*] for a brief introduction to Fat Studies and the size acceptance movement. The fat pride community, also known as the size acceptance movement, began in the United States in 1969 with the National Association to Advance Fat Acceptance (NAAFA). *Id.* at x.

<sup>16</sup> See generally SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY (2d ed. 2003).

<sup>17</sup> See CLAUDE LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 206–31 (Claire Jacobson, trans., Basic Books 1963). The dominant narrative judging and classifying based on weight must reinforce itself continually as normal and natural. *Id.*

<sup>18</sup> As Lauren Jones notes, size can be a screen to oppress people based on class and race. See Lauren Jones, *The Framing of Fat: Narratives of Health and Disability in Fat Discrimination Litigation*, 87 NYU L. REV. 1996, 2005 (2012) (“Because poor people and people of color already face severe oppression, some scholars theorize that blame for fatness is a tool to enforce social inequalities and to reject the responsibility of providing aid.”) (citing multiple sources).

<sup>19</sup> See Kersh & Morone, *supra* note 12, at 846 (noting that fat people are blamed for “liv[ing] unhealthy lifestyles”). The fat adult is held solely responsible for being fat, while the thin adult is stereotyped as “work[ing] hard to maintain a healthy lifestyle.” See *id.* at 847.

<sup>20</sup> See RHODE, *supra* note 3, at 42 (“Weight reflects a complex interaction of physiological, psychological, socioeconomic, and cultural factors.”); see also MICHAEL GARD & JON WRIGHT, THE OBESITY EPIDEMIC: SCIENCE, MORALITY, IDEOLOGY 107–25 (2005); GINA KOLATA, RETHINKING THIN: THE NEW SCIENCE OF WEIGHT LOSS—AND THE MYTHS AND REALITIES OF DIETING 116–25 (2007); NAT’L INST. HEALTH ET

The “neutral” value attached to a smaller body likewise masks negative assumptions about fat and fat people. Fat people are stereotyped as “undisciplined, self-indulgent, unhealthy, lazy, untrustworthy, unwilling and non-conforming.”<sup>21</sup> Fat itself is seen “as a sign of moral and physical decay.”<sup>22</sup> As one scholar makes even more clear, “Fat people carry an enormous burden. . . . They are weighed down not by their weight, but by the force of hatred, contempt and pity, amusement and revulsion. Fat bodies are invaded by comments, measured with hatred, pathologized by fear and diagnosed by ignorance.”<sup>23</sup> Fat people are frequently criticized about their weight and food choices by strangers, advertisements, co-workers, and family members.<sup>24</sup> The corpulent person is viewed with multiple, sometimes conflicting, emotions and stereotypes; her body is a source of ridicule and a source of fear.<sup>25</sup>

Yofi Tirosh astutely compares the rise of fat as a set of negative and

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AL., THE PRACTICAL GUIDE: IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS 5 (2000); Laura Blue, *The Myth of Moderate Exercise*, TIME, July 28, 2008, <http://www.time.com/time/health/article/0,8599,1827342,00.html>.

<sup>21</sup> DAVID BELL & GILL VALENTINE, CONSUMING GEOGRAPHIES: WE ARE WHERE WE EAT 36 (1997); see also RHODE, *supra* note 3, at 11 (“As with other forms of prejudice, bias based on appearance often rests on inaccurate stereotypes. Assumptions that overweight individuals are lazy, undisciplined, or unfit are a case in point.”).

<sup>22</sup> See BELL & VALENTINE, *supra* note 21.

<sup>23</sup> Susan Tenzer, *Fat Acceptance Therapy (F.A.T.): A Non-Dieting Group Approach to Physical Wellness, Insight, and Self-Acceptance*, 8 WOMEN & THERAPY: A FEMINIST QUARTERLY 39, 47 (1989) (quoting R. Bull, *Challenging the Myth: Some Facts on Fat*, MATRIX, Apr. 1987, at 3).

<sup>24</sup> RHODE, *supra* note 3, at 29 (citing multiple surveys). See also SOLOVAY, *supra* note 7.

<sup>25</sup> See Laura S. Brown, *Fat-Oppressive Attitudes and the Feminist Therapist: Directions for Change*, 8 WOMEN & THERAPY: A FEMINIST QUARTERLY 19, 19–20 (1989). Some scholars use the term “fat oppression,” which is defined as:

[H]atred and discrimination against fat people, primarily fat women, solely because of their body size. It is the stigmatization of being fat, the terror of fat, the rationale for a thousand diets and an equal number of compulsive exercise programs. It is the equation of fat with being out-of-control, with laziness, with deeply-rooted pathology, with ugliness. LAURA S. BROWN & ESTHER D. ROTHBLUM, FAT OPPRESSION AND PSYCHOTHERAPY: A FEMINIST PERSPECTIVE1 (1989).

feared traits—an identity—with the transformation of homosexuality into identity in the nineteenth century.<sup>26</sup> In noting this “Foucauldian turn,” Tirosh recognizes Foucault’s work on how homosexual practices turned from being forbidden acts to a particular deviant personality in the late 1800s.<sup>27</sup> Tirosh notes that, similarly, “fatness emerges as a trait that allegedly reveals much more about the individual than . . . body mass index or fats in blood. The new category of fatness pathologizes excessive weight and paves the way for many kinds of social control mechanisms aimed to supervise this perversion.”<sup>28</sup> Just as homosexuality was at one point seen as a deviant choice, fat now fits that same paradigm.

The varied emotions and stereotypes against fat and fat people are driven by the persistent notion that people choose to be the size they are, that they choose to be fat, even though there is no clear definition as to what size qualifies as fat.<sup>29</sup> Despite the assumption that body mass index determines whether a body is fat, fat cannot only equate with a particular physical size or medical marker.<sup>30</sup> Instead, fat is often recognized as an “emotional size.”<sup>31</sup> Each individual views her body shape and size differently on the spectrum of thin to fat, guided more by emotions than a physical definition

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<sup>26</sup> Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL’Y, L. & ETHICS 264, 279–80 (2012).

<sup>27</sup> *Id.* at 280.

<sup>28</sup> *Id.*

<sup>29</sup> See Longhurst, *supra* note 10, at 252. (“The reasons why people are fat are a complex blend of physiology, psychology, sociology and environment. . . . Despite this, many who are not large blame fat people for their ‘condition.’”).

<sup>30</sup> Wann, *Foreword*, *supra* note 15, at xiv. “In 1998, the BMI cutoff points that define ‘overweight’ and ‘obese’ categories were lowered; with that change, millions of people became fat overnight.” *Id.* The lower BMI cutoff points were chosen based on morbidity mortality rates related to fat, but “[m]orbidity/mortality correlations with weight are often contradictory. Sometimes being fat protects against disease. Sometimes fat people live longer.” *Id.* See also Reubin Andres, *Effects of Obesity on Total Mortality*, 4 INT’L J. OBESITY 381, 381–86 (1980); Katherine M. Flegel et al., *Excess Deaths Associated with Underweight, Overweight, and Obesity*, 293 JAMA 1861, 1861–67 (2005).

