Recognizing and Confronting Bias: A Defender’s Guide

**Presenters:** L. Song Richardson, Esq., Professor of Law, University of California, Irvine  
Jeffery Robinson, Esq., Deputy Legal Director, ACLU

**DATE:** Friday May 12  
**TIME:** 10:00 a.m. – 1:00 p.m.  
**PLACE:** Daniel Patrick Moynihan Federal Courthouse  
Room 850  
500 Pearl Street, New York, NY 10007

**Agenda**

10:00-11:00: The Science of Implicit Bias:  
How it Impacts Defenders and How Defenders Can Use Research to Help Their Clients  
Presenter: L. Song Richardson, Esq.

11:00-12:00: Explicit Bias:  
A Brief History of Race and Bias in America  
Presenter: Jeffery Robinson, Esq.

12:00-12:15: Break

12:15-1:00: Overcoming Racial Anxiety and Stereotypes  
Presenters: L. Song Richardson, Esq.  
Jeffery Robinson, Esq.

Questions about the program may be directed to:  
Karen Van Outryve, (212) 417-8741, email: Karen_van_outryve@fd.org

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The Federal Defenders of New York is an Accredited Provider with the New York State Continuing Legal Education Board. Attendance at this event will provide a maximum of three credit hours, which can be applied to the Ethics and Professionalism requirement for newly admitted and experienced attorneys.
Recognizing and Confronting Bias: A Defender’s Guide

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SONG RICHARDSON
Senior Associate Dean for Academic Affairs and Professor of Law
University of California, Irvine School of Law

Song Richardson is the Senior Associate Dean for Academic Affairs and Professor of Law at the University of California, Irvine School of Law with a joint appointment in the Department of Criminology, Law and Society. She received her AB from Harvard College and her JD from Yale Law School. Her interdisciplinary research uses lessons from cognitive and social psychology to decision-making and judgment in a variety of contexts. Currently, she is working on a book that examines the legal and moral implications of mind sciences research on policing and criminal procedure. She is a member of the American Law Institute.


Her legal career has included partnership at a boutique criminal law firm and work as a state and federal public defender in Seattle, Washington. She was also an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc. Immediately upon graduation from law school, Professor Richardson was a Skadden Arps Public Interest Fellow with the National Immigration Law Center in Los Angeles and the Legal Aid Society’s Immigration Unit in Brooklyn, NY.

Richardson frequently gives talks across the country for judges, prosecutors, public defenders, police officers, non-profit organizations, and law firms on the science of implicit racial bias, implicit gender bias, stereotype threat and racial anxiety. She also presents her work at academic symposia and non-academic legal conferences.
JEFFERY P. ROBINSON  
Deputy Legal Director and Director of the Trone Center for Justice and Equality  
American Civil Liberties Union (ACLU), New York

Jeff Robinson is a Deputy Legal Director and the Director of the Trone Center for Justice and Equality, which houses the ACLU’s work on criminal and racial justice and reform issues. Since graduating from Harvard Law School in 1981, Jeff has three decades of experience working on these issues. For seven years, he represented indigent clients in state court at The Defender Association and then in federal court at the Federal Public Defender’s Office, both in Seattle. In 1988, Jeff began a 27 year private practice at the Seattle firm of Schroeter, Goldmark & Bender where he represented a broad range of clients in local, state, and federal courts on charges ranging from shoplifting to securities fraud and first degree murder. He has tried over 200 criminal cases to verdict and has tried more than a dozen civil cases representing plaintiffs suing corporate and government entities. Jeff was one of the original members of the John Adams Project, which enabled him to work on the behalf of one of five men held at Guantanamo Bay charged with carrying out the 9-11 attacks.

In addition to being a nationally recognized trial attorney, Jeff is also a respected teacher of trial advocacy. He is a faculty member of the National Criminal Defense College in Macon, Georgia, and has lectured on trial skills all over the United States. He has also spoken nationally to diverse audiences on the role of race in the criminal justice system. He is past President of the Washington Association of Criminal Defense Lawyers and a life member and past member of the board of directors of the National Association of Criminal Defense Lawyers. Jeff is also an elected fellow of the American College of Trial Lawyers.
Implicit Racial Bias in Public Defender Triage

ABSTRACT. Despite the promise of Gideon, providing “the guiding hand of counsel” to indigent defendants remains unmanageable, largely because the nation’s public defender offices are overworked and underfunded. Faced with overwhelming caseloads and inadequate resources, public defenders must engage in triage, deciding which cases deserve attention and which do not. Although scholars have recognized the need to develop standards for making these difficult judgments, they have paid little attention to how implicit, i.e., unconscious, biases may affect those decisions. There is reason to suspect that unconscious biases will influence public defender decisionmaking due to generations of racial stereotypes specific to stigmatized groups and crime. This Essay urges legal scholars and practitioners to consider how implicit biases may influence the rationing of defense entitlements and suggests ways to safeguard against the effects of these unconscious forces.

AUTHORS. L. Song Richardson is Professor, University of Iowa College of Law; Yale Law School, J.D.; Harvard College, A.B. Phillip Atiba Goff is Assistant Professor, University of California, Los Angeles, Department of Psychology; Stanford University, Ph.D.; Harvard College, A.B. We are grateful to all those who took the time to provide insightful comments, critiques, and suggestions on this Essay, including John Bronsteen, Jack Chin, Stella Elias, Paul Gowder, Cynthia Ho, Emily Hughes, Angela Onwuachi-Willig, Todd Pettys, Matt Sag, Lauren Sudeall Lucas, Deborah Tuerkheimer, and faculty who attended the workshop at Loyola University Chicago School of Law. Additionally, I thank the organizers of this conference, Nancy Leong, Justin Marceau, and members of The Yale Law Journal, particularly Doug Lieb and Ida Araya-Brumskine. Solomon Chouicha, Ernâni Magalhães, and Taylor Whitten provided excellent research assistance. Finally, Professor Richardson must acknowledge Kurt Kieffer for countless conversations and insights. Any errors are our own.
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INTRODUCTION

As we commemorate the fiftieth anniversary of the Supreme Court’s landmark decision in Gideon v. Wainwright, there is little doubt that its promise to provide “the guiding hand of counsel” to indigent defendants remains largely unrealized. There are many reasons for this, including the lack of political will to fulfill Gideon’s promise by guaranteeing adequate funding and imposing caseload limits. Although some jurisdictions created public defender (PD) offices to meet the demand for services, attorneys in the majority of these offices handle cases well over the maximum recommended limit.

Scholars rightly bemoan the current state of indigent defense. However, insufficient attention has been paid to the fact that, until much-needed changes in the provision of indigent defense services occur, PDs will engage in triage, the process of prioritizing cases for attention. This reality raises important questions about how to guide attorney decisionmaking in order to avoid ad hoc judgments. We focus on state PDs rather than on assigned counsel and contract systems because state PD offices handle the majority of indigent cases in state criminal proceedings.

Almost no attention has been paid to the effects that unconscious, i.e., implicit, biases may have on PD decisionmaking. This is surprising because over three decades of well-established social science research demonstrates that these biases are ubiquitous and can influence judgments, especially when information deficits exist. Worse, these biases are likely to be particularly influential in circumstances where time is limited, individuals are cognitively taxed, and decisionmaking is highly discretionary—exactly the context in which PDs find themselves. Thus, the domain of PDs and triage presents a rare confluence of factors ripe for the influence of implicit biases (IBs) and consequently deserves far more scholarly treatment than it has received.

We argue that it is critical to consider the probable effects of IBs on PD decisionmaking because zealous and effective advocacy is a scarce resource in the current environment. Thus, the distribution of this resource should not be based on unconscious judgments tied to a defendant’s race. In the Parts that follow, we consider how IBs may affect PD decisionmaking and end with some suggestions for safeguarding against their influence. This Essay focuses on the

effects of IBs on black clients because psychological research disproportionately addresses anti-black prejudice. However, IBs are likely to impact judgments of other clients who are similarly stereotyped as dangerous and criminal.

I. OVERVIEW OF IMPLICIT RACIAL BIASES

Implicit social cognition is a branch of psychology that studies how mental processes that occur outside of awareness and that operate without conscious control can affect judgments about and behaviors toward social groups. These unconscious processes are simply an extension of the way humans think and process information. Briefly stated, our mental processes facilitate decisionmaking by making automatic associations between concepts. For example, people might automatically associate “doctor” with “hospital” and other related ideas. These associations are linked in our minds because they often occur together.

Implicit racial biases refer to the unconscious associations we make about racial groups. The existence of these biases is consistent with the conclusion of more general research that we automatically and unconsciously use heuristics to cope with the enormous amount of information that bombards us. Implicit racial biases facilitate our ability to “manage information overload and make decisions more efficiently and easily” by “filtering information, filling in missing data, and automatically categorizing people according to cultural stereotypes.” Like all unconscious mental processes, implicit racial biases are unintentional because they are not planned responses; involuntary, because they occur automatically in the presence of an environmental cue; and effortless, in that they do not deplete an individual’s limited information processing resources. Those characteristics can be

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9. Id.
contrasted with conscious processes, or mental activities of which the person is aware, that they intend, that they volitionally control, and that require effort.\textsuperscript{10}

The fact that these biases are unconscious means that they “are not consciously accessible through introspection.”\textsuperscript{11}

We use the term implicit racial biases to refer both to unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups). Implicit stereotypes and attitudes result from the practice we get associating groups (e.g., blacks) with traits (e.g., criminality). This practice stems from repeated exposures to cultural stereotypes that are ubiquitous within a given society. For instance, the cultural stereotype of blacks as violent, hostile, aggressive, and dangerous persists within our society.\textsuperscript{12} Merely being aware of these stereotypes, without personally endorsing them as correct, is sufficient to activate unconscious stereotypes in a person’s mind—often resulting in chronic associations that we call implicit attitudes.\textsuperscript{13} The underlying theory is that some groups (again, like blacks) are so commonly associated with negative traits (again, like criminality) that there is a general tendency to categorize the group with anything negative because of the overall negativity of the associations.

IBs can be activated by racial cues present in the environment,\textsuperscript{14} including another person’s skin color, age, gender, and accent.\textsuperscript{15} Where blacks are concerned, even thinking about crime may be sufficient to activate IBs. This is because the association between blacks and crime is so pervasive that it has become bidirectional—thoughts of criminality unconsciously activate thoughts of blacks, and reciprocally, thoughts of blacks activate thoughts of crime.\textsuperscript{16}

Over three decades’ worth of research repeatedly demonstrates that IBs,

\textsuperscript{10}. Id. (citations omitted).
\textsuperscript{11}. Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. REV. 1124, 1129 (2012).
\textsuperscript{12}. See, e.g., Jennifer L. Eberhardt et al., Seeing Black: Race, Crime, and Visual Processing, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004); Graham & Lowery, supra note 8, at 485; Sophie Trawalter et al., Attending to Threat: Race-Based Patterns of Selective Attention, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008).
\textsuperscript{13}. See Joshua Correll et al., The Police Officer’s Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1323 (2002).
\textsuperscript{14}. 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, 310 (2010).
\textsuperscript{16}. Eberhardt et al., supra note 12, at 883.
once activated, influence many of our behaviors and judgments in ways we cannot consciously access and often cannot control. Furthermore, IBs can predict real-world behaviors. For instance, one study found that for every additional standard deviation of added IB, employers were five percent less likely to hire a job applicant with an Arab- or Muslim-sounding name than a white-sounding name.

There is ample reason for concern that IBs will affect public defenders’ judgments because IBs thrive in situations where individuals make decisions quickly with imperfect information and when they are cognitively depleted, anxious, or distracted. As we discuss next, PDs work in precisely this type of environment.

II. PUBLIC DEFENDER TRIAGE

Indigent defense is in a state of crisis. Defender offices are chronically underfunded, resulting in crushing caseloads. Most offices do not have caseload limits, and those that do regularly surpass them. Thus, despite the existence of dedicated and committed PDs, the lack of adequate resources coupled with unmanageable caseloads make it virtually impossible to provide

19. See Dan-Olof Rooth, Implicit Discrimination in Hiring: Real World Evidence 1, 4-5 (Inst. for the Study of Labor, Discussion Paper No. 2764, 2007), http://d-nb.info/98812002X/34 (discussing the difference in receiving callback job interviews between applicants with Arab or Muslim names and applicants with Swedish names); see also Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94 Am. Econ. Rev. 991, 998 (2004) (demonstrating that job applicants with white sounding names such as Emily or Greg were 50% more likely to receive callback job interviews in Boston and 49% more likely in Chicago than applicants with black-sounding names like Jamal).
20. Graham & Lowery, supra note 8, at 486.
zealous and effective representation to every client.

The financial impediments to realizing the promise of Gideon must be remedied. In the interim, however, PDs are forced to make difficult resource-allocation decisions among their clients. These resources include an attorney’s time and mental energy, as well as purely monetary resources, such as funds to hire experts.

In an ideal world, defenders would have unlimited opportunities to interview and investigate all of the state’s witnesses, canvass the neighborhood where the crime occurred, and otherwise thoroughly investigate the case. Furthermore, defenders could conduct legal research, file motions, request funds for expert assistance, and engage in extensive plea negotiations. They also would have the time to develop relationships with clients, which is critical because clients have important information that can aid attorneys in their trial preparation and their arguments for pretrial release, better plea offers, and reduced sentences.

