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# Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs

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By Walter I. Gonçalves, Jr.\*

## INTRODUCTION

When a criminal defense attorney is assigned a case and shows up at the first court appearance, more often than not the client will be of color.<sup>1</sup> Depending on the region, the client has a greater chance of being African American, Latinx, or Native American compared to white.<sup>2</sup> This is true for

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<sup>1</sup> Many who identify as Latinx, Native American, or African-American appear white. This article focuses on clients that identify as Latinx. Parts of the analysis apply only if the client physically appears Latinx (i.e. has darker skin tone, hair color, particular facial features, or perhaps a Spanish, Portuguese, French, or indigenous language accent). It may be difficult to identify whether a person physically appears Latinx.

<sup>2</sup> The over-representation of minorities in the system has many sources. See generally MARC MAUER, RACE TO INCARCERATE (2d ed. 2006) (exploring the impact of mass incarceration on the “underclass”); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (Revised Edition) (2012) (detailing the rise of young African-American criminal defendants as a result of the “War on Drugs.”); Cesar Cuauhtémoc Garcia Hernandez, *Creating Crimmigration*, 2013 B.Y.U. 1457 (2013) (discussing the rise of criminal and immigration detention and its affects in Latinx communities); and MILTON HEUMANN & LANCE CASSAK, GOOD COP, BAD COP: RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE (2003) (discussing the impact of the practice of profiling on racial and ethnic minorities).

most federal district courts<sup>3</sup> in the United States.<sup>4</sup> To make matters worse, racial minorities have always been sentenced to more time in prison compared to similarly situated whites.<sup>5</sup> These facts are problematic because the percentage of minorities charged with crimes is greater compared to their percentage of the country's population.<sup>6</sup> These systemic racial inequities coexist with and are heightened by the behavior of defense attorneys, prosecutors, judges, jurors, and probation and pre-trial service officers through implicit racial bias and racial stereotyping.<sup>7</sup> Implicit bias and racial

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<sup>3</sup> The approach outlined in this article applies to Latinx clients in all criminal courts. This author's practice is in federal court, and thus, most examples are from federal court. This does not change the applicability of strategies and techniques.

<sup>4</sup> In fiscal year 2017, 53.2 percent of all persons convicted of a federal offense were Hispanic, while 21.5 percent were White, and 21.1 percent were Black. See U.S. SENTENCING COMM'N, FY2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2017), tbl. 4, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB\\_Full.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf). State figures are available on a state-by-state basis. In 2009 among the nation's largest counties, 24 percent of inmates were Hispanic. See Bureau of Just. Stat., *FAQ Detail*, <https://www.bjs.gov/index.cfm?ty=qa&iid=418> (last visited Apr. 1, 2019) [<https://perma.cc/BSK9-TBKD>].

<sup>5</sup> See Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, 3 NAT'L COUNCIL ON CRIME AND DELINQUENCY (2009), [https://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](https://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf) [<https://perma.cc/JB9E-5XE8>].

<sup>6</sup> Whites comprise 62.06 percent of the population, African Americans comprise 12.7 percent, and Latinxs comprise 17.8 percent. See FactFinder, *2016 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_16\\_1YR\\_CP05&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_1YR_CP05&prodType=table) [<https://perma.cc/C9YT-XQL3>]. See also AMER. CIVIL LIBERTIES UNION, *Hearing on Reports of Racism in the Justice System of the United States*, [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf) [<https://perma.cc/5JHX-FWGC>].

<sup>7</sup> This article only addresses criminal defense practice. Implicit bias has been studied with respect to judges, probation officers, and prosecutors. See Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE UNIV. L. R. 795, 807 (2012) ("even after legally relevant factors ... are taken into account, racial differences affect how cases are processed: whites are less likely to have charges filed against them"); Jess Jannetta et al., *Examining Racial and Ethnic Disparities in Probation Revocation*, URBAN INSTITUTE (Apr. 2014), <http://www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF> [<https://perma.cc/2HQP-X3FG>]; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE

stereotypes have real-life outcomes on bail, jury deliberations, sentencing, and other parts of the criminal justice process<sup>8</sup>. On the other hand, there is reason for optimism—empirical research shows that explicitly discussing race during trials and pre-trial hearings reduces reliance on stereotypes.<sup>9</sup> This shows that defense lawyers should pay more attention to race and make it salient as a litigation strategy.<sup>10</sup>

In part, due to recent psychological findings, a body of literature focused on race-consciousness<sup>11</sup> exists to aid defense lawyers in blunting the negative impact of implicit bias and racial stereotypes.<sup>12</sup> The approach encourages

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DAME L. REV. 1195, 1197 (2009) (judges hold implicit racial biases, but can, in some instances, compensate for their implicit biases).