<sup>31</sup> Rachel Colls, *Bodies Out of Bounds: Fatness and Transgression*, 9 GENDER, PLACE & CULTURE J. FEM. GEOGRAPHY 218, 219 (2002) (reviewing BODIES OUT OF BOUNDS, *supra* note 8).

or quantification.<sup>32</sup> Fat, therefore, is a conception as much as a reality. As Robyn Longhurst notes, “[e]ven within a day people can *feel* different sizes and shapes depending on an array of factors such as clothing, feeling of well-being, the activity being undertaken, and interactions with people,” and it is critical to “recogniz[e] that bodies are always situated in multiple psychoanalytic discursive and material spaces.”<sup>33</sup> This ambiguous conception of fat may heighten the ease with which weight bias is internalized and grows more pervasive.

## II. FATISM AND OTHER FORMS OF DISCRIMINATION

Fatism, similar to other forms of appearance-based discrimination, is both a conscious and subconscious bias based on physical traits. As Charles Lawrence’s seminal writings declare in the context of racism, tacit understandings instead of explicit lessons remain in our subconscious from a shared history and culture that assign values and characteristics to a personal trait.<sup>34</sup> These understandings become the underlying narrative to

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<sup>32</sup> Longhurst, *supra* note 10, at 249. For example, “[m]any people with anorexia *see themselves* as overweight, even when they are starved or are clearly malnourished.” *Anorexia Nervosa*, NAT’L ASS’N OF ANOREXIA NERVOSA & ASSOC. DISORDERS, <http://www.anad.org/get-information/get-informationanorexia-nervosa/> (last visited Nov. 12, 2012) (emphasis added).

<sup>33</sup> Longhurst, *supra* note 10, at 249. (“Fatness and thinness are not binary terms but exist on a continuous spectrum.”).

<sup>34</sup> See generally Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STANFORD L. REV. 317 (1987).

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.

*Id.* at 322.

explain the actions of the body and to identify the person, a narrative superimposed voicelessly on the individual.

Social narratives of fat create conscious or subconscious power dynamics in which being a fraction thinner is coveted, and being a fraction fatter is reviled or regretted. This intimate association with weight and social power on such a microlevel blocks an individual from recognizing the entire structure of fat-based bias.<sup>35</sup> As Marilyn Wann notes, “[e]very person who lives in a fat-hating culture inevitably absorbs anti-fat beliefs, assumptions, and stereotypes, and also inevitably comes to occupy a position in relation to power arrangements that are based on weight.”<sup>36</sup> These beliefs alienate individuals from their own “uncooperative” body parts and the bodies of others, while instilling a hierarchy of value.

#### *A. Performing Size*

Within this hierarchy, a particular performance is expected based on one’s size. A woman may be identified physically as fat, but it is her performance of social size that allows her the chance to be acceptable and accepted.<sup>37</sup> Just as Judith Butler famously proclaimed that one cannot

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<sup>35</sup> Wann, *Foreword*, *supra* note 15, at xv (discussing Hogan’s concept of microhierarchization as applied societal notions of corpulence, as seen generally in PATRICK COLM HOGAN, *THE CULTURE OF CONFORMISM: UNDERSTANDING SOCIAL CONSENT* (2001)).

<sup>36</sup> Wann, *Foreword*, *supra* note 15, at xi.

<sup>37</sup> Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 *THEATRE J.* 519, 522 (1988).

When de Beauvoir claims that “woman” is a historical idea and not a natural fact, she clearly underscores the distinction between sex, as biological facticity, and gender, as the cultural interpretation or signification of that facticity. To be female is, according to that distinction, a facticity which has no meaning, but to be a woman is to have *become* a woman, to compel the body to conform to an historical idea of “woman,” to induce the body to become a cultural sign, to materialize oneself in obedience to an historically delimited possibility, and to do this as a sustained and repeated corporeal project. The notion of a “project,” however, suggests the originating force of a radical will, and because gender is a project which has cultural survival as its end, the term

simply be a gender, rather one must “do” or perform gender,<sup>38</sup> one may equally be required not simply to be fat, but to “do” fat. Butler deconstructed the concept of “woman,” claiming a distinction between physical characteristics that constitute sex, and repetitive, socially demanded, performative acts that create gender.<sup>39</sup> This same performance is what creates, stabilizes, and legitimizes the concept of “fat” in our society. Socially sanctioned, and even mandated, ways to perform according to one’s body size and shape continue to naturalize biased views on corpulence.<sup>40</sup>

In the courtroom, jurors may make these same associations and expect a

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“strategy” better suggests the situation of duress under which gender performance always and variously occurs.”

*Id.*

<sup>38</sup> *Id.* at 520–21. Butler writes:

[T]he existence and facticity of the material or natural dimensions of the body are not denied, but reconceived as distinct from the process by which the body comes to bear cultural meanings. . . . One is not simply a body, but, in some very key sense, one does one’s body and, indeed, one does one’s body differently from one’s contemporaries and from one’s embodied predecessors and successors as well.

*Id.*

<sup>39</sup> *See id.*

<sup>40</sup> *See id.* at 519–31. Referring to gender, Butler states:

Discrete genders are part of what “humanizes” individuals within contemporary culture; indeed, those who fail to do their gender right are regularly punished . . . because gender is not a fact, the various acts of gender create the idea of gender, and without those acts, there would be no gender at all. Gender is, thus, a construction that regularly conceals its genesis. . . . The authors of gender become entranced by their own fictions whereby the construction compels one’s belief in its necessity and naturalness.

*Id.* at 522. Sanctioned performance and assumptions about fat could be seen as similarly naturalized and socially enforced. *See* Jennifer Dianne Thomas, *Mandatory Wellness Programs: A Plan to Reduce Health Care Costs or a Subterfuge to Discriminate Against Overweight Employees?*, 2 HOWARD L.J. 513, 513 (2010) (noting that “[i]n many ways, social conditioning in American society silently encourages a palpable level of disdain for overweight individuals”).

particular performance from fat defendants. Indeed, a “poor” performance may validate a guilty verdict in the mind of a juror.

When people connect fat with perceptions of a lack of self-control,<sup>41</sup> lack of respect, and even with guilt,<sup>42</sup> then studies on social reaction and response to size become applicable to the courtroom. A recent study found that in a simulated check fraud case, male jurors were more likely to find a female defendant guilty if she was fat than if she was slim.<sup>43</sup> Social science theory and research have examined the latent biases juries can hold against defendants who differ from them—by race or by gender, to name but a few.<sup>44</sup> Bias based on fat may be equally harmful to a defendant, particularly when the body expresses a size and situation that the voice is not permitted to explain.

### III. DISCRIMINATION AGAINST CORPULENT DEFENDANTS AND TALKING ABOUT WEIGHT IN THE COURTROOM

Courtroom discrimination may coincide with how the court permits the defendant to present herself and her body, versus how someone else discusses or addresses the defendant’s body. Simply mentioning the defendant’s weight may associate the defendant negatively with fat and stereotypes about fat. The use of the term “obese” can be a confusing and

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<sup>41</sup> Roughly two-thirds of Americans surveyed believe that people are fat because they lack self-control. RHODE, *supra* note 3, at 42 (citing J. ERIC OLIVER, *FAT POLITICS* 102 (2005)).

<sup>42</sup> See SOLOVAY, *supra* note 7.