However, most PDs do not work in an ideal environment. They cannot realistically provide each client with zealous and effective advocacy. PDs are forced by circumstances to engage in triage, i.e., determining which clients merit attention and which do not. As one defender put it, “The present M.A.S.H. style operating procedure requires public defenders to divvy effective legal assistance to a narrowing group of clients, [forcing them] to choose among clients as to who will receive effective legal assistance.”

It is no wonder that the provision of indigent defense is often likened to medical triage. Similar to hospital emergency rooms, PD offices face demands that far outpace their resources. In order to save time to defend the cases that they find deserving, attorneys may plead out other cases quickly or go to trial unprepared. This reality means that for most PDs, the question is not “how do I engage in zealous and effective advocacy,” but rather, “given that all my clients deserve aggressive advocacy, how do I choose among them?”

We are unaware of any PD office that has formal triage standards to help attorneys make these difficult judgments. Even if standards do exist, they

25. Id. at 69.
27. Id.
29. We have paraphrased David Luban here. See David Luban, Are Criminal Defenders Different?, 91 MICH. L. REV. 1729, 1765 (1993).
cannot completely eliminate attorney discretion. For instance, even with standards, attorneys must still make judgment calls about whether to advise clients to take a case to trial or to accept a plea offer, and IBs can affect these evaluations. As a result, two similarly situated clients may be treated differently.

On this point, a comparison to medical triage is illuminating. Hospitals have developed objective triage standards to guide medical decisionmaking.\textsuperscript{30} Despite this, implicit racial biases still affect decisions. In one study, researchers determined that emergency room doctors’ implicit racial biases predicted their treatment decisions.\textsuperscript{31} More specifically, “[a]s physicians’ prowhite implicit bias increased, so did their likelihood of treating white patients and not treating black patients” with procedures to abort a heart attack.\textsuperscript{32} Hence, while objective triage standards are important, they are not a panacea for implicit bias.

Given the similarities between PD offices and emergency rooms, it would be surprising if IBs did not affect defender judgments. One study of the implicit attitudes of death penalty defense lawyers found evidence of IBs.\textsuperscript{33} Furthermore, abundant research demonstrates that IBs affect individuals who, like defenders, work in cognitively taxing environments and must make complex decisions under time pressure and in the face of ambiguous facts.\textsuperscript{34} No group appears immune to the possibility of influence. Moreover, IBs can affect judgments even if PDs are committed to zealous advocacy, and consciously and genuinely reject negative stereotypes and attitudes about marginalized populations.\textsuperscript{35} In other words, individuals’ conscious attitudes are weakly

\begin{itemize}
  \item \textsuperscript{30} Chet D. Schrader & Lawrence M. Lewis, \textit{Racial Disparity in Emergency Department Triage}, 49 J. EMERGENCY MED. 511, 511 (2013).
  \item \textsuperscript{31} See Alexander R. Green et al., \textit{Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients}, 22 J. GEN. INTERNAL MED. 1231, 1231 (2007).
  \item \textsuperscript{32} \textit{Id}. The procedure in question, thrombolysis, attempts to break up blood clots and is often used to treat heart attacks. See \textit{Thrombolytic Therapy}, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/ency/article/007089.htm (last updated June 1, 2010).
  \item Theodore Eisenberg & Sheri Lynn Johnson, \textit{Implicit Racial Attitudes of Death Penalty Lawyers}, 53 DEPAUL L. REV. 1539, 1545-51 (2004). We are unaware of any study that examines the relative number of hours lawyers spend on black versus white clients nor any that links differences in attorneys’ delivery of services to implicit biases.
  \item \textsuperscript{34} See, e.g., Eberhardt et al., \textit{supra} note 12; Phillip Atiba Goff et al., “I’m Not a Racist, but I Will [Mess] You Up”: Stereotype Threat as a Status-Threat that Provokes Aggressive Responses (2013) (unpublished manuscript) (on file with authors); Phillip Atiba Goff et al., \textit{The Essence of Innocence: Consequences of Dehumanizing Black Children} (2013) (unpublished manuscript) (on file with authors).
  \item \textsuperscript{35} \textit{But see infra} Section IV.A (discussing the effects of egalitarian attitudes on implicit bias).
\end{itemize}
related to their implicit attitudes. As such, even the most egalitarian individual can fall victim to IBs absent other precautions.\textsuperscript{36} In fact, confidence in one’s own egalitarianism can be an obstacle to identifying IBs,\textsuperscript{37} meaning that individuals who became PDs in order to fight racial injustice may be just as susceptible to the effects of IBs as those with less noble motives. Additionally, research suggests that even if PDs are nonwhite themselves, they are in danger of being influenced by IBs.\textsuperscript{38}

Next, we examine how IBs may affect defender judgments. While factors other than IBs can influence triage decisionmaking, this Essay focuses solely on the possible effects of IBs. We will provide some discussion of the research; however, given the constraints of this Essay, we refer the reader to our prior work and other useful sources for an extended discussion of the underlying studies, including their validity, reliability, and effect sizes.\textsuperscript{39}

\section{III. Implicit Biases’ Effects on Triage Judgments}

Defender triage involves choices about how to allocate precious resources. These triage decisions begin from the moment the PD receives the case. Attorneys likely use a number of different criteria to make these decisions. For instance, they may prioritize cases based upon their assessment of whether the state can prove its case beyond a reasonable doubt. Or they may expend more effort on cases in which they believe their client is factually innocent.\textsuperscript{40} While the science on IBs does not permit us to identify when IB is operating in any

\begin{thebibliography}{99}
\bibitem{40} We, like others, take the view that public defenders should not focus on cases of factual innocence. See, e.g., Robert P. Mosteller, \textit{Why Defense Attorneys Cannot, but Do, Care About Innocence}, 50 \textit{SANTA CLARA L. REV.} 1, 3-4 (2010); Abbe Smith, \textit{Defending the Innocent}, 32 \textit{CONN. L. REV.} 495, 509 n.100 (2000).
\end{thebibliography}
particular case, the concern of this Essay is the aggregate probability that, given the prevalence of IBs, PDs’ decisions may be frequently affected without correction for the negative consequences. What follows is a discussion of how IBs may influence a host of triage decisions.

A. Biased Evaluations of Evidence

Of necessity, defenders must begin evaluating cases from the moment they are assigned. Their initial evaluations will affect a variety of subsequent decisions important to the ultimate resolution of the case. For instance, after reviewing the discovery, they may decide that expending resources to conduct a fact investigation would be a waste of time because the state’s evidence is strong. On the other hand, if attorneys determine that the state’s case has weaknesses they can exploit, they may expend more resources to defend the client, including investigating the case and engaging in vigorous plea bargaining. Thus, early appraisals of cases can become self-fulfilling prophecies. While attorneys must evaluate a case’s merits, the problem is that IBs may influence these judgments.

Studies consistently demonstrate that IBs can affect evaluations of ambiguous evidence. In one, a researcher activated IBs by subliminally priming subjects with words associated with blacks, such as slavery.41 Afterwards, the researcher asked subjects to read a vignette about a racially unidentified male and to rate his ambiguous behaviors on a number of traits. The results established that IBs made subjects more likely to rate his behaviors as hostile. Another study utilizing the identical method found that, when IBs were activated, police and probation officers judged a male juvenile as being more culpable and more deserving of severe punishment than when these biases were not activated.42 IBs can even influence how mock jurors evaluate evidence that is ambiguous as to guilt. These biases not only caused jurors to be more likely “to judge the evidence as tending to indicate criminal guilt,” but “also more likely to believe that the defendant was guilty.”43

41. Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). “Priming refers to the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context.” Bargh et al., supra note 15, at 230. “Subliminal” means that the priming occurs below the level of conscious awareness. Subliminal priming is achieved by a variety of methods and typically involves flashing images on a computer screen so quickly that individuals are unaware they saw anything.
42. Graham & Lowery, supra note 8, at 483.
43. Levinson & Young, supra note 14, at 310-11.
When translated to the context of PD triage, these studies suggest that when clients are black or otherwise criminally stereotyped, IBs can influence evidence evaluation, potentially causing PDs to unintentionally interpret information as more probative of guilt. Consequently, PDs may determine that the state will have little difficulty meeting its burden of proof and thus, that the case does not warrant much effort.

The effects of IBs on triage judgments can occur even before defenders meet their clients. At this point, attorneys likely have information about the client’s race. This knowledge, coupled with reading the discovery, is sufficient to activate IBs and their attendant effects. The consequences for the defendant can worsen once his attorney meets him, particularly if the client has stereotypically African features such as very dark skin.

Furthermore, the influence of IBs will be facilitated if the charge itself is associated with the client’s race. For instance, young black men serve as our mental prototype of the violent street criminal and drug dealer. If the client is black and the charge involves a drug offense, a judgment of guilt may be cognitively easier to make because of the strong implicit association between blacks and crime. This gut feeling can then affect the attorney’s views about the merits of the case. Of course, additional investigation might change her initial hunch. However, part of what defenders regulate is how much effort to expend in acquiring additional information. Hence, unless defenders have reason to second-guess their initial impressions, IBs can negatively affect judgments about cases involving clients stereotyped as criminal and crimes stereotyped as black.

B. Biased Interactions

The defender’s initial client meeting is another domain likely to influence triage decisions. For instance, during the meeting, attorneys will inevitably make judgments about client credibility. If lawyers do not credit their clients’ version of events, they may not follow up on leads or may forgo possible motions to suppress government evidence. Additionally, clients are important

44. See supra notes 14-19 and accompanying text.
45. See infra Subsection III.C.2.
46. See Trawalter et al., supra note 12, at 1322.
47. See, e.g., Eberhardt et al., supra note 12, at 883 (demonstrating the relationship between blacks and crime); Bernd Wittenbrink et al., Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes, 81 J. PERSONALITY & SOC. PSYCHOL. 815 (2001) (demonstrating the importance of context to the activation of IBs).
sources of witnesses and exculpatory and mitigating information. If the initial meeting goes badly, however, clients may not be willing to share information that might be crucial to the case, and attorneys may determine that the client will not be cooperative, forthcoming with information, or otherwise helpful to an investigation. Thus, an unpleasant interaction can influence how much time an attorney is willing to devote to a case.

Unfortunately, IBs can adversely affect interactions with negatively stereotyped individuals. First, IBs can influence how attorneys interpret a client’s ambiguous behaviors and facial expressions. In one study, identical expressions were deemed more hostile on black faces than on white faces by subjects with high IB. In another, subjects with more IB assessed hostile expressions as lingering longer on black than white faces. Research also demonstrates that study participants interpret black actors engaging in ambiguous behaviors as more aggressive than white actors engaging in identical behaviors. In fact, when the actor is black, white subjects are more likely to attribute the negative behavior to the individual’s character rather than to the situation.

Second, IBs can negatively influence attorneys’ behaviors. In one study, when interacting with negatively stereotyped individuals, people tended to maintain a greater physical distance, make more speech errors, and end the contact earlier than with positively stereotyped individuals. Furthermore, unconscious stereotypes can cause people to act in accordance with them. For instance, research subjects who were subliminally primed with a black male face reacted with more hostility to bad news than those primed with white faces. This occurred, the researchers concluded, because subliminally priming participants with black male faces unconsciously activated the stereotype of black hostility, which then influenced the participants’ behaviors. These behavioral effects of IB are problematic because individuals on the receiving

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51. Id.
52. Carl O. Word et al., The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109 (1974); see also Dovidio et al., supra note 36 (finding that nonverbal behaviors can be affected by implicit bias).
54. Id. at 239.
end of negative behaviors may respond in kind. However, because the originators of the behavior are unaware of their own role in triggering the unpleasant response, they may attribute the negative behavior solely to the other. This “behavioral confirmation” effect explains how IBs can adversely influence interactions.

Third, IBs can cause attorneys to treat stereotyped individuals in stereotype-consistent ways. Research demonstrates that stereotypes of blacks as untruthful lead police to push black suspects harder for confessions and to adopt more accusatory interrogation techniques. This approach may yield more anxious behaviors in suspects that, in turn, may produce perceptions of guilt.

With these studies in mind, imagine the interactions between negatively stereotyped clients and defenders. As a result of IB, the attorney may unconsciously exhibit hostility. The attorney may also be more likely to interpret the client’s body language and facial expressions as antagonistic. Furthermore, the attorney’s unconscious negative expectations may produce perceptions and attributions consistent with them.

If the client mirrors the attorney’s behaviors, this will confirm the attorney’s initial negative expectations, and the attorney may attribute this behavior to the client’s disposition rather than to the attorney’s own behaviors or the situation. The resulting negative interaction can create a vicious cycle of mutual distrust and dislike, adversely affecting the attorney’s triage decisions. Spending time with a client can, of course, change these initial impressions. However, an unpleasant initial interaction may reduce the defender’s desire to do so.

C. Biased Acceptance of Punishments

We have been discussing the effects that implicit stereotypes and attitudes may have on defender judgments. Here we will consider two additional types of implicit racial bias that can also influence decisionmaking: implicit

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dehumanization and features-based IB.

1. Implicit Dehumanization

Implicit dehumanization stems from a tendency to unconsciously associate highly stigmatized groups with nonhuman animals. Here, we focus on the unconscious association between blacks and apes because of its long history in our culture.59 Remarkably, this unconscious association can be activated even when people are not consciously aware of the association.60 However, once triggered, it predicts real-world behaviors.

For instance, Goff and colleagues had subjects watch a video of police viciously beating a suspect. If subjects were subliminally primed with images of apes before watching the video, they were more likely to find the beating justified when the victim was black.61 However, when the victim was white or when the subjects were not subliminally primed, they did not endorse the beating.