<sup>8</sup> See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142–43 (2012), citing Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005) (fact that a juror was of a different race than the defendant influenced both verdicts and sentencing).

<sup>9</sup> See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in A Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) (calling attention to race may be the best way to defuse the adverse effects of implicit racial bias). See also Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003) (presenting jurors with race-based voir dire questions in cases involving interracial violence reduced racial bias in white jurors).

<sup>10</sup> Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2264 (2014) (discussing ways for defense counsel to inject issues concerning race discrimination into courtroom conversation “which, for too many reasons to recount ... manages to bypass race bias while being steeped in it”).

<sup>11</sup> “Race-consciousness” is a term used by this author to describe the application of strategies in criminal defense practice to reduce implicit bias.

<sup>12</sup> See generally Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999 (2013) (discussing opportunities that defense lawyers have to educate others about implicit racial bias during litigation, including motions practice, voir dire, jury instructions, and sentencing advocacy); Sterling, *supra* note 10; Robin Walker Sterling, *Raising Race*, THE CHAMPION, April 2011, at 24 (discussing various ways to inject race into criminal defense practice); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013) (public defender triage presents a way for implicit racial bias to affect legal outcomes); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012) (discussing office culture and a confrontation with a colleague after testy encounter with client at cell block);

lawyers to use pre-trial motions, voir dire, counter-narratives, jury instructions, and experts in novel ways, such as to open judges and jurors' minds about social issues that underlie the facts and law of the case.<sup>13</sup> The literature also encourages indigent defense offices to change their internal culture through hiring practices, training, and accountability policies.<sup>14</sup> The line attorney may not have the power to change office policy but can apply said strategies in his or her practice.<sup>15</sup> These strategies are applicable to any clients of color, but nothing in the literature specifically addresses Latinx criminal defendants. The empirical data is also scant on Latinxs in criminal defense.

This article proposes an articulation for criminal defense lawyers to reduce implicit bias for Latinx criminal defendants.<sup>16</sup> It summarizes approaches for reducing implicit bias for criminal defendants as a whole, applies the approaches to Latinxs, and describes how the use of narrative, client culture, and individuation can reduce bias. It explores ways to implement a race-conscious approach to examples involving Latinxs in the federal criminal

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Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649 (2017) (summarizing studies showing evidence of implicit racial bias in the criminal and juvenile justice systems and suggesting ways to overcome it); Cynthia Lee, *supra* note 9 (discussing the importance of making race salient if one is concerned about racial bias); James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, August 1999, at 22 (suggesting ways of addressing racial bias against the accused in a case involving interracial violence); and Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835 (2016) (arguing that Rule 609 keeps defendants off the witness stand, thus removing an opportunity to lessen the effects of jurors' implicit bias against minority defendants).

<sup>13</sup> See Rapping, *supra* note 12, 1016–1042.

<sup>14</sup> See Richardson & Goff, *supra* note 12, at 2644.

<sup>15</sup> *Id.*

<sup>16</sup> The term “Latinxs” as employed in this article refers to populations in and outside the United States, who in some way identify as Latinx and have been charged with a crime. Latinxs are a diverse people. The author acknowledges the existence of cultural and ethnic differences between Chicanos, for example, and Puerto Ricans; or among Cuban-Americans and Brazilians in the United States. These differences do not alter the analysis presented herein.

justice system. It differs from other articles in that it encourages the use of client culture as a way to decrease bias. The article presents a client-centered, race-based paradigm to defend Latinxs, the fastest growing minority nationwide<sup>17</sup> and the largest subset of criminal defendants in the federal system.<sup>18</sup>

The article proceeds as follows. Part I defines the client-centered approach to criminal defense and shows how a race-based paradigm for representation requires those values. Part II summarizes pre-trial and trial strategies in the existing literature for the race-conscious lawyer. Part III describes how Latinxs have been historically perceived in the media, summarizes studies on implicit bias affecting Latinxs, and provides specific strategies for reducing implicit bias. Part III also examines how the use of narrative, examples of client-culture, and individuation reduce implicit bias for Latinxs.