<sup>43</sup> Schvey et al., *supra* note 5. Corpulent male defendants were neither more or less likely to be thought guilty in the simulation. *See id.*

<sup>44</sup> See, e.g., Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 506 (1991) (noting jurors’ latent gender stereotypes and biases in rape cases); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (discussing how conscious and unconscious biases influence decision-makers’ judgment); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993) (examining evidence and experiments analyzing the effect of jury racial composition on jury decisions).

damaging identifier in criminal cases.<sup>45</sup> The word “obese,” furthermore, does not necessarily describe the actual size of the perpetrator.<sup>46</sup> A person who is obese could be five feet seven inches tall and weigh 180 pounds, or she could be five feet four inches tall and weigh 225 pounds.<sup>47</sup> As one court stated, “to be tall and a little obese is a relative question.”<sup>48</sup>

The true damage may lie in a court publicly applying the label “obese” to the defendant without an opportunity for the defendant to explain her size.<sup>49</sup> Judges and members of the court can differ in their opinions as to whether someone is obese.<sup>50</sup> Even when an individual does self-identify as obese, the judge may determine the individual is *not* obese and then not allow the

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<sup>45</sup> See, e.g., Jack B. Weinstein, *Book Review*, 81 COLUM. L. REV. 441, 447–48 (1981) (reviewing ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979)) (noting the misidentification of a man based on his obesity); see also *State v. Escalante*, 734 P.2d 597 (Ariz. Ct. App. 1986).

<sup>46</sup> See, e.g., *State v. Condon*, 742 N.W.2d 861, 874 n.16 (S.D. 2007).

We note that Comparan testified at trial that the woman . . . ‘looked like she was tall’ and ‘a little obese.’ Whether being 5’7” and weighing 180 lbs., like Condon, is to be tall and a little obese is a relative question. Condon has asserted that she should be eliminated as a suspect because Rodriguez, who is 5’4” and weighs 225 lbs., is closer to the description of the jewel thief given by Millette at the motions hearing.

*Id.*

<sup>47</sup> See *id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *infra* Section VI for further discussion. Defendants are often denied the opportunity to discuss their weight and presumptions about weight in open court, despite the fact that fat is a broad term scientifically applied to two-thirds of the American population. Kersh & Morone, *supra* note 12 (“Over 65 percent of all Americans are overweight and 31 percent are clinically obese.”).

<sup>50</sup> See, e.g., *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995).

[T]he prosecutor struck three venire persons whom defendant’s counsel claimed were obese. Defense counsel himself claimed to be obese . . . . The district court disagreed with defense counsel’s claim of his own obesity, and also stated that it did not regard at least one of the struck venire persons to be obese.

*Id.*

individual to discuss her weight.<sup>51</sup> Challenges between the defense and prosecutorial perspectives on someone's size may end up resolved only through a subjective decision by the court.<sup>52</sup> Because the identification of obesity can have little connection to the person's actual size and shape, the label can take on heightened significance. If social science studies indicate that individuals feel validated in condemning a person's size, then a label of "obese" may justify jurors' biased perceptions of a defendant.

In criminal cases that address and name the corpulence of the defendant, during voir dire, jurors have gone so far as to say that the defendant was probably guilty because he was fat.<sup>53</sup> In *State v. Phelps*, the defendant argued that a juror was biased after the juror allegedly told the court that Phelps likely committed the crime charged because Phelps was obese.<sup>54</sup> When morality is associated with physical appearance, then a fat defendant may be viewed as acting, living, and existing beyond proscribed boundaries, all to his detriment in the courtroom.<sup>55</sup>

#### IV. CORPULENT VICTIMS: THEIR BELIEVABILITY, AND THEIR POSSIBLE IMPACT ON DEFENDANTS

##### *A. Pity and the Fat Victim*

Fat victims in the criminal context receive either injustice or enhanced pity due to weight bias. These victims are either not taken seriously, and their claims are ridiculed, or they are viewed only through a prism of pity based on their size. Unlike the corpulent defendant, whose size may

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<sup>51</sup> See, e.g., *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *State v. Phelps*, No. 29909-7-II, 2005 WL 45540, at \*4 (Wash. Ct. App. Jan. 11, 2005).

<sup>54</sup> *Id.* Because the record did not support this argument, the appellate court refused to consider it. *Id.*

<sup>55</sup> See Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1669–75 (2004) (discussing the importance of "framing" in our perception of others and our reliance on stereotypes).

associate her with lack of self-control, sloth, and blame, the corpulent victim's size may associate her with that alternate face of prejudice against fat people: pity. Images and stereotypes contrast the beautiful slim victim with the fat defendant,<sup>56</sup> heightening destructive images of corpulence; these images may be reversed when the victim is fat.<sup>57</sup> Prosecutors in criminal cases may thoroughly victimize the fat victim, emphasizing her helplessness, additional health problems,<sup>58</sup> and inability to protect herself.<sup>59</sup> For both the fat defendant and the fat victim, their bodies can be viewed as beyond personal control.<sup>60</sup> Under this view, a fat predator is not able to control herself from committing harmful acts and, likewise, a corpulent victim cannot control her body to protect herself. Similar to victims who are children, elderly, or mentally ill, within this view, corpulent victims may receive the pity of a jury.<sup>61</sup>

If the fat victim is seen as helpless, the defendant becomes a monster by attacking her, regardless of the defendant's own weight. This heightened victimization may push the defendant's actions out of socialized and

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<sup>56</sup> See, e.g., *Davis v. Singletary*, 853 F. Supp. 1492, 1571 (M.D. Fla. 1994) (finding prosecutor's references to defendant as "monster," "350-pound bully," and "creature" during death penalty sentencing, along with comparisons to the "beautiful bodies" of the victims, insensitive to the defendant's feelings and apparent obesity, but proper nonetheless); see also Lisa A. Binder, "With More Than Admiration He Admired": *Images of Beauty and Defilement in Judicial Narratives of Rape*, 18 HARV. WOMEN'S L.J. 265, 272 (1995).

<sup>57</sup> See Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 221-23 (2010).

<sup>58</sup> See *id.*

<sup>59</sup> See, e.g., *People v. Potter*, Nos. C052634, C053349, 2007 WL 4305547, at \*2 (Cal. Ct. App. Dec. 10, 2007); *State v. Prevette*, 345 S.E.2d 159, 161 (N.C. 1986) ("Defendant left the victim, an elderly and obese woman, in this position [tied and with a gag], obviously realizing she was helpless and would not be missed or discovered for many hours."); *Hancock v. State*, 155 P.3d 796, 810, 824 (Okla. Crim. App. 2007) (finding victim was "morbidly obese," and that the victim, "obese, in poor health, and physically limited, was not a threat to Appellant").

<sup>60</sup> See *id.*

<sup>61</sup> See SOLOVAY, *supra* note 7, at 154 (noting that fat plaintiffs also co-opt this bias as a strategy by portraying themselves as helpless due to their weight).

normalized behavior and into the incomprehensible.<sup>62</sup> If fat victims likewise are expected to perform a script of vulnerability and victimhood, which they may need to do in order to simply be heard, this script might further emphasize the brutality of any attack. This is a traditionally gendered script, although it is also seen applied to fat male victims.