To determine whether implicit dehumanization could predict real-world behaviors, these researchers examined Philadelphia newspaper articles reporting on death-eligible cases, looking for ape-related metaphors. After controlling for factors other than race, they found that “Black defendants who were put to death were more likely to have apelike representations in the press . . . than were those whose lives were spared.”62 Importantly, in previous experiments, the researchers found that implicit associations between blacks and apes (but not explicit associations) predicted similar behaviors in the lab, leading to the hypothesis that implicit dehumanization likely contributed to both the media representations of death-eligible defendants and the sentencing judgments.

Recently, Goff and colleagues built on these findings in a juvenile justice context.63 They found that the more individuals unconsciously associated blacks with apes, the less innocent they thought black children suspected of a crime were. Worse yet, implicit dehumanization predicted racial disparities in the violent treatment of children by police officers. When the researchers

60. See id.
61. Id. at 302.
62. Id. at 304.
63. Goff et al., supra note 34.
compared police officers’ actual use-of-force history against juveniles with their implicit dehumanization score—the implicit association between blacks and apes—they found that police officers who held the association more strongly were also more likely to use force against black as opposed to white children.

Taken together, these studies raise concerns that defenders may be more accepting of higher sentencing recommendations for black versus white clients and, thus, less likely to negotiate aggressively for lower sentences or to conduct mitigation investigations. While the effects of implicit dehumanization on PDs have yet to be demonstrated, the fact that implicit dehumanization shapes other actors’ behaviors in criminal-justice-related settings suggests that defenders are probably not immune.

2. Features-Based Implicit Bias

Research demonstrates that individuals with more stereotypically black features (i.e., darker skin, broader nose, and fuller lips) are unconsciously judged to be more dangerous and culpable than others. One study demonstrated the effect of features-based IB on outcomes in death penalty cases. After controlling for a wide range of factors, researchers found that fifty-seven percent of black defendants in the half of the sample determined to have more stereotypically black features received death sentences, compared to twenty-four percent in the other half of the sample. The effect only appeared when the victim was white.

In another study, researchers examined whether “the degree to which . . . inmates manifested Afrocentric features” would predict sentence length after controlling for race, criminal history, and the seriousness of the crime. Their results were troubling. When comparing white defendants to each other, they discovered that those with more stereotypically black features received longer sentences. They found the same results when comparing black defendants to each other. This finding confirmed prior research that people unconsciously “use Afrocentric features to infer traits that are stereotypic of African

64. See, e.g., Irene V. Blair et al., The Influence of Afrocentric Facial Features in Criminal Sentencing, 15 PSYCHOL. SCI. 674, 676–77 (2004) (discussing how Afrocentric features significantly correlate with harsher sentences).
66. Blair et al., supra note 64, at 676.
67. Id. at 677.
68. Id.
Americans.” As a result, even within races, people with more stereotypically black features are perceived as being more criminal. In fact, one recent study found that subjects were more likely to shoot black individuals with more stereotypically “black” features than those with fewer stereotypically “black” features.

In sum, features-based IB may result in defenders unconsciously being more accepting of harsher sentences for some clients than others. Because of their belief that a tougher sentence is appropriate or likely to be imposed, PDs may be less likely to fight for their client’s release on bail and spend time, effort, and scarce resources negotiating a better plea deal. Hence, features-based IB can affect a host of triage decisions that can disadvantage clients of all races who have stereotypically black features.

**IV. RECOMMENDATIONS**

As the previous discussion demonstrates, IBs may have pernicious effects on PD decisionmaking. However, while IBs are ubiquitous, they are also malleable. Consequently, defender offices may be able to implement strategies to help debias their attorneys. What follows are five recommendations that have the potential to mitigate or safeguard against the probable effects of IBs on defender judgments. However, given the constraints of this Essay, we only trace the broad outlines of each recommendation and do not address possible limitations.

**A. Office Culture**

A person’s motivations and ideological commitments may be important to

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69. *Id.*

70. *Id.* at 677-78; see also Eberhardt, * supra* note 12, at 877, 888 (demonstrating that more racially stereotypical black men are seen as more criminal).


reducing IBs.\textsuperscript{74} People highly motivated to be nonprejudiced can reduce or eliminate IBs’ effects on their behavior,\textsuperscript{75} especially if they are internally motivated.\textsuperscript{76} Additionally, high epistemic motivation—that is, requiring more information to feel comfortable making a decision—is associated with reduced reliance on stereotypes because it “increase[s] the tendency to engage in systematic information processing.”\textsuperscript{77} Furthermore, people committed to egalitarian goals may be better able to control the activation of IBs.\textsuperscript{78} This is good news for defender offices because many attorneys become defenders as a result of their commitments to equal justice.

Since motivations appear to affect implicit bias, public defender offices should reward these motivations and also consider them when making hiring decisions.\textsuperscript{79} Some defender organizations are already attempting to transform the culture of their offices through “values-based” recruiting.\textsuperscript{80} For instance, Gideon’s Promise (formerly the Southern Public Defender Training Center) screens new lawyers “for their receptiveness to client-centered values.”\textsuperscript{81} Paying attention to a new recruit’s client-centered values is important because the desire to develop relationships with and form positive impressions of members of stereotyped groups may help to reduce the activation of negative racial

\textsuperscript{74} Brian A. Nosek et al., \textit{Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site}, 6 \textit{GROUP DYNAMICS: THEORY, RESEARCH & PRACTICE} 101, 106 (2002).
\textsuperscript{76} E. Ashby Plant & Patricia G. Devine, \textit{The Active Control of Prejudice: Unpacking the Intentions Guiding Control Efforts}, 96 \textit{J. PERSONALITY & SOC. PSYCHOL.} 640 (2009); see also Leslie R.M. Hausmann & Carey S. Ryan, \textit{Effects of External and Internal Motivation To Control Prejudice on Implicit Prejudice: The Mediating Role of Efforts To Control Prejudiced Responses}, 26 \textit{BASIC & APPLIED SOC. PSYCHOL.} 215, 222 (2004) (finding that those with internal motivations to be nonprejudiced show decreased implicit biases compared to those who are only externally motivated).
\textsuperscript{78} See, e.g., Gordon B. Moskowitz et al., \textit{Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals}, 77 \textit{J. PERSONALITY & SOC. PSYCHOL.} 167 (1999).
Another important consideration during recruitment is the potential hire’s experiences navigating diverse environments. Research demonstrates that significant positive contact with individuals who do not fit our stereotypes about their group can reduce IB. For instance, one study found that people reporting more positive personal contacts with blacks were less likely to have negative beliefs about their criminality and violence. These considerations are job-related because any defender will almost certainly have negatively stereotyped people as clients. Furthermore, racial diversity among defenders themselves can be important to reducing IBs because it increases opportunities for positive interactions between racial group members of equal status, helps to create positive associations, and motivates people to make more accurate, nonstereotyped judgments. All of these factors reduce implicit bias.

Finally, promoting people who demonstrate the desire to be fair and egalitarian will help to demonstrate the importance of these values within the office, thereby encouraging a culture that motivates attorneys to live up to such values. Group norms are among the most influential factors in changing attitudes of any kind. Individuals operating within an organizational culture of tolerance tend to become more tolerant—particularly when influential others such as supervisors perform that norm. Conversely, individuals operating

83. See, e.g., Shaki Asgari, Nilanjana Dasgupta & Nicole Gilbert Cote, When Does Contact with Successful Ingroup Members Change Self-Stereotypes? A Longitudinal Study Comparing the Effect of Quantity vs. Quality of Contact with Successful Individuals, 41 SOC. PSYCHOL. 203 (2010).
87. See, e.g., Elizabeth Levy Paluck & Hana Shepherd, The Salience of Social Referents: A Field Experiment on Collective Norms and Harassment Behavior in a School Social Network, 103 J. PERSONALITY & SOC. PSYCHOL. 899 (2012) (demonstrating the importance of collective norms to changing behavior); see also Susan T. Fiske, Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice, 17 SOC. JUST. RES. 117, 123 (2004) (discussing the motivation to conform to group norms); Gretchen B. Sechrist & Charles Stangor, Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility, 80 J. PERSONALITY & SOC. PSYCHOL. 645, 649-51 (2001) (finding that peers can influence racial
within an organizational culture that does not value egalitarianism will tend to become less tolerant. Consequently, adopting office norms that demonstrate a commitment to equality will likely increase behavior in keeping with that norm. In sum, being deliberate about instilling a culture that strives for the provision of equitable public defense will not only better serve indigent clients but will also create an environment conducive to reducing the effects of IBs.

B. Objective Triage Standards

Offices should develop triage standards because the wholly discretionary decisionmaking that currently exists does nothing to curb IBs. While we do not advance specific standards in this short Essay, we suggest some criteria offices should utilize when developing them.

First, offices should not rank cases based upon the perceived possibility of factual innocence, as some have suggested. Given the limited time defenders have to prioritize cases, innocence determinations can only be speculative hunches based upon inadequate information. Implicit biases thrive under these circumstances.

Second, triage standards ought to be based upon criteria that are objectively measurable, i.e., criteria that are not subject to interpretation. An example is to prioritize cases based upon custody status, with in-custody clients being given priority. Another is to prioritize cases randomly, or to reserve a subset (e.g., twenty-five percent) to be prioritized at random. Alternatively, defenders could prioritize cases based upon the speedy trial date. What these suggestions have in common is that they do not rely upon attorneys’ subjective or idiosyncratic judgments. While imperfect, these proposals exemplify the types of objective criteria offices can utilize to focus attorney decision-making away from client stereotypes.

Although objective standards are important, attorneys cannot avoid subjective decisionmaking altogether. For instance, even if offices decided that attorneys should focus their energies on cases where clients are in custody, or on cases with clients facing the stiffest potential punishment, attorneys would still have to make subjective judgments about how to prioritize cases within a given category. Unfortunately, IBs may affect these judgments. Thus, while

attitudes and that participants’ implicit beliefs about African Americans became less stereotypic if they discovered that their peer group was more egalitarian than themselves)

88. Fiske, supra note 87, at 123.
triate standards are important, they are not the panacea for IBs. Rather, offices should also employ the additional strategies mentioned in this Part to reduce IBs’ effects.

C. Accountability

Offices should also institute accountability mechanisms. Creating checklists that attorneys can use when evaluating their cases is one such mechanism.90 Checklists can help reduce biased judgments because having predetermined criteria to guide decisionmaking can hinder people’s unintentional tendency to change the criteria upon which their decisions are based in order to fit their preferred course of action.91

Additionally, offices should collect data about attorneys’ decisions. This data will not only inform attorneys and offices about trends, but will also give offices the ability to monitor their attorneys’ judgments. This data should include information about guilty pleas, sentencing outcomes, time spent on cases, and the number of meetings with clients broken down by race and initial charges. Once this data is collected, we recommend that PD offices use a simple accountability rule: defenders must be able to explain any racial disparities in how they allocated their resources. This rule can reduce IB because people exercise more care when they know their decisions are monitored and will have to be explained,92 and because thinking more carefully and deliberately helps to debias.93

D. Awareness

Reducing IBs is more likely when individuals are aware of the potential for biased decisionmaking and are aware of the possibility of safeguarding against

90. Hal R. Arkes & Victoria A. Shaffer, Should We Use Decision Aids or Gut Feelings?, in HEURISTICS AND THE LAW 411, 411-13 (Gerd Gigerenzer & Christoph Engel eds., 2004).


92. See, e.g., Fiske, supra note 87, at 123 (discussing the motivations that reduce implicit bias); Jennifer S. Lerner & Philip E. Tetlock, Accounting for the Effects of Accountability, 125 PSYCHOL. BULL. 255, 267–70 (1999) (discussing how accountability can reduce cognitive biases).

the influence of implicit bias.\textsuperscript{94} Accordingly, we recommend that attorneys be taught about implicit biases and their probable effects on behaviors and judgments. This type of education is already occurring with judges, so it should be fairly simple to implement this suggestion.\textsuperscript{95}

Additionally, offices should consider requiring or encouraging defenders to take the Implicit Association Test (IAT), the most widely used mechanism for revealing the existence of implicit bias.\textsuperscript{96} A recent study suggests that receiving feedback about IAT results can debias.\textsuperscript{97} Because the sole purpose of any such requirement would be to inform defenders of their own probable biases, they must not be required to disclose the results. This suggestion will be easy to implement because the IAT is available online and provides immediate feedback. If individuals are made aware of the fact that IBs may affect their behaviors and judgments in ways they would not consciously endorse, they likely will be motivated to exercise more care in their decisionmaking and to engage in efforts to reduce the potential for bias.

\textbf{E. Intentional Goals}

Defender offices can also utilize a variety of techniques that, in research contexts, have allowed people to reduce the effects of IB on their behaviors and judgments. These include repeated practice denouncing stereotypes,\textsuperscript{98} affirming counterstereotypes,\textsuperscript{99} and using mental imagery.\textsuperscript{100} Even thinking


\textsuperscript{95} Kang et al., supra note 11, at 1175.