## I. RACE CONSCIOUSNESS AND THE CLIENT-CENTERED APPROACH<sup>19</sup>

The race-conscious approach embodies client-centered representation, a model that emphasizes client autonomy and needs.<sup>20</sup> Client-centered representation demands the lawyer involve the client in decisions requiring more than just the decision to plead guilty or not guilty, accept a plea agreement, testify at trial, or concede guilt on any count as a strategy during

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<sup>17</sup> See Anna Brown & Mark Hugo Lopez, *Mapping the Latinx Population, by State, County, and City*, PEW RESEARCH CENTER (2013), <http://www.pewhispanic.org/2013/08/29/mapping-the-Latinx-population-by-state-county-and-city> [https://perma.cc/LVV3-4P8S]. The 2010 United States Census shows that Hispanics or Latinxs represent 18.1 percent of the United States population. U.S. Census Bureau, *Quick Facts: United States*, <https://www.census.gov/quickfacts/fact/table/US/RHI725217> [https://perma.cc/2JWM-6NE8].

<sup>18</sup> See Hartney & Vuong, *supra* note 5; U.S. CENSUS BUREAU, *supra* note 6.

<sup>19</sup> Race is a sensitive subject. The defense attorney should be mindful of this at all stages of representation when addressing prosecutors, judges, jurors, and clients. The defense attorney can quickly lose credibility if (s)he is not fully prepared when addressing race.

<sup>20</sup> The Federal Public Defender, District of Arizona, where the author is employed, subscribes to a “client-centered” approach. “We subscribe to a client-centered approach to legal representation.” See Federal Public Defender: District of Arizona, *Our Mission*, <https://www.fpdaz.org/> [https://perma.cc/7AVL-PNZZ]. The author speaks only for himself and not the Arizona Federal Public Defender’s Office.

trial.<sup>21</sup> The approach takes into full consideration the client’s viewpoint, life experiences, and decision-making during representation.<sup>22</sup> Client-centered advocacy is rooted in American values of individual autonomy, self determination, and the dignity of clients.<sup>23</sup> One example of client-centered advocacy includes the decision to call a particular character witness over another for trial. Traditionally this type of decision is left to the lawyer, but the client may possess insights about the habits or proclivities of the witness known only to a few people.

A Race-conscious approach requires client-centered ideals in order to facilitate meticulous research into a client’s life so as to present him/her in the best possible light. Latinxs are treated more harshly compared to similarly situated whites. A race-conscious approach with client-centered principles can allow the lawyer to zero in on facts and decisions that otherwise would not be known. Client-centered strategies such as presenting important life experiences of the client decrease bias because it more effectively humanizes the person. Detailed narratives present the client as a unique person.

Fortunately, many defense lawyers recognize that a client-centered approach is extremely effective—the best way to fulfill ethical responsibilities to clients.<sup>24</sup> Some defense lawyers may acknowledge that the prevalence of racial disparities, in part resulting from implicit racism,<sup>25</sup> shows that client-centeredness without race-consciousness fails standards of

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<sup>21</sup> See Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 587 (2011) (noting that clients don’t enter representation with static and pre-determined objectives to which lawyers can simply defer).

<sup>22</sup> *Id.*

<sup>23</sup> See Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370 (2006) (identifying client-centered representation as one of the most influential doctrines in legal education today).

<sup>24</sup> See Nathan M. Crystal, *The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1092 (1999) (noting that “Many, perhaps most, lawyers are client-centered in their approach to lawyering”).

<sup>25</sup> Kang et al., *supra* note 8.

“zealous representation.”<sup>26</sup> Nonetheless, the decision to incorporate race is one only the individual attorney can make depending on the attorney’s knowledge, case-specific factors (judge, prosecutor, and charges), and the client’s consent.<sup>27</sup> There is no “one size fits all” philosophy to incorporating race.