### *B. Believing the Fat Female Victim*

The victim receives pity, however, only if the fat victim is believed. Fat women may not have their accounts of abuse taken seriously by court actors who conceptualize victims of abuse as being thin.<sup>63</sup> As Sondra Solovay notes, “When a fat woman is verbally abused and told ‘You’re a fat slob. Who would want to sleep with you?’ the abuse is echoed and reinforced by

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<sup>62</sup> The body of the victim also plays a double role in cases where the victim was harmed specifically because she was fat. Vitriol against fat is seen most plainly in violence committed against people based on their size and shape. *See, e.g., Paige v. Warren*, No. 09–3287, 2010 WL 457111 (E.D. Mich. Feb. 3, 2010). In *Paige*, the defendant “sprayed the victim with the mace and then stabbed her twice in the chest. After the stabbing, petitioner left the scene and told someone that she ‘stabbed that bitch’ because the victim was fat and unable to defend herself.” *Id.* at \*3. In contrast, in *Killins v. State*, No. M2007-02086-CCA-R3-PC, 2008 WL 4830798, at \*2 (Tenn. Crim. App. Nov. 5, 2008), the defendant stated “that he didn’t think his stabs would kill her as his knife was ‘small’ and the victim was ‘fat.’” The hostility towards corpulence in our society is never made more physically manifest than in crimes committed against fat victims because of their size:

In a society with a general penchant for punishing difference, and an excessively high regard for bodily appearances as cultural markers, it makes perfect sense that fat bodies will be abused in a variety of ways. . . . This abuse is perhaps only the most literal expression of the punishment our culture imposes on bodies that dare to transgress from the socially prescribed norms.

Susan Koppelman, *Afterword* to *THE STRANGE HISTORY OF SUZANNE LAFLESHE, AND OTHER STORIES OF WOMEN AND FATNESS* 229, 258 (Susan Koppelman ed., 2003).

<sup>63</sup> Tracy Royce, *The Shape of Abuse: Fat Oppression as a Form of Violence Against Women*, in *THE FAT STUDIES READER* 151, 153 (Esther Rothblum & Sondra Solovay eds., 2009). *See also* W. CHARISSE GOODMAN, *THE INVISIBLE WOMAN: CONFRONTING WEIGHT PREJUDICE IN AMERICA* (1995); Lynn Mabel-Lois & Vivian Mayer (Aldeberan), *Fat Women and Women’s Fear of Fat*, in *SHADOW ON A TIGHTROPE: WRITINGS BY WOMEN ON FAT OPPRESSION* 53, 53–57 (Lisa Schoenfelder & Barb Wieser eds., 1983).

her culture.”<sup>64</sup> Fat victims of sexual assault and domestic violence, thus, can be discredited and dismissed.

Hostility toward fat itself is particularly visible in cases of domestic violence. Batterers use size as a tool to belittle a romantic partner, most often with insults and attacks on the victim’s sexual desirability.<sup>65</sup> This behavior does not necessarily depend on whether the victim is fat or not; in an abusive relationship the victim may be *told* she is fat and be punished for that description.<sup>66</sup> This, again, highlights the impact of language in identifying someone as fat, and the power of fat as a negative persona rather than simply as a body type.

These attitudes have their roots in a desire paradigm of sexual assault: the incorrect assumption that an attacker will not find a fat woman sexually desirable and, thus, no one will rape her.<sup>67</sup> Police officers have refused to take reports of sexual assault from fat women, stating the women are too

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<sup>64</sup> See SOLOVAY, *supra* note 7, at 79. Furthermore, “[w]hen fat people find themselves in an emotionally or physically abusive relationship, they will invariably find their weight a target of the abuse.” *Id.* at 78.

<sup>65</sup> See Royce, *supra* note 63, at 152–53; see also *People v. George*, 788 N.W.2d 655, 656 (Mich. 2010) (noting that the defendant frequently fought with his wife and would “storm out” leaving her crying; the defendant had called his wife fat and unattractive six days before her murder and had also cheated on her).

<sup>66</sup> See Koppelman, *supra* note 62, at 258.

<sup>67</sup> See *supra* note 59 and accompanying text. In a pop culture reference, Conan O’Brien recently joked about Olympian weightlifter Holly Mangold, “I predict 350 lb. weight lifter Holley Mangold will bring home the gold and 4 guys against their will,” which was otherwise interpreted by a blogger as “[s]he is fat and therefore no man would ever consent to sex with her. However, she is also strong, therefore their consent becomes irrelevant!” *Conan O’Brien’s Fat Girl Rapist Joke Against Olympian Holly Mangold*, GOOD MEN PROJECT (July 31, 2012), <http://goodmenproject.com/good-feed-blog/conan-obriens-fat-girl-rapist-joke-olympian-holley-mangold/#CusHkWXeD57kybIK.99>. This can also be extrapolated from Paul Woodward’s case in Mississippi. *Woodward v. State*, 635 So. 2d 805 (Miss. 1993). After evidence placed the defendant and the victim as having had sexual relations, defense counsel could have argued the act was consensual. However, returning to stereotypes of size and desire, perhaps based on Woodward’s size, defense counsel decided against this strategy and instead relied on a mental illness defense. *Id.* at 811–12.

unattractive—because of their size—to have been raped.<sup>68</sup> In one sexual assault case, the defendant attempted to protect himself from accusation by stating he would never assault the eleven-year-old victim because she was “fat and ugly.”<sup>69</sup> If the defense is one of consensual sex, the defendant may downplay any attraction to the victim. In *Fast Horse v. Weber*, the defendant argued, “I told [the victim] she was a fat, skanky, ugly looking bitch and she was nothing but a fuck and that was it.”<sup>70</sup> The onus would then be on the victim.

In another case, *People v. Egbert*, the prosecutor theorized that the defendant killed his corpulent wife because he was ashamed of her weight, rather than because he was obsessed with her and had become particularly abusive after she told him she was leaving him.<sup>71</sup> The defendant was charged with murdering his wife; evidence pointed to the defendant being controlling, abusive, and fearful that his wife would abandon him.<sup>72</sup> And yet the prosecutor argued a different motive: that the defendant “was ashamed that [the victim] was overweight and ill.”<sup>73</sup> No evidence of this was presented at trial.<sup>74</sup> The motive of shame, however, was convincing enough for the defendant to be convicted.<sup>75</sup> This example underscores not only the stereotypes about desirability in relation to size, but also the challenges corpulent victims find in reporting crimes of domestic violence and sexual

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<sup>68</sup> See SOLOVAY, *supra* note 7, at 83. Patricia Mullen’s story highlights how disrespectful police officers can be toward fat woman. Police found Ms. Mullen, a fat woman, dead in her bathtub. *Id.* The police left her naked body in the living room where children could see it for five hours before dragging Ms. Mullen’s still naked, exposed body across the lawn. *Id.*

<sup>69</sup> *State v. Ruhlman*, No. CA2005–05–125, 2006 WL 1132855, at \*2 (Ohio Ct. App. May 1, 2006). The Ohio Court of Appeals upheld his conviction. *Id.* at \*9.

<sup>70</sup> *Fast Horse v. Weber*, 598 N.W.2d 539, 543 n.1 (S.D. 1999).

<sup>71</sup> *People v. Egbert*, No. C060808, 2011 WL 303794 (Cal. Ct. App. Feb. 1, 2011).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*10.

<sup>74</sup> *Id.* at \*10–11. The court ordered the prosecutor’s statements be stricken from the record. *Id.*

<sup>75</sup> *Id.* at \*10. The prosecutor may have thought the narrative of shame was more believable regardless of the evidence presented.

assault.