\textsuperscript{98} Kerry Kawakami et al., Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation, 78 J. PERSONALITY & SOC. PSYCHOL. 871 (2000). The effect only lasted for twenty-four hours.

about ourselves as being less objective than we imagine ourselves to be can reduce the effects of IBs. 101

One successful technique involves people developing intentional and specific plans for what they will think or do in situations likely to activate IBs. These are “consciously formed if-then plans that indicate the specific cognitive or behavioral response that is to be made at a specific time and place.” 102 The “if x, then y” formulation is critical because simpler goals such as “I will not use stereotypes in my judgments” are generally ineffective. 103

In a recent study demonstrating the efficacy of this technique, researchers had subjects watch a video that contained photographs of either black men or white men posed in front of different backgrounds and holding either guns or crime-irrelevant objects such as cell phones. 104 Participants were asked to determine as quickly as possible whether or not the men were armed by pressing buttons labeled “shoot” or “don’t shoot.” Similar “shooter-bias” studies typically demonstrate that subjects mistakenly shoot unarmed blacks more often than unarmed whites because of IB. They also shoot armed targets more quickly when they are black as opposed to white. 105 In this particular study, however, researchers found that when subjects formed a specific, goal-directed plan to ignore race before beginning the task, they were able to reduce shooter bias. 106

Of course, in PD offices, it may not be advisable to tell attorneys to ignore the client’s race, especially because in criminal justice contexts, IBs are less likely to be expressed when race is made explicit. 107 Fortunately, research demonstrates that these “if-then” plans are effective even when social


103. See id.

104. Id. at 515.


106. Mendoza et al., supra note 102, at 516.

categories are salient. For instance, in a recent study published in 2012, researchers found that when subjects formed a specific plan to associate Muslims with peace as opposed to terrorism, they showed reduced IB. These researchers also found that “if-then” goal-directed thinking can reduce IBs in real-world decisionmakers, and that this reduction can be sustained over time.

These studies suggest an intriguing strategy for reducing IBs’ effects on defender decisionmaking. For instance, when reviewing the discovery in a new case, attorneys could form a specific plan to focus on the weaknesses of the state’s case or to think of the client as innocent. In other words, defenders might be asked to form the following specific intention: “If my client is black, then I will think ‘innocent’ when reviewing the discovery.” While it may be difficult to believe that such a simple intervention would reduce the effects of implicit bias, its simplicity is similar to the specific intention that reduced the effects of shooter bias. The utility of this strategy has not been tested in the public defense context, but, in light of its success across numerous studies in other contexts, there is reason for optimism.

CONCLUSION

Despite the fact that many public defenders are committed to zealous and effective advocacy, there is abundant reason for concern that implicit racial biases may affect their decisions. By highlighting the effects of implicit bias, we do not suggest that other structural inequities in the provision of indigent defense are unimportant. Rather, we seek to supplement existing critiques with our observations. Furthermore, some PDs might believe that their experiences making difficult resource allocation decisions immunize their intuitive, gut-driven triage judgments from the effects of IBs. However, IBs are likely to have their most damaging effects precisely when individuals fail to question their gut instincts. Moreover, without data collection, it is simply impossible to


109. Id.

110. See Mendoza, Gollwitzer & Amodio, supra note 102, at 515. The researchers provided subjects with an instruction that read, “You should be careful not to let other features of the targets affect the way you respond. In order to help you achieve this, research has shown it to be helpful for you to adopt the following strategy: If I see a person, then I will ignore his race!” Id. Subjects who formed this specific intention made fewer errors than subjects in the control group who were not given the additional instruction.
know whether similarly situated clients are being treated alike.

As public defenders seek to provide the best legal representation possible for indigent clients in order to fulfill Gideon’s promise, it is crucial not only that they remain open to the possibility that they are being influenced by IBs, but also that they be given the full array of tools necessary to protect the values of equality and fairness on which the legitimacy of our criminal justice system rests. Thus, we hope that public defenders will engage in data collection and create partnerships with social psychologists to determine when IBs are likely to influence defenders’ judgments and to develop specific defender-oriented approaches for reducing IBs’ effects. 111 Indigent clients deserve no less.

111. Dasgupta & Stout, supra note 94 (suggesting the importance of field research to help translate lab findings into real-world contexts).
Unconscious Bias

The video and jury instructions on this page were created by a committee of judges and attorneys and will be presented to jurors with the intent of highlighting and combating the problems presented by unconscious bias.

This video is the property of the United States District Court, Western District of Washington. It may not be rebroadcast or otherwise used without the Court’s written consent.
The Western District of Washington’s bench and bar have long-standing commitments to a fair and unbiased judicial process. As a result, the emerging social and neuroscience research regarding unconscious bias prompted the Court to create a bench-bar-academic committee to explore the issue in the context of the jury system and to develop and offer tools to address it.

One tool the committee developed was a set of jury instructions that address the issue of unconscious bias. Research regarding the efficacy of jury instructions is still young and some of the literature has raised questions whether highlighting the notion of unconscious bias would do more harm than good.\(^1\) However, the body of research supports that, as a general matter, awareness and mindfulness about one’s own unconscious associations are important and thus a decision-maker’s ability to avoid these associations, however that is achieved, will likely result in fairer decisions.\(^2\)

Accordingly, the proposed instructions are intended to alert the jury to the concept of unconscious bias and then to instruct the jury in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making. The instructions thus serve the purposes of raising awareness to the associations jurors may be making without express knowledge and directing the jurors to avoid using these associations.

The committee has incorporated unconscious bias language into a preliminary instruction, into the witness credibility instruction, and into a closing instruction.\(^3\) In addition, the committee has developed an instruction that can be given before jury selection if the parties are going to ask questions during *voir dire* regarding bias, including unconscious bias.

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\(^3\) The committee suggests introducing the topic as part of the preliminary instructions as there is research that suggests priming jurors may be more effective than waiting until the end of a case. See, e.g., Lisa Kern Griffin, Narrative, Truth, and Trial, 101 GEO. L.J. 281, 232 (2013); Kurt Hugenberg, Jennifer Miller & Heather M. Claypool, Categorization and Individualization in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem, 43 J. EXPERIMENTAL SOC. PSYCH. 334 (2007) (finding that warnings given ahead of time about likely misperceptions of other race faces may be effective).
PRELIMINARY INSTRUCTION TO BE GIVEN
TO THE ENTIRE PANEL BEFORE JURY SELECTION

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.
PRELIMINARY INSTRUCTIONS TO BE GIVEN
BEFORE OPENING STATEMENTS

DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.¹ Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.²

In addition, please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is similar to Model Civil Instruction 1.1B.

¹ Definitions modified by combining writings and comments by Harvard Professor Mahzarin Banaji.
CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the witness’s opportunity and ability to see or hear or know the things testified to;
2. the witness’s memory;
3. the witness’s manner while testifying;
4. the witness’s interest in the outcome of the case, if any;
5. the witness’s bias or prejudice, if any;
6. whether other evidence contradicted the witness’s testimony;
7. the reasonableness of the witness’s testimony in light of all the evidence; and
8. any other factors that bear on believability.

You must avoid bias, conscious or unconscious, based on the witness’s race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Model Ninth Circuit Criminal Instruction 1.7 (modified)
INSTRUCTION TO BE GIVEN
DURING CLOSING INSTRUCTIONS
(perhaps before 7.5 – Verdict Form)

DUTY OF JURY

I want to remind you about your duties as jurors. When you deliberate, it will be your
duty to weigh and to evaluate all the evidence received in the case and, in that process, to
decide the facts. To the facts as you find them, you will apply the law as I give it to you,
whether you agree with the law or not. You must decide the case solely on the evidence
and the law before you and must not be influenced by any personal likes or dislikes,
opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious
biases are stereotypes, attitudes, or preferences that people may consciously reject but
may be expressed without conscious awareness, control, or intention.¹ Like conscious
bias, unconscious bias, too, can affect how we evaluate information and make decisions.²

Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is
similar to Model Civil Instruction 1.1B.

¹ Definitions modified by combining writings and comments by Harvard Professor Mahzarin
Banaji.
JURY SELECTION AND RACE – DISCOVERING
THE GOOD, THE BAD, AND THE UGLY

INTRODUCTION

These materials come from a joint presentation on race and jury selection by a criminal defense lawyer (me, Jeff Robinson), an Assistant United States Attorney (Jill Otake), and a civil plaintiff’s lawyer (Corrie Yackulic). I use it with thanks to them.

Let’s talk about race – in a courtroom – as part of a criminal or civil trial. Can you create a more uncomfortable situation? No one likes to talk about race, especially in public. The justice system is perhaps the most volatile forum for a discussion of race. Mix the two together, and you get voir dire on the issue of race in an open, public courtroom in a criminal or civil case. Actual opinions held by jurors, whether expressed or not, will probably cover a broad range. Some people think racism died a long time ago, and they are tired of discussing it. Some feel that if a lawyer raises the issue, she is playing the “race card.” Some feel that minorities are simply more likely to be criminals or unworthy plaintiffs or victims not worthy of belief.

At the beginning, it is important not to fool ourselves. Who can honestly believe that opinions on issues as sensitive as race, opinions which have been formed over a person’s lifetime, could be changed in the time allowed for jury selection in a
criminal case? If we cannot change people’s opinions,\textsuperscript{1} we’d better get busy finding out what those opinions are, how strongly they are held, and how they may impact a verdict in our case. The challenge in jury selection is to get people to talk as forthrightly as possible about race so we can maximize our ability to intelligently exercise preemptory challenges and challenges for cause. If we succeed in getting people to talk about race, we may not change race relations in the world, but we may change the verdict in our case.

\textbf{THE RACE CARD}

A lawyer plays the so called “race card” by interjecting the issue of race into the analysis of a factual situation where race is, according to some undefined group of people, irrelevant. Many believed this was exactly what happened in the presentation of the O. J. Simpson defense. This viewpoint reveals how deeply issues of race divide the people that live in this country.

Soon after the Simpson verdict, an African American comedian in New York performed in front of a mostly black audience.\textsuperscript{2} He discussed his amusement at the anger exhibited by many white Americans as a result of the Simpson defense team suggesting that Detective Mark Furman’s racial views were somehow relevant to the

\footnotesize\textsuperscript{1} But see, Dasgupta, Greenwald, “On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals.” In this study, which can be found at \url{www.newschool.edu/gf/psv/faculty/dasgupta}, participants reminded of pro-black exemplars exhibited less automatic preference for whites over African-Americans than participants who were reminded of pro-white or non-racial exemplars. The authors’ research suggests that there may be some benefit to encouraging prospective jurors to look at positive African-American role models as part of the selection or questionnaire process.
issue of his credibility as a police investigator, and therefore Mr. Simpson’s guilt or innocence. The comedian posed a rhetorical question – if Jerry Seinfeld was accused of murder and Louis Farrakhan was the only police officer who claimed to have found a bloody glove, would people think it inappropriate for Mr. Seinfeld’s defense lawyers to discuss Mr. Farrakhan’s views about Jewish people? The comedian’s comment was met with a large amount of laughter and applause. It is inconceivable to many blacks that there could even be a debate on the appropriateness of exploring the racial bias of a police officer in a homicide prosecution where a black man is charged with killing two white people, the police officer is the only witness to a critical piece of evidence, and the officer has a love of using the N-word to describe black people. And yet, for some white Americans, it is inconceivable that race has any relevance whatsoever in a jury’s decision in such a case. Given this, we had better find out how our potential jurors define the “race card” and how that definition may reflect their broader viewpoint on issues of race.

**IMPLICATIONS OF THE WAR ON TERROR**

How many times have we heard something like “911 changed everything”? A new paradigm for fear and prejudice has been opened by the so-called “War on Terror.” Opinions about immigration, national security, “guest workers” all have a new overlay. Attitudes we seek to uncover can poison the decision making process.

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2 Chris Rock at the Apollo Theater.
regarding whether a worker is honest and diligent, whether a victim is worthy of belief, and whether a defendant is suspicious.

**STEREOTYPES CAN LEAD TO LOSING YOUR CASE**

It is a mistake to assume that, all other things being equal, a non-white juror is a better defense juror in a criminal case than a white juror, or that a person of color is a good/bad juror when judging liability or damages in a civil case. On the one hand, the experience of living as a non-white person in America will undoubtedly have an impact on a person’s worldview and life experience. Many people of color were either born and raised in the Deep South or have family members who were. The first-hand experiences of black people born in the pre-World War II years and those who grew up in the 50’s and 60’s are now the subject of documentary films on the horrors of racism. These same people are often deeply religious, hard working people. They believe in law and order. They can be politically conservative in many areas. In the garden variety criminal case, some jurors of color would not be ideal jurors whether the defendant was non-white or not. It is necessary to go beyond the surface level of analysis to thinking about what it means to grow up non-white in America and how the worldview that a non-white person may have connects with the actual issues in dispute in a particular civil or criminal case.
HOW DO YOU GET PEOPLE TO START TALKING?

No one likes to talk about race – especially not in public. What follows are a series of questions, grouped into chapters that may be helpful in getting prospective jurors to talk about race. These questions have been developed for use with the “struck method” or “Donahue” style of jury selection – that is, a method of jury selection where the lawyer first addresses questions to the entire panel as opposed to questioning individual jurors one at a time. Follow up with individual jurors is critical.

CHAPTER 1 – WHAT IF NO ONE LOOKED LIKE YOU?

These questions are designed to get jurors to think about how a minority victim/defendant/plaintiff might feel in the courtroom surrounded by people of a different race.

Assume that you involved in a trial as the victim/defendant/plaintiff. The judge and the lawyers are all (insert race/ethnicity different from the juror) – the witnesses were all (insert race/ethnicity different from the juror) – all the jurors who make up your jury are (insert race/ethnicity different from the juror), and you are the lone (juror ethnicity) in the courtroom:

What are you feeling?

Right now, as I describe this courtroom in which you are the only (juror ethnicity) face, what is going through your mind? Tell me about that.

Why do you feel this way?