The race-conscious defense attorney should ask clients if they are comfortable incorporating race in the defense.<sup>28</sup> Some clients may not want the lawyer to mention race as a factor in motions or court proceedings.<sup>29</sup> For instance, after enough interactions with the client, the lawyer may gain insight into the client’s experience with racial prejudice by asking questions relevant to mitigation. Through this knowledge-building, there comes trust. With enough trust, both lawyer and client may feel more comfortable discussing race prejudice and its potential influence in the representation. This author’s experience is that many clients appreciate lawyers sensitive to racial prejudice and willing to do something about it within the system.

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<sup>26</sup> PROFESSIONAL RESPONSIBILITY CANON 7 (1983). See also Charles P. Cursit, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951) (“Zealous representation” is a concept that embraces the view that the interests of the client are generally paramount to the interest in the administration of justice and almost invariably paramount to the interests of third parties). Ample evidence points to clients of color being at a disadvantage compared to white clients. See ALEXANDER, *supra* note 2. Arguably, without a race-conscious approach, a defense lawyer discredits Latinx clients and other clients of color. See Abbe Smith, “Nice Work If You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523, 565 (1998) (noting that criminal lawyers must use all they can to be zealous advocates).

<sup>27</sup> If the client does not consent, the defense lawyer should not incorporate a race-conscious approach.

<sup>28</sup> Individual clients can choose to forsake their interests for the sake of a larger group or issue, but lawyers should not forsake individual clients for any “larger” cause. See Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1595–96 (1999) (arguing that a criminal defense attorney’s primary concern should be for his or her client’s rights, not justice for the larger racial community the client associates himself or herself with).

<sup>29</sup> See Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1348 (1998) (providing an overview of race-salient trials and discussion of race-conscious jurisprudence as it relates to client representation).



Using a client-centered approach to combat the negative effects of race in client interactions, pre-trial motions, sentencing memorandums, jury instructions, voir dire, opening, and closing arguments helps the individual client and the system as a whole, even if substantive arguments are not successful in a particular case. For example, a trial court may rule not to include an implicit bias instruction with final jury instructions. Even so, the defense lawyer openly discussed matters of race supported by social science evidence and created a record for appeal. The lawyer has also primed the court for the next trial when the attorney can request the same or similar instruction. Therefore, from a race-based approach, success means “creating a courtroom situation in which implicit race discrimination and bias are openly joined on the record instead of relegated to the background.”<sup>30</sup>

Under a race-conscious approach, success requires that the defense lawyer not only becomes aware of prejudice within the system but practices in an intelligent way to ethically raise issues of race. Most defense lawyers do not succeed in convincing trial judges to grant a significant percentage of their pre-trial motions. By filing motions and arguing before the court, the defense lawyer educates the court, prosecutors, and other criminal justice players. The hope is that over time judges will be more accepting of race-based arguments and open to ruling favorably for the defense.

## II. STRATEGIES TO MITIGATE THE IMPACT OF IMPLICIT BIAS

People form both favorable and unfavorable assessments about others based on characteristics such as race, ethnicity, age, or appearance, without consciously deciding to do so.<sup>31</sup> Implicit bias refers to attitudes or stereotypes that affect one’s understanding, actions, and decisions in an unconscious

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<sup>30</sup> See Sterling, *supra* note 12 at 26.

<sup>31</sup> See Cheryl Staats, *State of the Science: Implicit Bias Review 2014*, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY (Sept. 14, 2018), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf> [<https://perma.cc/BJ9-NMUW>].

way.<sup>32</sup> Through exposure to direct and indirect messages, including media and news programming, people's biases begin to develop at an early age.<sup>33</sup> Researchers of implicit bias have determined that, to some degree, everyone possesses biases that affect how we view the world.<sup>34</sup> When people form a bias, they subconsciously<sup>35</sup> look for information that affirms their existing beliefs.<sup>36</sup> The implicit associations that we hold are not related to our declared, committed beliefs, nor do they even necessarily reflect positions we would explicitly endorse.<sup>37</sup> People often hold implicit biases that favor their own in-group; however, research has shown that people can still hold implicit biases against their own in-group.<sup>38</sup> Fortunately, implicit biases are malleable and can be gradually unlearned and replaced with new mental associations.<sup>39</sup> It is the defense attorney's job to become aware of implicit biases and their negative effects so they can help judges, jurors, and prosecutors to reduce those biases. The following section briefly describes implicit biases and how they affect players in the system.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> For a contrary viewpoint, see Michael Selmi, *The Paradox of Implicit Bias and A Plea for A New Narrative*, 50 ARIZ. ST. L.J. 193 (2018) (implicit biases may just be a part of conscious bias and should be treated as stereotype evidence, which places the focus more on conscious discrimination).