## V. DISCRIMINATION AGAINST CORPULENT JURORS

The treatment of corpulent jurors highlights an apparent discomfort with fat individuals in the courtroom. Just as jurors may have a critical view of corpulence when looking at courtroom actors, any reproach based on weight is returned against potential jurors. Jurors have openly been struck from juries due to their size and shape, or characteristics associated with size and shape. Yet courts have been reluctant to identify this form of discrimination. The following examples suggest a lens of weight-based bias that is pervasive in the courtroom and that is used against all actors, not only the defendant or the victim. In the available cases, an intersection between race, weight, and sex discrimination is also apparent.<sup>76</sup>

### A. Equal Protection: Weight, Race, and Gender

Weight may simply be used as a shield for striking jurors based on their race and gender. For example, in *People v. Dolphy*, the defendant brought an equal protection<sup>77</sup> claim of race discrimination. The state responded that the juror was not struck because of race, but because of weight.<sup>78</sup> Although the juror was the only African American on the jury panel, the state's race-neutral reasoning for striking the female juror was she was "overweight."<sup>79</sup> Specifically, the male prosecutor stated it was his "practice" to strike fat people because "heavy-set people tend to be very sympathetic toward any defendant."<sup>80</sup> The court affirmed this reasoning as race neutral, thereby,

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<sup>76</sup> See, e.g., *Mitchell v. State*, 579 So. 2d 45 (Ala. Crim. App. 1991); *People v. Galbert*, No. A064486, 1995 WL 108696, at \*2 (Cal. Ct. App. 1 Dist. Jan. 30, 1995); *People v. Dolphy*, 685 N.Y.S.2d 485, 487 (N.Y. 1999); *Walker v. State*, 859 S.W.2d 566, 568 (Tex. App. 1993).

<sup>77</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that race-based peremptory challenges violate the Equal Protection Clause).

<sup>78</sup> *Dolphy*, 685 N.Y.S.2d at 487.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

condoning bias based on stereotypes of one physical characteristic over another acknowledged and inappropriate bias—race.

The male prosecutor in *Walker v. State* likewise argued that size was his “non-discriminatory” reason for striking two African American jurors on a panel.<sup>81</sup> The prosecutor explained his belief that corpulent people “tend to be more lenient on punishment.”<sup>82</sup> According to the appellate opinion, “[t]he trial court implicitly found the prosecutor’s explanations to be non-discriminatory, and there is nothing before us to suggest otherwise.”<sup>83</sup> The prosecutor had acted against an unprotected class: fat people.<sup>84</sup> In the context of criminal courts, corpulent individuals have no protection from rational or irrational stereotypes and assumptions based on their weight.<sup>85</sup>

These assumptions connect with individual accountability for weight and are shaped by whether the corpulent individual complies with socially scripted criticisms of weight. In a word, apologize. Discriminating against a juror based on her intersectional identity as a corpulent African American woman, one Alabama prosecutor stated she struck the juror because she “was a very obese woman, who to me had a somewhat . . . pompous – kind of pompous, putting on airs type attitude.”<sup>86</sup> The woman failed to initially reveal that her job was housekeeping.<sup>87</sup> With a “race neutral” reason for the

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<sup>81</sup> *Walker*, 859 S.W.2d at 568.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> While it may be recognized as a unifying characteristic, particularly in clarifying an attacker’s common intent, fat is otherwise not acknowledged as a motivating factor for violence, a characteristic that may invite hostility, nor even as a basis for discrimination in the criminal courtroom. Hate crimes based on fat are not recognized or acknowledged. See *e.g.*, *Commonwealth v. Robinson*, 864 A.2d 460, 502 (Penn. 2004).

<sup>85</sup> See, *e.g.*, *United States v. Santiago-Martinez*, 58 F.3d 422, 422–23 (9th Cir. 1995).

<sup>86</sup> *Mitchell v. State*, 579 So. 2d 45, 47 (Ala. Crim. App. 1991).

<sup>87</sup> *Id.*

When asked what her occupation was, she initially said ‘a supervisor and left it at that.’ Later on, when the prosecutor asked her what kind of supervisor, she responded a ‘supervisor of environmental services.’ The prosecutor stated that ‘it turned out to be was she was the head maid somewhere,’

strike, the court dismissed the *Batson* challenge of race discrimination.<sup>88</sup>

### 1. An Expectation of Shame

The prosecutor's comment rings true with evidence that fat plaintiffs who are apologetic about their weight and follow a social script of shame about their size are more successful in court than fat plaintiffs who refuse to apologize for their size and shape.<sup>89</sup> The fat individual who is proud of her weight, and challenges society for treating her differently based on her size, can expect to be viewed as unsympathetic and dangerous.<sup>90</sup>

The most publicly recognized of cases involving fat jurors, *People v. Galbert*, displays the fear and hostility shown to corpulent people who are not openly apologetic of their bodies and who, thus, challenge a social script of shame.<sup>91</sup> In *Galbert*, an African American prosecutor struck three corpulent African American women from the jury, stating to the press, “[y]oung, obese, black women are really dangerous to me . . . I’ve never liked young, obese, black women and I think they sense that.”<sup>92</sup> The prosecutor went on to describe one of the women’s clothing as revealing and inappropriate, saying, “[s]he’s grossly overweight. . . . She’s got on a

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which turned out to be a local hospital. *Id.*

<sup>88</sup> *Id.* at 50.

<sup>89</sup> See Sondra Solovay & Dylan Vade, *No Apology: Shared Struggles in Fat and Transgender Law*, in *THE FAT STUDIES READER* 167, 167–68 (Esther Rothblum & Sondra Solovay eds., 2009). Solovay and Vade discuss two different cases of employment discrimination against fat individuals, Toni C. and John R. *Id.* In sum, “Toni was fiercely proud. She lost her case. John was apologetic. He won.” *Id.* “[Employment discrimination] law requires fat people to acknowledge, uphold, and glorify body norms. And this makes sense. Fat-affirmative attitudes are threatening.” *Id.* at 173. “Winning cases generally adopt a legal posture that reinforces societal prejudices. Cases that challenge societal prejudices generally lose.” *Id.* at 168.

<sup>90</sup> See *id.* at 168.

<sup>91</sup> See generally *People v. Galbert*, No. A064486, 1995 WL 108696, at \*2–3 (Cal. Ct. App. 1 Dist. Jan. 30, 1995).

<sup>92</sup> Tanya Schevitz, *Appeals Court Backs Banning of Fat Jurors*, S.F. EXAMINER, A1, A12, (Feb. 8, 1995) (quoting prosecutor William Tingle); Associated Press, *Court Gives Lawyer OK to Dump Fat Jurors*, SEATTLE TIMES, Feb. 10, 1995, <http://community.seattletimes.nwsourc.com/archive/?date=19950210&slug=2104281>.

little tiny skirt that doesn't fit her[,] . . . a skirt that's hiked halfway up her thighs when she stands and then when she sits you can see everything that God gave the woman.”<sup>93</sup> The other corpulent African American woman was wearing a dark blue pant suit with gold buttons, which was also called into question as the prosecutor stated the woman “is that big and dresses . . . to draw that kind of attention.”<sup>94</sup> No matter whether the women wore a conservative suit or a short skirt, they were criticized for their apparent lack of shame. Whether one looks to the women's race or size, they were struck because the power of their intersectional bodies—as female, African American, and fat—was beyond socialized physical boundaries.