What are you fearful of, being the only one who is (juror ethnicity) in a sea of (insert different ethnicity) faces?
Have you ever been in a situation, like a group, or an attendee at a meeting, or a social gathering where you were in the minority racially?

Tell me about that. How did that situation make you feel?

Mr./Ms. ________ may face a trial by an all white jury (this question takes on additional power if the opponent decides to strike a juror of color).

How do you think/feel that an all white jury may affect the verdict?

Why? (Ask several people.) If you find that this question is not generating responses from the jury:

Try the technique of reversal and ask the following: “How many people think that the fact that Mr./Ms. ________ may be tried by an all white jury will have no impact on the verdict?”

Ask, “Why do you think this?” “Tell me more.” “Who feels otherwise?”

Or, style the question so the prospective jurors have to choose: e.g. “Some people think an all white jury will have no impact, while others feel it will make it more difficult for defendant/victim/plaintiff to be judged fairly. What do you think? Why? If the jury does end up being all white, how will you make sure the case is decided only on the evidence?”

CHAPTER 2 – HOW OFTEN DO YOU SPEND TIME WITH MINORITIES IN YOUR EVERYDAY LIFE?3

I. Neighborhood

Do you live in a racially integrated area? Why or why not?

Why do you think your neighborhood is (or is not) integrated?

3 Expert psychological testimony regarding the difficulty of cross racial identification is premised on research involving persons who had infrequent contact with members of the opposite race. Thus, for example, a white person who works with, lives in a neighborhood with, spends time socializing with or is in a relationship with a non-white is generally better able to accurately identify non-whites than is a white person who has little contact with non-whites.
What do you hear/think about racial tensions in (your town)? How do those tensions affect your neighborhood?

II. Work

Tell me whether you have contact with (insert race/ethnicity of victim/defendant/plaintiff) at work. How often? Describe those contacts? Have you ever been supervised by or had a boss who was an (insert race/ethnicity victim/defendant/plaintiff)? How was that experience?

Have you held jobs in the past where you had frequent contact with (insert race/ethnicity of victim/defendant/plaintiff)? Tell me about that.

III. Socializing

Do you belong to any social club, political organization or religious groups that have no (insert race/ethnicity of victim/defendant/plaintiff) members?

Why do you think no (insert race/ethnicity of victim/defendant/plaintiff) are members of this club?

How often do you spend your leisure time with (insert race/ethnicity of victim/defendant/plaintiff)? Do you have any friends who are (insert race/ethnicity of victim/defendant/plaintiff)? If yes, please tell us about them - have you ever invited them to your home? Have you ever been invited to their home?

How would you feel if a family member wanted to marry someone who was (insert race/ethnicity of victim/defendant/plaintiff)?

Tell me about a memorable experience, positive or negative, you have had with a person of (insert race/ethnicity of victim/defendant/plaintiff) descent.
CHAPTER 3 – MORE LIKELY TO COMMIT CRIMES/BE UNRELIABLE/LESS WORTHY OF DAMAGES…?

Racial Hoaxing:

How many people have heard of the Susan Smith case in South Carolina where Ms. Smith drowned her two children and then claimed that a black male had kidnapped them?

How many people have heard of the case in Boston where a man named Charles Stuart killed his wife then claimed that a black man had attacked them in a car?

Why do you think these white people chose to claim that a black male had attacked them?

If I (white female defender) decided to accuse a man of rape, would it be easier to accuse an African American or a Caucasian? Why?

If I (white female prosecutor) were the alleged victim in a rape, would it be easier to believe me or a (ethnicity of victim) woman? Why?

(When client is dressed in a suit and tie or formal Courtroom attire for a woman) When you walked into the courtroom, did anyone think Mr./Ms. Plaintiff/Defendant was the lawyer and I (white male lawyer) was the client? Why or why not?

Racial Slurs:

What kind of derogatory stereotypes and words have you heard about (insert race/ethnicity of victim/defendant/plaintiff)? (Perhaps make a list of them on the board.)

Do you think (insert race/ethnicity of victim/defendant/plaintiff) are more prone toward violence or other kinds of crimes than whites?

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Why or why not?

Do you think those opinions are widely held?

What do you think those opinions are based on?

How do you think those opinions will affect _________’s ability to get a fair trial/to have his/her testimony judged fairly? (If you have made a list of derogatory stereotypes, you can refer to it when asking this question.)

CHAPTER 4 – EVERYBODY IS PREJUDICED, HOW ABOUT YOU?

Self Disclosing helps others be truthful: A very close friend of mine, a white person, a person that I know is not a bigot or a racist, told me that she was at a stoplight the other day when a young black male pulled up in a brand-new BMW. She said that her first thought was “drug dealer.” Not son of a doctor, son of a lawyer, but drug dealer. Has anyone else ever had a similar experience? (You may be able to substitute yourself as the person making the assumption – if you can admit to such thoughts, the jurors may as well).

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

Has anyone flown on an airplane with Middle Eastern passengers? When I did last month, I was nervous about this person. Has anyone else felt this way? Why?

If a minority can admit to prejudice, whites can too: Jesse Jackson tells the story about one night when he was walking down the streets of a large city and got nervous when he heard footsteps approaching from behind, and was then relieved when he saw that it was three young white males instead of three young black males – why do you think he was embarrassed about his thoughts?

Making the target bigger: If whites are encouraged to discuss their own experiences being victims of discrimination, they may have an increased ability to understand the danger of prejudiced thinking in the courtroom.

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5 December 17, 1993, Wall Street Journal; the full quote from Jesse Jackson reads: “There is nothing more painful for me at this stage of my life, than to walk down the street and hear footsteps and start to think about robbery, and then to look around and see it’s somebody white and feel relieved.”
Have you heard the saying that you should not judge a book by its cover? What does that mean?

Have you been judged by a cover – either because you are old, or young, fat, bald, a bleach blonde, have facial hair, drive a motorcycle, etc.

How did that make you feel?

What was unfair about how you were treated?

What is the risk to an innocent man if jurors rely on judging based on a surface characteristic like skin color rather than look to the evidence?

**CHAPTER 5 – LET’S TALK ABOUT “PLAYING THE RACE CARD”**

What have you heard about “playing the race card?” Tell me more. Do you believe that *(insert race/ethnicity of victim/defendant/plaintiff)* “play the race card?” Why do you believe that? How does it help *(insert race/ethnicity of victim/defendant/plaintiff)* to “play the race card?” How does it hurt *(insert race/ethnicity of victim/defendant/plaintiff)* to do so?

When is it necessary to look at the role race plays in a criminal/civil case? Under what circumstances? When might it make it harder to find the truth if race is ignored?

What is the risk to an innocent, truthful *(insert race/ethnicity of victim/defendant/plaintiff)* if his lawyers never mention race with the jury?

Can racists become police officers? What do you think of that? What have you heard? Can racists sit on juries?

How can a racist end up being a juror when a *(insert race/ethnicity of victim/defendant/plaintiff) person* is on trial?
CHAPTER 6 - WHAT WILL YOU DO YOU IF SOMETHING BAD STARTS TO HAPPEN IN THE JURY ROOM?

Please tell us about experiences you have had where other people expressed racially prejudiced beliefs or opinions.

How do you feel when someone uses a racial slur or tells a racial joke?

What, if anything, do you do in response to hearing such language?

If your child used a racial slur, what would you tell your child?

What, if anything, do you think teachers should do to a white high school student who calls a (insert race/ethnicity of victim/defendant/plaintiff) high school student by a racial slur?

If you hear a juror making an argument based on race prejudice or stereotypes, what would you do about it? (You are really hoping here for someone to say that they will tell the judge – if that suggestion does not come up, you might ask, “would anyone consider telling the judge?”)

CHAPTER 7 – MAY I SEE A SHOW OF HANDS?

Experts on jury selection techniques suggest asking a series of questions that can simply be answered by a show of hands – for example, making a statement and asking who agrees and who disagrees. This format can encourage more of the prospective jurors to express themselves, thereby expanding the pool of persons who can be asked follow up questions on an individual basis. Some questions that may work with this technique follow:

**Yes or No Questions:** How many say “yes?” – If so, please raise your hand. Now, how many say “no?” Again, please raise your hand.

Is racism by whites against (insert race/ethnicity of victim/defendant/plaintiff) a thing of the past?

Do you believe there is more racial prejudice today than there was 30 years ago?
(Insert race/ethnicity of victim/defendant/plaintiff) commit more violent crimes than whites / are less reliable workers than whites / are less believable than whites.

Whites who encourage their children not to marry (insert race/ethnicity of victim/defendant/plaintiff) are making a wise choice.

Whites are being discriminated against due to affirmative action programs.

Blacks use more illegal drugs than whites.

Have any of you ever seen an example of racism? (The lawyer can ask people who raise their hands to describe the incident and their feelings about it, and then ask other jurors about their reaction to the incident described.)

CHAPTER 8 – IDEAS FOR QUESTIONNAIRES

You may want to ask the court for use of a questionnaire in cases where race is an issue. Prospective jurors may be more likely to reflect honestly and independently when answers are given in writing and individually as versus in the public and intimidating environs of a courtroom. Some sample questions follow. Be sure to leave several lines after each question so as to encourage fuller responses:

RACIAL PREJUDICE: Personal Experience:

A. Free response questions: Racial prejudice can take many forms. Tell us about your experiences with racial prejudice or where you have felt labeled.

Have you ever felt like you were the target of racial prejudice. Tell us about that situation or experience?

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

Please tell us about experiences you have had where other people expressed racially prejudices beliefs or opinions?

How do you feel when someone uses a racial slur or tells a racial joke?
What has been your most memorable experience with someone who is (insert ethnicity of victim/defendant/plaintiff).

When you are sitting at a stoplight two young (insert ethnicity of victim/defendant/plaintiff) men approach the crosswalk, do you check to see if your doors are locked? Why do you check?

Would you do the same thing if two young white men approached the cross walk?

Do you have any friends who are (insert ethnicity of victim/defendant/plaintiff)? If yes, please tell us about them.

How would you feel if a member of your family wanted to marry someone who was (insert ethnicity of victim/defendant/plaintiff)?

Have you ever invited someone who is (insert ethnicity of victim/defendant/plaintiff) to your home?

If your child used a racial slur, what would you tell your child?

Would you be more inclined to believe that a (insert ethnicity of victim/defendant/plaintiff) police officer would be more likely to lie or commit a crime than a white police officer? Why?

Is there any other feeling or opinion you have regarding race that you feel you should share with us?

**B. Multiple choice questions:** Circle the answer that you feel is most true:

I would not want my child to marry a (insert ethnicity of victim/defendant/plaintiff)

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>

I have become angry when I hear negative remarks about (insert ethnicity of victim/defendant/plaintiff).

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>

(Insert ethnicity of victim/defendant/plaintiff) are less disciplined than whites.

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>
No respectable white woman would ever have consensual sex with a \(\text{insert race/ethnicity of client}\) man.

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>

**Racial Prejudice: Beliefs about Societal Prejudice:** Circle the answer that you feel is most true:

Racial prejudice still exists.

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>

There is more racial prejudice today than there was 30 years ago.

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>

\(\text{Insert race/ethnicity of client}\) are more promiscuous than whites.

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>

Whites who encourage their children not to marry (insert ethnicity of victim/defendant/plaintiff) are making a wise choice.

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>

Whites are being discriminated against due to affirmative action programs.

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>

\(\text{Insert ethnicity of victim/defendant/plaintiff}\) use more illegal drugs than whites.

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
</table>

**CHAPTER 9 – BATSON V. KENTUCKY IS GOOD FOR SOMETHING: MAXIMIZING THE CASE FOR INDIVIDUAL VOIR DIRE**

**I. Sample Motion:**

**Motion of xxxxx for Individualized Voir Dire by Counsel and Incorporated Memorandum**

xxxxx, by and through undersigned counsel, move the Court for an Order permitting defense and government counsel to voir dire the venire panel individually.
MEMORANDUM IN SUPPORT

A. Individualized *voir dire* by counsel is essential so that the defendants can effectively and adequately exercise his peremptory challenges in selecting jurors. In light of *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, including *Georgia v. McCollum*, 112 S.Ct. 2348 (1992), and *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994), parties (including an accused) cannot exercise their peremptory challenges based on their personal race or gender biases or prejudices.

B. Case law now holds that where there is a prima facie case of racial discrimination in the exercise of a party’s peremptory challenges, that party “must articulate a racially neutral explanation for the peremptory challenge.” *McCollum*, 112 S.Ct. at 2359; see *Batson*, 476 U.S. at 98. Similarly, if there is a prima facie case of gender discrimination, counsel must offer a gender-neutral, non-pretextual explanation for the peremptory challenge. *J.E.B.*, 114 S.Ct. at 1430. To enable the accused to exercise his peremptory challenges intelligently and adequately, and to ensure that they can be supported by a race and gender neutral explanation, individualized *voir dire* is essential.

C. The Supreme Court’s decision in *J.E.B.* declared:

If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently, *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539,

114 S. Ct. at 1429 (brackets in original). Because, as Justice O’Connor pointed out in her concurring opinion in J.E.B., litigants can no longer simply rely on their intuition in exercising peremptory challenges, 114 S.Ct. at 1432 (O’Connor, J., concurring), fairness dictates that defense counsel be given an opportunity to voir dire the venire panel individually to ensure that a fair and impartial jury is selected consistent with the dictates of Batson and its progeny.