<sup>36</sup> See Melissa Little, *Implicit Bias: Be an Advocate for Change*, AMERICAN BAR ASSOCIATION (June 27, 2017), [https://www.americanbar.org/groups/young\\_lawyers/publications/tyl/topics/professional-development/implicit\\_bias\\_be\\_advocate\\_change.html](https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/professional-development/implicit_bias_be_advocate_change.html) [<https://perma.cc/6B3W-974D>].

<sup>37</sup> See GEOFFREY BEATTIE, *OUR RACIST HEART? AN EXPLORATION OF UNCONSCIOUS PREJUDICE IN EVERYDAY LIFE* (2013) (discussing how implicit biases based around race exist in the psyches of even the most liberal, educated and fair-minded).

<sup>38</sup> See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006).

<sup>39</sup> See Leslie E. Roos, et al., *Can Singular Examples Change Implicit Attitudes in the Real-World?*, FRONTIERS IN PSYCHOLOGY (Sept. 5, 2013), <https://www.frontiersin.org/articles/10.3389/fpsyg.2013.00594/full> [<https://perma.cc/KF8B-NK5Z>].

The mental process for the activation of implicit biases begins when an area of the brain called the amygdalae activates when humans feel fear, threat, anxiety, and distrust.<sup>40</sup> For example, people with a fear of snakes or spiders have higher levels of amygdala activation when they view pictures of these animals.<sup>41</sup> These fear triggers are not activated to the same degree when the same people see photos of other creatures—even creatures that different people may find scary.<sup>42</sup> Studies show that, for some people, seeing a photos of persons with darker skin triggers the same area of the brain.<sup>43</sup> Persons with darker skin tone trigger more amygdala activation compared to persons with lighter skin tone.<sup>44</sup>

Scholars have talked about what defense lawyers can do to mitigate the effects of implicit bias among themselves, judges, and juries.<sup>45</sup> No study, however, analyzes the representation of Latinxs through a racial lens in criminal defense. Those defending Latinxs can extrapolate insights from research on other minorities in the criminal courts. This research centers on judges,<sup>46</sup> jurors,<sup>47</sup> and lawyers.<sup>48</sup> The results of this research, as predicted, are

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. Cog. Neurosci. 729-33 (2000).

<sup>44</sup> See Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745 (2018).

<sup>45</sup> See generally supra note 12.

<sup>46</sup> See Rachlinski et al., supra note 7.

<sup>47</sup> See generally Huajian Cai, Justin D. Levinson, & Danielle Young et al., *Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. L. 187, 193-94 (2010) (significant association found between Black and guilty compared to White and guilty, producing a significant IAT effect); see also 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, 308 (2010) (participants who saw a photo of a dark-skinned perpetrator judged subsequent evidence as more supportive of a guilty verdict compared to participants who saw a photo of a lighter-skinned perpetrator).

<sup>48</sup> See Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?* 35 LAW HUM. BEHAV. 413, 414-15 (2011). Prof. Edkins found that the pleas attorneys felt they could get with a minority client

that racial minorities are treated less favorably compared to whites.<sup>49</sup> Because strategies for raising implicit bias and mitigating its impact are universal (they apply to clients of any ethnicity), this is not surprising.<sup>50</sup> On the other hand, different racial, ethnic, or cultural groups have unique characteristics and contexts that set each apart.

Before we turn to characteristics and contexts unique to Latinxs, the following section summarizes broader changes that public defense offices can make to improve their own culture. Individual lawyers must make these changes, hence their inclusion in this article. Case-specific strategies that lawyers can apply to reduce implicit bias are also discussed in sections B – G and include client interviews, pre-trial motion practice, voir dire, client testimony, use of expert testimony, use of narrative, jury instructions, and sentencing advocacy.