#### VI. VOCAL LANGUAGE VERSUS BODY LANGUAGE IN THE CRIMINAL JUSTICE SYSTEM

Social science studies demonstrate that negative character traits are associated with larger bodies.<sup>95</sup> Thus, one can surmise that the body speaks to a jury before the voice does—often through a language fraught with criticism and normalizing standards. In the setting of a trial or court proceeding, lawyers and jurors can give weight added importance in relation to a crime, inferring or presuming that the defendant's body provides insight into the crime and into the defendant. Stereotypes of the fat body may be used or understood to explain the behavior of the fat individual as a victim or a defendant. As Yofi Tirosh has opined, the body has “expressive force,” whether or not that is intentional.<sup>96</sup>

As an example, in one Florida death penalty case the prosecutor compared the defendant's fat body—calling him physically unattractive due to his size and shape—to the “beautiful bodies” of the mother and daughter

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<sup>93</sup> *Galbert*, 1995 WL 108696, at \*2.

<sup>94</sup> *Id.*

<sup>95</sup> See *supra* notes 39–40 and accompanying text.

<sup>96</sup> Tirosh, *supra* note 1, at 268 (questioning how her size and shape influence her authority and credibility).

victims.<sup>97</sup> In the sentencing phase of this case, the prosecutor referred to the defendant as a “monster,” “350-pound bully,” and “creature” because of his size.<sup>98</sup> The larger body speaks of breaking boundaries and challenging norms.<sup>99</sup> In a court setting this may be to the discomfort of all, disrupting a system created to establish and maintain regularity, behavior patterns, and social expectations.

*A. Using Vocal Language as a Tool to Narrate and Script the Body in Court*

To counteract these biases and the narrative of the body, some fat criminal defendants seek to orally address the jury and the court about their weight.<sup>100</sup> In *DePree v. United States*, the defendant declared he was denied effective assistance of counsel because his counsel failed to discuss the defendant’s obesity as a mitigating circumstance.<sup>101</sup> The court rejected the defendant’s argument, stating the defendant’s presence in the courtroom “assured that this condition was apparent to the Court.”<sup>102</sup> The court seemingly acknowledged the power of the body to speak and its unavoidable presence, and yet the court failed to recognize how spoken language can manipulate or explain the body’s message and can allow the defendant himself to speak in place of his body. While the body’s speech cannot be denied, it may be modified.<sup>103</sup> Instead, the court ignored any possible underlying negative associations with weight and the defendant’s

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<sup>97</sup> *Davis v. Singletary*, 853 F. Supp. 1492, 1571 (M.D. Fla. 1994).

<sup>98</sup> *Id.* The reviewing court found no error and upheld the conviction. *Id.* at 1585.

<sup>99</sup> BODIES OUT OF BOUNDS, *supra* note 8, at 3 (“Fat equals reckless excess, prodigality, indulgence, lack of restraint, violation of order and space, transgression of boundary. . . . [T]he fat body is interpreted and constructed as a body heedlessly embracing proscribed social mores.”).

<sup>100</sup> Throughout this article, my resources are limited to cases reviewed on direct appeal; thus, there exist many prosecutions of fat people that I do not include in my analysis.

<sup>101</sup> *DePree v. United States*, No. 1:05CV210 JCH, 2006 WL 3775960 (E.D. Mo. Dec. 19, 2006).

<sup>102</sup> *Id.* at \*5 n.6.

<sup>103</sup> *See* Tirosh, *supra* note 1, at 271.

body.<sup>104</sup>

For a defendant who is challenging stereotypes based on weight, vocal language is a powerful tool to narrate the body and possibly align the defendant as socially compliant.<sup>105</sup> As Tirosh asserts, language is often used to modify, alter, or ignore what the body itself is saying.<sup>106</sup> Oral language discussing the body apologetically and seeking affirmation<sup>107</sup> can be used to lessen the impact of size and shape.<sup>108</sup> A defendant who apologizes can attempt to gain juror sympathy by speaking the correct social narrative, asking for his body to be excused and acknowledging that its size is beyond social boundaries.<sup>109</sup> The apologetic fat person may receive sympathy,

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<sup>104</sup> *DePree*, 2006 WL 3775960 at \*5 n.6.

<sup>105</sup> *See, e.g.*, Tirosh, *supra* note 1, at 271–72. It should be noted, however, that when language is used in relation to the body, common adjectives and descriptions are often inherently pejorative, failing to allow for an objective space. *See* JOAN JACOBS BRUMBERG, *THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS*, xxxi (1997) (recognizing that “in talking about their bodies, women still struggle to find a vocabulary that does not rely on Victorian euphemisms, medical nomenclature, or misogynistic slang”). Adjectives of size and shape are in a hierarchy of value, just as body sizes themselves are ranked in value. Tirosh, *supra* note 1, at 275. When language is innately laden with prejudicial roots and history, the pointed use of language against someone becomes particularly betraying, condemning, and powerful. *See id.*

<sup>106</sup> Tirosh, *supra* note 1, at 271–72 (discussing the “discursive protective shield” created around bodies when speaking of them; “talking about one’s body might permit one to push one’s *actual* body away from the center, and take over through voice-over”).

<sup>107</sup> *See id.* at 270, 272.

<sup>108</sup> *See generally* JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: BOOK I: FREUD’S PAPERS ON TECHNIQUE 1953–1954*, at 53–61 (Jacques-Alain Miller ed., John Forrester trans., W.W. Norton & Co. 1988) [hereinafter LACAN, *FREUD’S PAPERS*] (asserting that the fundamental purpose of language is to prevent comprehension); JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: BOOK II: THE EGO IN FREUD’S THEORY AND IN THE TECHNIQUE OF PSYCHOANALYSIS 1954–1955*, at 244 (Jacques-Alain Miller ed., Sylvana Tomaselli trans., W.W. Norton & Co. 1988) [hereinafter LACAN, *FREUD’S THEORY*] (arguing that human nature is grounded in illusion, mistake, and a positive attempt to misunderstand).

<sup>109</sup> *See* Solovay & Vade, *supra* note 89 at 168–69 (Fat people “lose our rights unless we apologize”). In employment discrimination cases, if the fat victim of discrimination is apologetic about his size, telling the court there is something “wrong” with his body that he has tried to fix, he will be more successful than a complainant who is proud of her large body:

while the unapologetic fat person may encounter hostility.<sup>110</sup> In speaking about fat, a fat person is often expected to conform his viewpoint and attitudes on size—if not his actual physical body—to those of society.<sup>111</sup> Similar to the performance of gender, a person may be identified as physically fat, but it is the performance of social size that allows that person to be acceptable and accepted.<sup>112</sup>

Where a defendant seeks to address his weight in court, the issue is not, as was identified in *DePree v. United States*, that the jury is ever unaware of the defendant's body.<sup>113</sup> Instead, precisely because the jury can physically see that the defendant is corpulent, the jury may be biased against the defendant as a fat person.<sup>114</sup> The issue is the defendant's ability to speak to the hostile and negative associations that jurors may make based on his

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Both Toni and John encountered discrimination. Toni refused to locate the problem in, or on, her body, finding instead that the obstacle was the fat-phobic attitudes she faced. . . . Her argument is noteworthy because there were no apologies and nothing repentant in her tone.