CONCLUSION

For the foregoing reasons, the Court should enter an Order permitting defense and government counsel to voir dire the venire panel individually so that the accused can effectively and adequately exercise his peremptory challenges in selecting jurors.

CHAPTER 10 – SAMPLE INSTRUCTIONS AND LEGAL ARGUMENTS

Sample Jury Instructions:

It is natural for human beings to make assumptions about the parties and witnesses in any case based on stereotypes. “Stereotypes” constitute well-learned sets of associations or expectations connecting particular behaviors or traits with members of a particular social group. Often, we may rely on stereotypes without even being aware that we are doing so.
As a juror, you must not make assumptions about the parties and witnesses based on their membership in a particular racial group. You must not assume that a particular interpretation of a person’s behavior is more or less likely because the individual belongs to any particular racial group. Reliance on stereotypes in deciding real cases is prohibited both because every accused is entitled to equal protection of law, and because racial stereotypes are historically, and notoriously, inaccurate when applied to any particular member of a race.

To ensure that you have not made any unfair assessments based on racial stereotypes, you should apply a race-switching exercise to test whether stereotypes have affected your evaluation of the case. “Race-switching” involves imagining the same events, the same circumstances, the same people, but switching the races of the parties and witnesses. For example, if the accused is _____________ and the accuser is White, you should imagine a White accused and a _____________ accuser.

If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective.

INSTRUCTION No. ___

It is natural for human beings to make assumptions about the parties and witnesses in any case based on stereotypes.6 “Stereotypes” constitute well-learned sets of associations or expectations connecting particular behaviors or traits with members of a particular social group. Often, we may rely on stereotypes without even being aware that we are doing so.7 As a juror, you must not make assumptions about the parties and witnesses based on their membership in a particular racial group. You must not assume that a particular interpretation of a person’s behavior is

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more or less likely because the individual belongs to any particular racial group. Reliance on stereotypes in deciding real cases is prohibited both because every accused is entitled to equal protection of law, and because racial stereotypes are historically, and notoriously, inaccurate when applied to any particular member of a race.

To ensure that you have not made any unfair assessments based on racial stereotypes, you should apply a race-switching exercise to test whether stereotypes have affected your evaluation of the case. “Race-switching” involves imagining the same events, the same circumstances, the same people, but switching the races of the parties and witnesses. For example, if the accused is ________ and the accuser is White, you should imagine a White accused and a __________ accuser.

If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective.

18 U.S.C.A. § 3593(f):

(f) Special precaution to ensure against discrimination. -- In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether

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8 The Black-as-violent-criminal stereotype is ingrained in, and pervades, American society. B.L. Duncan, Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks, 4 J. PERSONALITY & SOC. PSYCHOL. 590 (1976) (75% of 104 white undergrads described Black person shoving White person as “violent,” 6% as “playing around;” only 17% described White person shoving Black person as violent; 42% described White person as playing around); Sager & Schofield, Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980) (both Black and White children tend to rate relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites); C. Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 Minn.L.Rev. 367, 406-10, 464 n.389 (1996) (impact of racial stereotypes in specific self-defense cases and studies of effect of stereotypes on jury function in sexual violence cases).


10 This instruction is derived from a model instruction proposed by Associate Professor C. Lee, in her article Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 Minn.L.Rev. 367, 482 (1996).
a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.


Sample Legal Argument on Relevance of Immigration Status

Evidence of The Immigration Status of N. R., Mario I’s Employee At The Wrought Corp. Jobsite Should Be Excluded.

Mario’s employee at the Wrought Corp. jobsite, N. R. may have been an undocumented immigrant from El Salvador. At his deposition, defense counsel repeatedly attempted to question him about his immigration status, directly and indirectly. See Ex. 5 (excerpts of Rodriguez dep., pp. 4-19). When pressed, defense counsel could give no valid reason for questioning N. on the topic. See id., pp. 10-19. Plaintiff’s counsel advised N. R. that he had the right to refuse to answer such questions, and he did refuse. Plaintiff’s counsel also invited defense counsel to bring a motion, if she disagreed – and she never did. However, plaintiff expects Wrought to try to raise the issue at trial – to intimidate N. R. or to play on the potential bias of
some jurors against undocumented workers. There is no valid reason for introducing any evidence, either directly or indirectly, regarding N. R’s immigration status. An Order should be entered clearly barring Wrought from making any intimation or insinuation that N. is or may be undocumented. See, e.g., Salas v. Hi-Tech Erectors, 143 Wn. App. 373, 383, 177 P.3d 769, 774 (2008), rev. granted (2009) (issue of immigration status is “divisive and prejudicial,” plaintiff’s immigration status not relevant unless defendant can show that the issue is relevant, e.g., by showing that plaintiff is unlikely to remain in US, undermining claim for future wage loss); State v. Avendano-Lopez, 79 Wn. App. 706, 718-19, 904 P.2d 324 (1995) (cross-examination on immigration status “grossly improper”); Maria de la O, et al. v. Arnold-Williams, et al., Order on Plaintiff’s Motion for Protective Order re: Tax Returns & Immigrant Status (Oct. 20, 2006); Rivera v. NIBCO, 364 F.3d 1057, 1064-05 (9th Cir. 2004) (affirming protective order barring discovery of immigration status). See also King County Superior Court policy, adopted October 2008 (warrants for the arrest of illegal immigrants not allowed within the courthouse).
Implicit Racial Attitudes of Death Penalty Lawyers

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IMPLICIT RACIAL ATTITUDES OF DEATH PENALTY LAWYERS

Theodore Eisenberg*
Sheri Lynn Johnson**

INTRODUCTION

Defense attorneys commonly suspect that the defendant's race plays a role in prosecutors' decisions to seek the death penalty, especially when the victim of the crime was white.1 When the defendant is convicted of the crime and sentenced to death, it is equally common for such attorneys to question the racial attitudes of the jury. These suspicions are not merely partisan conjectures; ample historical,2 statistical,3 and anecdotal4 evidence supports the inference that race matters in capital cases. Even the General Accounting Office of the United States concludes as much.5 Despite McCleskey v. Kemp,6 in which the United States Supreme Court concluded that strong, well-controlled statistical correlations with race do not demonstrate causa-

* Henry Allen Mark Professor of Law, Cornell Law School. The authors would like to thank Mary Mulhearn for her research assistance.
** Professor of Law, Cornell Law School.
1. A race-of-victim effect is widely supported by empirical studies. The existence of a broad race-of-defendant effect has been much more difficult to detect. David Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 CORNELL L. REV. 1638, 1658-59 n.61, 1662, app. B (1998) (collecting studies and reporting that race-of-defendant effect has not been found in over fifty empirical studies). For recent evidence of such an effect, see John H. Blume et al., Explaining Death Row's Population and Racial Composition, 1 J. EMPIRICAL LEGAL STUD. 165, 167, 200 (2004).
4. For a particularly egregious example, see Andrews v. Shulsen, 485 U.S. 919, 920 (1988) (Marshall, J., dissenting) (A juror handed the bailiff a napkin with a drawing of a man on a gallows above the inscription "Hang the Niggers.").
tion, half of all Americans believe that race does influence the admin-
istration of the death penalty.7

In investigating the influence of racial bias, commentators (ourselves included) have focused on prosecutors and jurors,8 generally neglecting the question of whether bias affects the representation defense counsel provides his or her client. In part, this may be due to the greater difficulty in uncovering evidence of bias in the ranks of defense counsel; most of the evidence of bias of other death penalty actors has been uncovered through the efforts of defense counsel, a class one might suspect would be less likely to scrutinize itself. It may also be faith in the adversary system that disinclines observers to suspect bias on the part of defense counsel: One would hope that those who represent capital defendants (or at least African-American capital defendants) would themselves be free of racialized thinking as they establish trust with their clients, direct both fact and mitigation investigations, select experts, choose witnesses to call, and decide what arguments to make. A final reason for this inattention to defense lawyers may be the apparent sincerity of the ideological commitment of most such lawyers to racial equality; not only do they proclaim that commitment,9 but the poor pay and low status of their work suggests some amount of sacrifice for those ideological commitments. But ideological commitment need not translate into racially unbiased evaluations, as a large accumulation of literature discussing social and cognitive psychology demonstrates.10 Indeed, the defense lawyer's commitment to the formal norm of equality is probably shared with most prosecutors and jurors. So the question should be asked, better late than not at all: What do we know about the capital defense lawyer's racial attitudes?

Nothing. Virtually nothing is known about the racial attitudes of lawyers in general, let alone defense lawyers or capital defense law-

7. See Tom Moranthau & Peter Annin, Should McVeigh Die?, Newsweek, June 16, 1997, at 20 (citing a Newsweek poll conducted by Princeton Survey Research Associates polling seventy-five adults, eighteen and older, June 5-6, 1997 in which 49% of respondents agreed). Non-white respondents overwhelmingly agreed. Id.

8. See, e.g., Baldus et al., supra note 3; Baldus et al., supra note 1; Gross & Mauro, supra note 3; Blume et al., supra note 3; Jeffrey J. Pokorak, Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors, 83 Cornell L. Rev. 1811 (1998).


ywers specifically. The demographic characteristics, compensation patterns, career paths, and occasionally the daily activities of lawyers are studied, but researchers to date have expressed little interest in their attitudes, with the exception of attitudes concerning job satisfaction.

In contrast, quite a lot is known about the racial attitudes of the general population. The prevalence of hostile, overt racism has been declining at least since the 1960s. Some researchers have observed that polls may overstate this trend, given the growing social unacceptability of racial hostility. Indeed, when experiments have tried to weed out social desirability effects, they do find greater levels of conscious stereotyping and hostility, though still clearly lesser levels than in the past. For the most part, however, old-fashioned, "Bull Connor-style" racism has not been replaced with colorblindness but with subtler manifestations of racial bias. Some social psychologists have labeled this newer racism "aversive racis[m]," documenting the prevalence of subjects who subscribe to a formal norm of equality, but desire to keep their distance from other racial groups, and often covertly disparage those groups. Cognitive psychologists have focused more on stereotypes, observing how thinking and judgment may be altered by stereotypes that the subject would not endorse, and often consciously rejects.


Both of these (related) conceptions of modern racism raise the troubling possibility that defense counsel, who are charged with undivided loyalty to their clients, and presumed to serve as a shield against racial bias on the part of other criminal justice system actors, may in fact experience both compromised loyalty and judgment when they serve African-American or Latino clients. On the other hand, perhaps capital defense attorneys, either by self-selection or by training, are different than the rest of the population in this regard. This Article describes preliminary data suggesting that they are not. That they exhibit similar automatic racial attitudes does not, of course, prove that their performance is impaired by those attitudes; we leave the implications of our findings for the discussion section.

II. Gathering the Data

A. The Instrument

The Implicit Association Test (IAT) was developed to measure the relative strength with which groups (or individuals) are associated with positive and negative evaluations. It has been used to measure attitudes about a variety of issues, including race, gender, age, and political candidates, and is accepted as a valid research tool. All variations of the IAT use some form of response latency to assess those attitudes that are "automatic," as opposed to attitudes that are subject to intention or control, and operate on the principal that it should be easier to make the same behavioral response to concepts that are associated than to concepts that are not associated. Computerized versions of the IAT achieve these pairings by assigning a keyboard key to be pressed in response to items from categories such as old or bad, and another key to be pressed in response to items from the opposite categories, such as young or good. Then the pairings are switched, with the subject being asked to press one key in response to either old or good, and another key in response to items from either the young or bad category. The differential speed required to complete these two opposite pairings is measured, yielding information both about the direction of the implicit attitude and the strength of the association; thus, if it takes longer for a subject to complete the pairings of old and good than the pairings of young and good, then the researcher infers that young is automatically associated with good for that subject, and old with bad.

19. This is not to say that the subject cannot thwart the accurate measure of these automatic attitudes, should he or she choose to do so, but only that subjects who faithfully follow the directions will reflect their unconscious associations, not their conscious preferences.
More than 500,000 IATs that focus on race have been taken online using this format. In the race IAT, subjects are first asked to pair "good" words with pictures of white faces and "bad" words with pictures of black faces, and then to reverse the pairings. Here, if the subject can more quickly complete the task when white and good (and black and bad) are paired than when black and good (and white and bad) are paired, it means that the subject automatically pairs white with good—and black with bad.

A paper and pencil version of the race IAT is also available and was used in collecting these data because of time and computer accessibility constraints. In the paper and pencil version, subjects are faced with a column of words and faces, which he or she is asked to categorize "as quickly as possible without making too many mistakes" in twenty seconds. First the subjects complete two practice tests; the first test pairs flowers with good and insects with bad, and the second pairs insects with good and flowers with bad. This practice is designed to make the subject familiar with the pairing and check-off process, and accustomed to the idea of switching which items are paired. Then the subjects are asked to familiarize themselves with four new categories. One category is "good," which is composed of the words flower, pretty, and love; a second category is "bad," composed of the words ugly, vomit, and hate; the third category is "white," which is composed of five white faces; and the fourth category is "black," which is composed of five black faces. A short column of these words and pictures appears, and the subjects are instructed to go down the column checking the items that are "white or good" on the left of the item and items that are "black or bad" on the right of the item. After permitting questions, the subjects are told that when they turn the next page, they will be asked to check white faces or good on the left, and black faces or bad on the right, completing as many as possible in the allotted time, as the (shorter) sample below indicates:


22. In the practice test, subjects attempt to go through as many items as possible in the time limit, checking items that are either flowers or good on the left side of the page and either insects or bad on the right side of the page; then on the next page, the subject is asked to check off items that are either insects or good on the left and items that are either flowers or bad on the right.
After completing this task, the subjects are asked to turn the page, and the new pairing of black with good and white with bad is explained. Subjects then complete the same task with the new pairing, as the sample below indicates:

The number of items correctly completed on each test is then counted; it is not the number of items a particular subject can complete that is of significance, but the difference in the number of items
he or she completes when white is paired with good and black with bad, as contrasted with the number completed when black is paired with good and white with bad.