John's approach was that his weight constituted a physiological disorder. He agreed that there was a problem with his body, that something was "wrong." He had tried fasting, hypnosis, and even having his jaws wired shut in his attempts to become a thin person.

Toni was fiercely proud. She lost her case. John was apologetic. He won.

*Id.* at 168 (citations omitted).

<sup>110</sup> *Id.* at 173. Employment discrimination "law requires fat people to acknowledge, uphold, and glorify body norms. And this makes sense. Fat-affirmative attitudes are threatening." *Id.*

<sup>111</sup> *Id.* ("When fat people show that they want to be thin and that they have consistently tried to become thin, they reinscribe the societal truth of 'thin is good/normal.'").

<sup>112</sup> See *supra* notes 35–38 and accompanying text.

<sup>113</sup> *DePree v. United States*, No. 1:05CV210 JCH, 2006 WL 3775960, \*5 n.6 (E.D. Mo. Dec. 19, 2006) (concluding, "[w]ith respect to Movant's alleged obesity, the court agrees with the Government that Movant's presence in the courtroom during both the change of plea and the sentencing proceedings assured that this condition was apparent to the Court").

<sup>114</sup> See Elizabeth E. Theran, "Free to be Arbitrary and . . . Capricious": *Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113, 152–56 (2001).

weight. Whether the defendant is verbally identified as fat or physically identified as such, negative biases against corpulence work to the defendant's detriment.

*B. Narrating Women's Bodies*

The negative stereotypes against defendants based on weight can translate to the same hostility fat victims experience. This judgment may be particularly salient against female victims because women share a history in which their bodies have "communicated" in place of their voices.<sup>115</sup> For a corpulent woman in particular, wearing revealing or suggestive clothing may result in her being judged harshly. While an outfit could be fashionable for a thin woman it may become a moral statement for the fat woman.<sup>116</sup> This may be particularly true given that corpulent women are stigmatized more than corpulent men,<sup>117</sup> and that men are more likely to display weight bias than women.<sup>118</sup>

Consider how expectations of beauty, along with stereotypes and

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<sup>115</sup> See DEIRDRE COOPER OWENS, 'COURAGEOUS NEGRO SERVITORS' AND LABORING IRISH BODIES: AN EXAMINATION OF ANTEBELLUM-ERA MODERN AMERICAN GYNECOLOGY (2008) (documenting the use of Irish immigrant's and bondswomen's bodies in the early stages of modern gynecology; discussing how doctors listened to the bodies, rather than to the women or children themselves). These women spoke with their bodies; their voices were then transformed into the voices of educated white males—white males who profited from these novel surgeries by gaining prestigious faculty and chair positions at universities and hospitals, and who eventually established gynecology as a respected branch of medicine and surgery. *Id.* at 9.

<sup>116</sup> SOLOVAY, *supra* note 7, at 94.

Media attitudes define thin people as hip, fashionable, and sexy while reviling a fat person in the same outfit as sloppy and inappropriately dressed. Fat people are not supposed to wear the revealing or suggestive clothing that thin people may wear, so if a fat woman wears a miniskirt, she may be unfairly regarded as making a moral statement rather than a fashion choice.

*Id.*

<sup>117</sup> See, Puhl & Heuer, *The Stigma of Obesity: A Review and Update*, 17 OBESITY 941, 941–64 (2009).

<sup>118</sup> See Christian S. Crandal, *Prejudice Against Fat People: Ideology and Self-Interest*. 66 J. SOC. PSYCHOL. 141, 603–15 (2001).

criticism, attach to each body<sup>119</sup> in our society<sup>120</sup> across a spectrum of size.<sup>121</sup> In the criminal context of sexual crimes, a victim's body (often female)—including body language and dress—is evaluated and analyzed in court, documented and examined through pictures and descriptions until a judgment can be made as to whether and how her sexuality was displayed.<sup>122</sup> The woman does not necessarily control how her body speaks. It is an image and perception put upon her that could be based on her size as

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<sup>119</sup> See, e.g., Alexandra W. Griffin, *Women and Weight-Based Employment Discrimination*, 13 CARDOZO J.L. & GENDER 631, 635–36 (2007) (discussing the intersection of identities, including weight); see also Janet D. Latner et al., *Stigmatized Students: Age, Sex, and Ethnicity Effects in the Stigmatization of Obesity*, 13 OBESITY RES. 1226 (2005).

<sup>120</sup> The intersectionality of identities cannot be overlooked here. For example, African American women's bodies and Caucasian women's bodies are understood differently in society, are stereotyped differently, and carry different histories—such as there being slavery and segregation in African American women's histories. As one example, for much of our nation's history, many states did not consider it a crime to rape African American victims. See, e.g., *Wash v. State*, 14 S. & M. 120 (Miss. 1850) (noting it is only a capital offense for “any slave to attempt to commit a rape on any *free white woman* or *female child* under the age of twelve years,” *not* for raping an adult bondswoman (emphasis added)); *George v. State*, 37 Miss. 316, 316 (Miss. 1859).

As injuries committed on or by slaves are not embraced in the common law . . . the crime of rape does not exist in this State between African slaves. Our laws recognize no marital rights as between slaves; their sexual intercourse is left to be regulated by their owners. The regulations of law, as to the white race, on the subject of sexual intercourse, do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous, and the violation of a female slave by a male slave would be a mere assault and battery.

*Id.*; *Minor v. State*, 36 Miss. 630, 634 (Miss. 1859) (“Experience has proved . . . that masters and slaves cannot be governed by the same laws. So different in position, in rights, in duties, they cannot be the subjects of a common system of laws.”). Elucidating one of the stereotypes behind this legal distinction, Angela Harris notes the cultural misconception that African American women were considered “naturally” promiscuous. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990). Harris writes: “‘Rape,’ in this sense was something that only happened to white women; what happened to black women was simply life.” *Id.*

<sup>121</sup> See generally BORDO, *supra* note 16.

<sup>122</sup> See, e.g., COOPER OWENS, *supra* note 110, at 21 n.37 (describing historical racist associations between bodies and behaviors).

well as other adjoining attributes.<sup>123</sup>

When power is conceptualized as the ability to speak<sup>124</sup> and when actors are unable to use their voices, it becomes apparent that bodies can be more powerful communicators than voices. Bodies speak even though individuals cannot control what their bodies say or what others perceive. This predicament is faced by corpulent jurors, as well as by silenced fat defendants and fat female victims. Although jurors may be biased against fat defendants, jurors are subject to the same hostility and determinations that prosecutors and defense attorneys make about weight.

## VII. RECOMMENDATIONS

One possible solution for fatism in the courtroom is having jury instructions on latent biases against corpulent individuals. Just as there are jury instructions on race and gender, as well as jury instructions that are particularly applicable in hate crimes, a jury instruction should be adopted that lays out the general stereotypes associated with corpulence. These instructions could create awareness and help the jury to distinguish between the words and associations of the body and the presentation of evidence in the case.<sup>125</sup>

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<sup>123</sup> See *id.* at 19 n.29, 19 n.31 (describing how bondswomen and Irish immigrant women's bodies were racialized as capable of "transcending" pain). Cooper-Owens further describes how these women "masked" sexual abuse and poorly performed surgeries by appearing open while maintaining strict silence about such abuse and exploitation to protect themselves. See *generally id.* at 24–27.