B. The Subjects

Two of the three data sets are the product of presentations made by one of the authors at training sessions for capital defense lawyers. The first was obtained at an annual gathering of lawyers who represent death row inmates in federal habeas corpus proceedings. Most of these attorneys are experienced capital litigators, but some novices were invited. The training session was held in Nashville, Tennessee, but the attorneys came from all over the country. These subjects we will call the "habeas lawyers." The second data set was collected at a training session for Georgia trial lawyers involved in representing defendants charged with capital crimes; these subjects we will call the "trial lawyers." We asked all of these subjects for their race. For the trial lawyers, we also collected the age and gender of each subject. The third data set is composed of most of the students in a first-year constitutional law class at Cornell Law School; we will call them the "law students." For the law students we collected race, age, and gender data.

III. Results

As shown in Table 1, on average, the subjects in all three groups completed more items when white was paired with good and black with bad than when black was paired with good and white with bad, and in all three groups these differences are statistically significant. For example, the table's first row shows that, for all subjects combined, an average of 16.4 correct responses were given when white was paired with good and black with bad compared to 13.5 correct responses when black was paired with good and white with bad. A test of the statistical significance of the difference in means, computed using a t-test, yields a p-value of less than 0.0001 for our 321 subjects, as reported in column (4). The difference in means is significant at that level for each group as well as for all groups combined.

23. The primary purpose in administering all of these tests was educational, and after the tests were administered, the subjects were asked to compare the number of items they were able to complete in the time period, and then the interpretation of the test suggested by the authors was presented. In all three cases, substantial discussion followed.
TABLE 1. NUMBER OF ITEMS COMPLETED WHEN “GOOD” IS PAIRED WITH WHITE FACES V. WHEN “GOOD” IS PAIRED WITH BLACK FACES, BY SUBJECT GROUP

<table>
<thead>
<tr>
<th></th>
<th>Average Number of Correct Responses When “Good” is Paired with:</th>
<th>Difference = (1) - (2)</th>
<th>Significance of Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) White Faces</td>
<td>(2) Black Faces</td>
<td>(3) (4) (5) (6)</td>
</tr>
<tr>
<td>All subjects</td>
<td>16.4</td>
<td>13.5</td>
<td>2.8</td>
</tr>
<tr>
<td>Habeas lawyers</td>
<td>14.4</td>
<td>12.1</td>
<td>2.3</td>
</tr>
<tr>
<td>Trial lawyers</td>
<td>16.7</td>
<td>13.6</td>
<td>3.0</td>
</tr>
<tr>
<td>Law students</td>
<td>19.5</td>
<td>15.9</td>
<td>3.6</td>
</tr>
</tbody>
</table>

To eliminate the possibility that the significance of the difference is the product of a few extreme individuals and to assure that the results are not sensitive to the distributive assumptions associated with the t-test, we also tested the statistical significance of the differences in median correct scores. Column (5) shows that the median differences are also significant beyond the 0.0001 level for all groups and for the groups aggregated into a single sample. Thus, the probability of observing by chance differences as large as, or larger than, those observed is vanishingly small.

As shown in the Table 5 regression models reported below, differences between the three groups—habeas lawyers, trial lawyers, and law students—are not statistically significant. Within each group, however, the differences between black and white subjects are highly significant. Table 2 expands on Table 1 by reporting the results broken down by race within each subject group. Table 2 shows that, for all groups combined, as well as for each subject group, the average white subject completed more items when white was paired with good than when black was paired with good, while the average black subject completed more items when black was paired with good. For example, for all white subjects combined, an average of 16.6 correct responses were given when white was paired with good and black with bad compared to 13.2 correct responses when black was paired with good and white with bad. In contrast, for all black subjects combined, an average of 14.4 correct responses were given when white was paired with good and black with bad compared to 15.8 correct responses when black was paired with good and white with bad.

24. We do not refer to our subjects as “African American” because, although virtually all of the black subjects in the two lawyer groups were African American, in the constitutional law class, Caribbean and African students are a significant part of the total.
Columns (3) of Table 2, which is the difference in correct responses between columns (1) and (2), shows that this racial difference persists for all three groups. White subjects in all these groups provided more correct responses when white was paired with good. Black subjects in all three groups provided more correct responses when black was paired with good. For the most part, we limited our analysis to white and black subjects because the subjects in the two lawyer groups were almost exclusively black and white. In the constitutional law class, however, there were fourteen Asian subjects, enough to make analysis of their results potentially meaningful. We found that the Asian subjects were not significantly different than the white subjects, but were significantly different than the black subjects.

<table>
<thead>
<tr>
<th>Table 2. Number of Correct Responses When “Good” Is Paired with White Faces v. When “Good” Is Paired with Black Faces, by Race of Subjects</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Average Number of Correct Responses When “Good” is Paired with:</strong></td>
</tr>
<tr>
<td>All subjects</td>
</tr>
<tr>
<td>Whites</td>
</tr>
<tr>
<td>Blacks</td>
</tr>
<tr>
<td>Habeas lawyers</td>
</tr>
<tr>
<td>Whites</td>
</tr>
<tr>
<td>Blacks</td>
</tr>
<tr>
<td>Trial lawyers</td>
</tr>
<tr>
<td>Whites</td>
</tr>
<tr>
<td>Blacks</td>
</tr>
<tr>
<td>Law Students</td>
</tr>
<tr>
<td>Whites</td>
</tr>
<tr>
<td>Blacks</td>
</tr>
</tbody>
</table>

Columns (4) and (5) show that, for all groups of white subjects, the differences in the numbers of correct responses between white being paired with good and black being paired with good are highly statistically significant. In part because of the smaller number of black subjects in each group, and in part because the mean difference in their white/good and black/good scores is smaller, differences in black subjects’ performance on the white/good pairing as compared to the

25. The constitutional law class comprised both United States citizens and nationals of other countries, and each racial group included foreign students. To determine whether the Asian (as opposed to Asian-American) subjects might be driving these results, we removed them from the analysis, but the results were unchanged.
black/good pairing are not statistically significant for the three subgroups considered separately. When the three groups are combined, however, the differences in the median numbers of correct responses for black subjects between white being paired with good and black being paired with good are statistically significant at the .039 level, and the means differ at the .097 level.

Thus, both white and black subjects score higher when their own racial group is paired with good. But Table 2 indicates that the difference is not of the same magnitude. Table 3 explores this difference by reorganizing some of the data in Table 2. Table 3 again shows that both black and white subjects on average scored higher when their own racial group was paired with good than when it was paired with bad. In all three groups, white subjects' scores were more affected by which race was paired with good than were the scores of black subjects. Column (3) reports these differences in differences for each subject group.

<table>
<thead>
<tr>
<th></th>
<th>Mean Difference Between Number of Correct Responses When &quot;Good&quot; is Paired with Subject's Own Race v. When &quot;Good&quot; is Paired with Other Race</th>
<th>Difference = (1) - (2)</th>
<th>Significance of Difference</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Whites</td>
<td>Blacks</td>
<td></td>
<td></td>
</tr>
<tr>
<td>All subjects</td>
<td>3.4</td>
<td>1.4</td>
<td>2.1</td>
<td>.008</td>
</tr>
<tr>
<td>Habeas lawyers</td>
<td>2.4</td>
<td>1.3</td>
<td>1.1</td>
<td>.548</td>
</tr>
<tr>
<td>Trial lawyers</td>
<td>4.3</td>
<td>1.1</td>
<td>3.2</td>
<td>.0003</td>
</tr>
<tr>
<td>Law Students</td>
<td>4.5</td>
<td>1.8</td>
<td>2.7</td>
<td>.130</td>
</tr>
</tbody>
</table>

Columns (4) and (5) show that, for the groups combined (as well as for the trial lawyers taken individually), the differences in differences are statistically significant. For the two other groups, the direction of the effect is the same but the effect is not statistically significant at traditional levels, a result likely attributable to the small number of black subjects. The races' different reaction also emerges in another measure. Only a quarter of white subjects scored the same or better on the black/good pairing as on the white/good pairing, while almost half of the black subjects scored the same or better on the white/good pairing as on the black/good pairing.

We also examined the effect of gender on the performance, holding race constant. Table 4 below reports the results. (Its sample is
smaller than the samples in the other tables because we did not record the gender of the subjects for the first group we sampled, the habeas lawyers.) Table 4 can be used to explore two separable questions. First, do the results in Tables 1 and 2 hold when the sample is disaggregated by gender? That is, do males and females separately confirm the pattern of more correct responses when white faces are paired with "good" than when black faces are paired with "good?" Second, Table 4 explores whether the pattern of responses varies not only by race, as suggested in Tables 2 and 3, but also by gender.

Table 4 shows that the core result of significantly different reactions to white/good pairings and black/good pairings holds for black males, white females, and white males. However, for white females and males the significant advantage is in white/good pairings, while for black males, the significant advantage is in black/good pairings. For black females, the tendency is toward easier black/good pairings, but the difference, as reported in columns (3) through (5), is not statistically significant.

Column (6) explores whether the difference in differences varies statistically significantly across the race/gender groups. White women (as well as black women and black men) are significantly different from white men. For both blacks and whites, the tendency is for men to reflect a greater own-race advantage than women, but for black subjects, the difference is smaller and not significant.

### Table 4. Number of Items Correctly Completed When "Good" Is Paired with White Faces v. When "Good" Is Paired with Black Faces, by Race and Gender

<table>
<thead>
<tr>
<th></th>
<th>Average Number of Correct Responses When &quot;Good&quot; is Paired with:</th>
<th>Difference = (1) - (2)</th>
<th>Significance of Difference (1)-(2) From White Males' Difference</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) White Faces</td>
<td>(2) Black Faces</td>
<td>(3)</td>
<td>(4) Means</td>
</tr>
<tr>
<td>Black females</td>
<td>15.0</td>
<td>16.1</td>
<td>-1.1</td>
<td>.365</td>
</tr>
<tr>
<td>Black males</td>
<td>14.3</td>
<td>16.1</td>
<td>-1.8</td>
<td>.020</td>
</tr>
<tr>
<td>White females</td>
<td>18.1</td>
<td>15.1</td>
<td>2.9</td>
<td>.0001</td>
</tr>
<tr>
<td>White males</td>
<td>18.6</td>
<td>13.8</td>
<td>4.8</td>
<td>&lt;.0001</td>
</tr>
</tbody>
</table>

Note. Column (6), which shows the level significance of difference from white males, reports a test of the difference in the median number of good characteristics correctly associated with one's own race and the other race. A t-test of the difference in means is also statistically significant.

The analysis so far explores subject group differences and race/gender differences in isolation from one another. To assess all factors simultaneously, we employ regression analysis and report the results.
in Table 5 and include age in the models for those subjects for whom age is known. Models reported in columns (1) and (2) explore the differences described in Tables (1) and (2)—the difference between subjects' scores when whites are paired with good characteristics and when blacks are paired with good characteristics. We report both ordinary least squares models and negative binomial models. Negative binomial models are appropriate because the dependent variables in our models are count data—the difference in the number of correct responses. Columns (3) and (4) report models that explore the difference in differences between the white/good and black/good scores. It thus assesses whether the explanatory variables in the model help explain the degree of within-race favoritism.

**Table 5. Regression Models of Differences in Scores Between Pairings**

<table>
<thead>
<tr>
<th></th>
<th>(1) Dependent variable = Difference between subject's white/good and black/good scores</th>
<th>(2) OLS</th>
<th>Negative binomial</th>
<th>(3) Dependent variable = Difference between subjects own-race/good and other-race/good scores</th>
<th>(4) OLS</th>
<th>Negative binomial</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>OLS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black female</td>
<td>-6.465**</td>
<td>-0.344**</td>
<td>-4.272**</td>
<td>-0.285**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(4.88)</td>
<td>(4.30)</td>
<td>(3.37)</td>
<td>(3.06)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black male</td>
<td>-7.001**</td>
<td>-0.381**</td>
<td>-3.149**</td>
<td>-0.206**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(8.59)</td>
<td>(7.99)</td>
<td>(3.50)</td>
<td>(3.39)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White female</td>
<td>-2.035*</td>
<td>-0.098*</td>
<td>-2.099*</td>
<td>-0.133*</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2.51)</td>
<td>(2.50)</td>
<td>(2.59)</td>
<td>(2.54)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White male = reference category</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trial lawyers</td>
<td>0.802</td>
<td>0.041</td>
<td>0.645</td>
<td>0.045</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.91)</td>
<td>(0.95)</td>
<td>(0.73)</td>
<td>(0.78)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Habeas lawyers</td>
<td>-2.437</td>
<td>-0.128</td>
<td>-1.947</td>
<td>-0.136</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1.02)</td>
<td>(0.98)</td>
<td>(0.81)</td>
<td>(0.79)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law students = reference category</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>-0.620</td>
<td>-0.031</td>
<td>-0.835*</td>
<td>-0.054*</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1.56)</td>
<td>(1.59)</td>
<td>(2.12)</td>
<td>(2.13)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age missing</td>
<td>-1.613</td>
<td>-0.075</td>
<td>-2.794</td>
<td>-0.178</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.58)</td>
<td>(0.51)</td>
<td>(0.98)</td>
<td>(0.90)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gender missing</td>
<td>0.166</td>
<td>0.014</td>
<td>0.344</td>
<td>0.035</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.12)</td>
<td>(0.19)</td>
<td>(0.25)</td>
<td>(0.35)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>6.278**</td>
<td>3.154**</td>
<td>6.912**</td>
<td>2.954**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(6.43)</td>
<td>(69.42)</td>
<td>(7.12)</td>
<td>(51.01)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Observations</td>
<td>321</td>
<td>321</td>
<td>321</td>
<td>321</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R-squared or pseudo R-squared</td>
<td>0.16</td>
<td>0.030</td>
<td>0.10</td>
<td>.017</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Robust t statistics in parentheses
* significant at 5%; ** significant at 1%

26. *Alan Agresti, Categorical Data Analysis* 559 (2d ed. 2002). To assure positive values of the dependent variable in the negative binomial analyses, a positive integer was added to the values of the dependent variable for all observations. *Id.*
Table 5 confirms the results in the earlier tables. Models (1) and (2) show that black females, black males, and white females all tend to have less extreme differences between the white/good and black/good conditions than do white males. The results are all significant at or beyond the 0.05 level. The results do not depend on the functional form, least squares, or negative binomial of the models used. The story is constant across models (1) and (2). Similarly, models (3) and (4) show that the difference between the number of good characteristics correctly associated with one's own race and the other race is associated with a race/gender effect. White males again differ statistically significantly from the other three race/gender combinations. They tend to record greater differences between own-race/good and other-race/good pairings than do the other race/gender combinations. The result is statistically significant and persists in both least squares and negative binomial models.

Again, differences between the three subject groups—habeas lawyers, trial lawyers, and law students—are not significant. The only surprise is that age, which viewed in isolation was not a significant predictor of performance, is slightly but significantly correlated, and in a negative direction, with size of mean white/good and black/good differences.

IV. Discussion

Because speed at these tasks reflects relative ease in associating two categories of items, the creators of the IAT describe a subject who is more adept at pairing white with good than black with good as having an "automatic preference" for white. In adopting this terminology, we note that "preference" as used here does not imply a conscious choice, but merely an automatic association; when we say that subjects have an "automatic preference for white," we mean nothing more than that they automatically associate white with good and black with bad.27 Part III of this Article reported both the direction of the automatic associations and their relative strength for each professional group (habeas lawyers, trial lawyers and law students) and for demographic subgroups of each group (dividing the groups by race, gender,

27. This preference is not the result of greater familiarity with white faces. Researchers have eliminated the familiarity hypothesis by using familiar black faces (or names) and unfamiliar white faces (or names), and find that the automatic preference of whites subjects for white survives unchanged. See generally Nilanjan Dasgupta et al., Automatic Preference for White Americans: Eliminating the Familiarity Explanation, 36 J. EXPERIMENTAL. SOC. PSYCHOL. 316 (2000), available at http://faculty.washington.edu/agg/pdf/DasguptaEtAlJESP2000.pdf (last visited Apr. 13, 2004).
and age). Because we used a paper and pencil version of the IAT, we are unable to compare the strength of observed preferences with those found in the larger IAT databases, but we can compare the direction of those preferences with those observed in the larger, more diverse (and overwhelmingly lay) subject pool, as well as relative differences between the demographic subgroups in each data set. After making these comparisons, we will turn to the question of what behavioral implications, if any, these observed automatic preferences entail.

The direction and demographic distribution of the automatic preferences we observed are strikingly consistent with those observed in the larger trials not targeted at occupational subgroups. Data from the websites, like our data, reflect significant automatic preference for whites among white subjects: this is true when good and bad are in turn paired with black and white faces, and it is also true when they are paired with first names that are associated with black or white persons. Black web subjects, on the other hand, show an automatic preference for black faces or names, but that preference, like the preference of our defense lawyer and law student subjects, is weaker than is white subjects’ automatic preference for white faces or names. Our responses and the web responses both mimic earlier laboratory results with college student subjects. Moreover, the web researchers found, as we find, that Asian respondents show a pro-white bias level

28. We were, however, able to compare the strength of automatic preferences in our law student and defense lawyer groups with the strength of the automatic preferences of undergraduates who attended the Race to Execution Symposium, and found no significant differences. We do not report the symposium data because it reflects such a hodge-podge of respondents that we were uncertain as to the meaning of any results, but the undergraduate component of the symposium was large enough to analyze, and gives us some reason to believe that our sample does not differ in strength of the automatic-race preference from lay populations, just as the web data gives us confidence that the direction of our sample’s preferences is indistinguishable from that of the general population.

29. The IAT has been administered in laboratory settings to college students, but most of the reported data has been harvested from demonstration web sites. As the authors who report web-site findings acknowledge, there are selection effects that render these web subjects different from a random sample of the population; most obviously, these subjects must have access to a computer, awareness of the test, and interest in taking the test. (Recruitment occurred through four known channels: media coverage, links from other sites, search engines, and word of mouth, with media coverage being the most significant source.) See Brian A. Nosek et al., Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site, 6 GROUP DYNAMICS: THEORY RES. PRAC. 101, 102-103 (2002), available at http://projectimplicit.net/nosek//papers/harvesting.GroupDynamics.pdf (last visited Apr. 13, 2004). Nonetheless, the data represents a much more diverse subject pool than those ordinarily surveyed in psychology experiments, id. at 102, and one likely to be largely composed of nonlawyers.

30. Id. at 105-06.
31. Id. at 105.
32. Id.
comparable to that of white respondents. Finally, while our regression reflected that white women showed slightly, but significantly less, negativity toward black faces than did white men, web researchers reported that women subjects (not broken down by race, but predominantly white) showed slightly less automatic preference for whites.

The reader will recall that our results on age were of marginal significance in the regression, with older age predicting *slightly less* of an automatic preference for white. This is the only place our results differ even slightly from those of the web research; there, older participants did not differ at all from younger ones on the analogous face test. Several explanations for these disparate findings are possible. While it is possible that our older capital defense attorneys, unlike their age peers in the general population, actually do harbor weaker automatic preferences for white than do otherwise similar subjects, web research on the performance of various measuring algorithms suggests that our results may be an artifact of our scoring method, which does not account for the fact that older subjects perform all of the tasks more slowly.

Thus, our capital defense attorneys, both trial and post-conviction (trial lawyers and habeas lawyers), look like our law students in their implicit attitudes about race and, as far as we can tell, pretty much like the rest of the population. White men have the strongest automatic preference for white, followed by white women. The responses of Asian subjects look like those of white subjects. In contrast, black subjects have an automatic preference for black, but it is significantly smaller than the preference white and Asian subjects have for white. If one imagines that automatic reactions are the combined product of culture and individual experience, these patterns are not surprising.

Looking at other empirical evidence concerning lawyers, the observed similarities between defense lawyers, law students, and the lay population are also not surprising. Popular impression to the con-

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33. Nosek, *supra* note 29, at 110. The web data also has a substantial number of Hispanic respondents, who also show a pattern similar to that of white respondents. *Id.*

34. *Id.* at 109.

35. In our scoring, a *proportionally* equal impairment would result in a smaller absolute difference score for an older subject; for example, if an older subject completed fifteen items in the white/good test, but only twelve in the black/good test, while a younger subject completed twenty items on the white/good pairing, but only sixteen on the black/good pairing, the older subject, by our measurement, would have a weaker preference for white. In contrast, web researchers have developed a more complicated algorithm for measuring automatic preference, one that includes calibration by each respondent's latency variability. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 *J. Personality & Soc. Cognition* 197, 214 (2003). That algorithm is not transferable to the paper and pencil test, so we could not benefit from its development.
trary, comparisons between judges and juries generally find little difference in the damages they award.\textsuperscript{36} And, most relevantly, judges appear to be just as susceptible as are jurors to three cognitive illusions that hinder accurate decision making: anchoring, hindsight bias, and egocentric bias.\textsuperscript{37} Finally, judges' political orientation has been shown to have some influence in politically charged cases.\textsuperscript{38} As is slowly being recognized across the field, "lawyers are like other people and suffer from the same human failings as those not admitted to the bar."\textsuperscript{39} Though we have presented evidence that white capital defense lawyers, like the rest of the population, have automatic reactions that make associating white with good easier than associating white with bad, we have by no means proved that they treat black clients (or witnesses, jurors, attorneys, or judges for that matter) differently than they treat their white counterparts. Indeed, even the evidence on the relationship between explicit prejudice and discrimination is complex. Subjects who acknowledge negative attitudes toward vulnerable groups do not always discriminate against them; either lack of opportunity or social disapproval may inhibit the expression of those attitudes.\textsuperscript{40} Likewise, subjects who disavow negative attitudes toward a vulnerable group may nonetheless discriminate against that group for a variety of reasons, including social pressure to do so and covert or unconscious stereotypes about the target group.\textsuperscript{41} Because measurement of implicit racial attitudes is quite new, even less is known about how those attitudes affect behavior.

It is, however, possible to note what external factors are known to make discrimination more likely and consider their presence or ab-


\textsuperscript{37} Chris Guthrie et al., \textit{Inside the Judicial Mind}, 86 \textit{CORNELL L. REV.} 777, 816 (2001). Judges also fall prey to framing effects and the representative heuristic, though they are less susceptible than others.


\textsuperscript{39} Fred C. Zacharias, \textit{The Humanization of Lawyers}, 2002 \textit{PROF. LAW.} 9, 10 (arguing that this is one of the significant transformations in professional responsibility scholarship in recent years).

\textsuperscript{40} Gordon W. Allport, \textit{The Nature of Prejudice} 56-57 (1954).

\textsuperscript{41} The sharp differences between explicit attitudes and implicit attitudes found by web researchers attests to the frequency of unconscious (or covert) negative attitudes. See, e.g., Nosek et al., \textit{supra} note 29, at 111.
sence in the context of capital representation of a minority-race defendant. As already mentioned, social approval (or even the absence of social disapproval) enhances the likelihood of discrimination. The factor of social approval must vary widely in capital representation, depending in part on whether the relevant audience is the local prosecutor (with whom the next case must be plea-bargained), the local judge (who may be the source of the next appointment as counsel), the local defense bar (whose attitudes differ by area), the jurors (who in some small localities are potential clients), or the national capital defense bar. Stereotypes are more likely to alter judgement when a task is complex, or a decision difficult, or when the context activates stereotypes. Certainly the task of representing a capital defendant or habeas petitioner is complex and involves many difficult decisions. Moreover, the capital litigation context—in which the defendant is accused of heinous crimes—seems especially likely to activate stereotypes of violence and criminality.

There is some evidence that awareness of automatic reactions can trigger attempts to counteract them, and that such attempts are sometimes successful. Here we have no clear indication of whether capital defense attorneys struggle against their own automatic reactions. On the one hand, we would predict from their ideological commitments that they would be inclined to do so, if they were aware that they had such reactions; on the other hand, anecdotal experience in administering these tests leads us to believe that many capital defense attorneys were surprised at their own automatic preferences and,

42. Allport, supra note 40, at 56-57.

43. Thus, for example, mock jury studies of race and guilt attribution find race-of-defendant effects in the “marginal evidence” cases; when proof of guilt is either weak or strong, these effects do not appear. See Sheri Lynn Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1626-34 (1985) (reviewing the literature). The same pattern is reflected in the Baldus data on capital cases in Georgia; race-of-victim effects are found in the cases that are in the middle range of aggravating factors. See McCleskey v. Kemp, 481 U.S. 279, 364 (1987) (Stevens, J., dissenting).

44. See, e.g., Howard Ehrlich, The Social Psychology of Prejudice 40 (1973). See also Patricia Linville & Edward E. Jones, Polarized Appraisals of Outgroup Members, 38 J. Personality & Soc. Psychol. 689 (1980). IAT research reveals that automatic race evaluations are significantly stronger when the black exemplars were disliked than when they were liked. Jason P. Mitchell et al., Contextual Variations in Implicit Evaluation, 132 J. Experimental Psychol. 455, 460 (2003).

45. Annie Murphy Paul, Where Bias Begins: The Truth About Stereotypes, Psychol. Today, May-June 1998, at 52 (quoting researcher Margo Monteith). However, attempts to suppress stereotypes may also sometimes backfire, causing them to return in a stronger form. Id.
therefore, would not have previously realized that they should struggle against those preferences.\textsuperscript{46}

IV. CONCLUSION: WHO IS POLICING THE BIAS POLICE?

Our initial foray into the racial attitudes of capital defense lawyers permits us a modest conclusion: Like the rest of the population, race influences their automatic reactions. This proves neither that race does, nor that it does not, often influence the quality of representation afforded the black clients of these attorneys. For judges reviewing the effectiveness of the assistance of counsel provided to capital defendants, our data suggest that they should not \textit{assume} that race has not influenced the actions of defense counsel, and that they should not \textit{assume} that counsel will be sensitive to the racial bias of other criminal justice system actors. For the capital defense lawyers themselves, it suggests that introspection about racial stereotypes and reactions, as well as vigilance concerning those effects on others, is necessary. For the public, it may be yet another reason to doubt the evenhandedness of capital punishment.

\textsuperscript{46} It is clear that the process of “de-automatization” works only for people disturbed by the discrepancy between their conscious and unconscious beliefs. \textit{Id}. Creation of awareness of the discrepancy, in both the lawyers and the law students, was the primary purpose of administering the IAT to these groups.