<sup>124</sup> See *generally* LACAN, FREUD'S PAPERS, *supra* note 108 at 53–61. The ability to define oneself is a form of power and the act of description is an act of creation. *Id.*

<sup>125</sup> See, e.g., PA. INTERBRANCH COMM'N FOR GENDER, RACIAL, AND ETHNIC FAIRNESS, PROPOSED AMENDMENTS TO PENNSYLVANIA STANDARD JURY INSTRUCTIONS (2011), available at [http://www.pa-interbranchcommission.com/\\_pdfs/Prop\\_Amend\\_To\\_PA\\_Stand\\_Jury\\_Insts..pdf](http://www.pa-interbranchcommission.com/_pdfs/Prop_Amend_To_PA_Stand_Jury_Insts..pdf). We propose to substitute the language below in place of the text in Pa SSJI (Civ) 1.52 (f):

### INSTRUCTION 1.52 (Civ)-CONDUCT OF THE JURY

As jurors, you are officers of this court. You must come into these proceedings with an open mind and you must maintain an open mind at all times throughout the trial and during deliberations. You must not be influenced by

A range of initiatives support the purpose behind jury instructions on size: recognizing weight bias. For example, one can look nationally to anti-discrimination legislation that prohibits discrimination based on appearance, height and weight, and involuntary physical characteristics.<sup>126</sup> Or, like scholar Cynthia Lee's proposed jury instructions on race-switching (which aims to get to the root of biases), similar instructions could be made for size.<sup>127</sup> Just as jurors are encouraged to mentally switch the races of the defendant and the victim in order to expose latent race-based biases,<sup>128</sup> in a similar instruction based on size, jurors would be advised to mentally switch the bodily sizes of the defendant and the victim. One federal judge has recognized the powerful conscious and subconscious roots of discrimination and includes a slide on implicit bias when instructing juries in his courtroom.<sup>129</sup> Other judges support further scholarship on addressing

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public opinion on the case. You must be fair to both sides and not allow bias, prejudice or sympathy, or your personal likes or dislikes to influence you. Bias includes, but is not limited to, bias for or against the witnesses, attorneys or parties, based on disability, gender, nationality, national origin, race, ethnicity, religion, gender identity, sexual orientation, age or socioeconomic status.

*Id.* at 2. We propose to add the language indicated in italics to Pa SSJI (Civ) 1.39:

INSTRUCTION 1.39 (Civ)-CAUTIONARY INSTRUCTIONS - BIAS ON  
ACCOUNT OF RACE, RELIGION . . .

Remember that under our justice system, the race, *gender*, religion, national origin, *ethnicity*, *disability*, *gender identity*, *sexual orientation*, *age* or *socioeconomic status* of a party or attorney must not be considered by you in the discharge of your sworn duty as a juror.

*Id.* at 1. In these proposed amendments, shape and size would likely fall under disability.

<sup>126</sup> See RHODE, *supra* note 3, at 125–34 (describing such ordinances in Santa Cruz, CA; Urbana, Ill.; San Francisco, CA; Washington, DC; Howard County, MD.; Madison, WI; and Michigan); *Appendix B: Legal Briefs*, in THE FAT STUDIES READER 343–50 (Esther Rothblum & Sondra Solovay eds., 2009) (including the language of national legal ordinances against appearance bias as an appendix).

<sup>127</sup> See CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 252–59 (2003); Cynthia Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 481–82 (1996).

<sup>128</sup> *See id.*

<sup>129</sup> Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, The Failed Promise of Batson, and Proposed*

implicit bias in the courtroom.<sup>130</sup>

Raising awareness of weight and size bias on the part of the jury is one step, while another is raising awareness on the part of the prosecutor. In particular, prosecutors should be admonished if they rely on stereotypes of appearance and weight<sup>131</sup> regarding any courtroom player, from the defendant to the defense attorney.

Awareness of implicit biases should also extend to jury selection. While there is presently no federal extension of *Batson* that prohibits the striking of potential jurors based on characteristics other than race and gender, a handful of federal district courts have applied *Batson* to ethnic and religious characteristics.<sup>132</sup> State courts have occasionally been more generous in protecting potential jurors by enacting state rules of criminal procedure that prohibit striking jurors from a list of classes<sup>133</sup> that extends beyond race and

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*Solutions*, 4 HARV. L. & POL'Y. REV. 149, 169 (2010). Information on implicit bias informs individuals of their own biases, of which they may not have been previously aware.

<sup>130</sup> Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023 (2008) (“I encourage those in the Academy to continue to pursue and refine their research in this area of unconscious bias to offer insight for us into how improvements in judicial function could be achieved.”).

<sup>131</sup> See, e.g., *People v. Dolphy*, 685 N.Y.S.2d 485, 487 (N.Y. 1999).

The prosecutor, in response to the *Batson* challenge, stated that he struck the juror based on the fact that she was overweight. As a matter of practice, the prosecutor stated that, based on his own personal jury criteria, he omitted obese people based on his past experience that ‘heavy-set people tend to be very sympathetic toward any defendant.’ County Court found the explanation to be race neutral and denied defendant’s request for a mistrial.

*Id.*; see also *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995) (holding “that the equal protection analysis in *Batson v. Kentucky* . . . does not apply to prohibit peremptory strikes on the basis of obesity”).

<sup>132</sup> See *United States v. Greer*, 968 F.2d 433 (5th Cir. 1992) (holding *Batson* extends to religion); *United States v. Somerstein*, 959 F. Supp. 592 (E.D.N.Y. 1997) (extending juror protection to religion); see also *United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988) (upholding trial court’s extension of *Batson* to Italian-Americans).

<sup>133</sup> See, e.g., Cal. Civ. Proc. Code § 231.5 (banning the use of peremptory challenges based on race, color, religion, sex, national origin or sexual orientation).

gender.<sup>134</sup>

Finally, defense attorneys need to be more aware of bias based on corpulence when representing their clients. Ineffective assistance of counsel should be recognized both for the failure to raise awareness of general biases against fat people and for the disparate treatment of a client due to a counsel's prejudice against fat individuals. Defense counsel bias based on a defendant's size may lead to diminished representation. Without a zealous advocate, a defendant may silently suffer the biases of courtroom players along with damages to the presentation of his case.

#### CONCLUSION

The site of a courtroom is not impervious to stereotypes about shape and size. In the criminal courtroom, weight bias implicates all players; it can be used against both jurors and defendants. While the size of the defendant may be used against her, the size of the victim may also be influential in how the jury and the court perceive the culpability of the person standing trial. Greater awareness of fatism is the key first step. The next step involves including weight bias as a recognizable form of discrimination, along with other characteristics such as gender, race, nationality, ability, and sexual orientation. Integrating awareness of biases against these other social and physical characteristics into the courtroom provides a framework for recognizing weight bias as well. In a time when weight is a national and public concern, courtrooms should recognize when the rights of fat individuals are being diminished and when social standards are shrinking constitutional rights. Only with increased awareness can weight bias be curtailed.

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<sup>134</sup> See *State v. Hodge*, 726 A.2d 531, 553 (Conn. 1999) (holding *Batson* extends to religion); for an example of discussion of peremptory challenges, see Maisa Jean Frank, Note, *Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota as a Case Study*, 94 MINN. L. REV. 2075 (2010).