#### *A. Recognizing Implicit Bias Within Oneself and the Office*

The experience of many public defenders is that they eventually “burn out” due to the volume and seriousness of cases.<sup>51</sup> When lawyers are tired, and morale is low, clients of color may not get the necessary attention because implicit bias favors some clients over others.<sup>52</sup> Attention may be paid to clients that suffer less from racial bias. The advantage of a race-conscious approach is that it teaches lawyers to take their time and to treat each client

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compared with a Caucasian client were significantly more likely to include some jail time. The reasons for the disparate recommendations were not due to increased perceptions of guilt with the minority client nor to perceptions that the minority client would fare worse at trial.

<sup>49</sup> See Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT’L & COMP. L. 89, 93 (2007) (noting that “[b]ecause unconscious and institutional discrimination are not recognized, racial minorities are subjected to different and less favorable treatment than similarly situated whites, but the law does not provide a means of redressing their injuries”).

<sup>50</sup> See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1561 (2005).

<sup>51</sup> See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 532 (1999).

<sup>52</sup> See Lyon, *supra* note 12 at 757.

individually. If each attorney does his or her part, broader cultural changes will benefit individual clients.

The first step to remediating implicit bias in the criminal defense office is to recognize it. The following section discusses the use of recognition and prioritization. One of the consequences of subscribing to the myth of a “post-racial” society, or employing a “color-blind” approach to practice, is that defense lawyers, uneducated about implicit racism, perpetuate office cultures that allow its impact to persist.<sup>53</sup> Defense lawyers often become desensitized to the injustices they see every day.<sup>54</sup> They become detached from racial injustice in criminal courts while racism, explicit and implicit, goes unrecognized.<sup>55</sup> The experience of this author provides an example.<sup>56</sup> While always aware of racial disparities in the system from when I first started trial practice as an Assistant Pima County Public Defender in Tucson, Arizona, it was only ten years into practice as an Assistant Federal Public Defender that this reality became more alarming. The percentage of minority criminal defendants in federal court in southern Arizona is greater compared to that of Pima County Superior Court.<sup>57</sup> This greater disparity concerned the author because colleagues rarely discussed race issues, and did not employ tactics to make race salient in practice other than through *Batson* challenges, motions

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT*, (2016) (describing overt racist practices in Cook County Superior Court) and L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom* Crook County: Racism and Injustice in America’s Largest Criminal Court by Nicole Van Cleve Stanford University Press, April 2016, 126 *YALE L.J.* 862, 869-71 (2017) (Prof. Richardson’s review of this book, examining implicit racism).

<sup>56</sup> U.S. SENT’G COMM’N, U.S. SENT’G COMM’N 2017 SOURCEBOOK OF FED. SENT’G STAT. (2017).

<sup>57</sup> David F. Sanders, *THE ADULT PROBATION DEPARTMENT PRIMA COUNTY, ANNUAL REPORT* (2015),

<http://www.sc.pima.gov/Portals/0/AP/AdultProbation2015AnnualReportForInternet.pdf?no-cache>; Mark H. Lopez & Michael T. Light, *A Rising Share: Hispanics and Federal Crime*, Pew Hispanic Center 3 (2009).

challenging cross-racial identifications, and—in rare cases—Fourth Amendment litigation.<sup>58</sup>

In order to minimize and recognize implicit bias, lawyers must address it among themselves and promote racial diversity in the workplace.<sup>59</sup> Jonathan Rapping, founder of Gideon's Promise,<sup>60</sup> suggests a campaign to raise self-awareness about implicit racism by proposing recruitment of defenders motivated to address racial inequities: training lawyers to understand the role their own implicit racial bias can play in driving disparate outcomes, and building an office culture in which resistance to the pressures that drive implicit racial biases is an explicit value.<sup>61</sup> This recruiting requires offices to reward motivations for lawyers to become aware of implicit bias and to apply tactics that mitigate it.<sup>62</sup> Second, promoting racial diversity in work environments is encouraged because it increases opportunities for positive interactions between racial group members of equal status.<sup>63</sup> This helps to create positive associations and motivates people to make more accurate, nonstereotyped judgments. All of these factors reduce implicit bias.<sup>64</sup> It is only after building awareness that the defense lawyer can begin to educate others in the system about unconscious biases.<sup>65</sup>

A critical element in changing office culture is to raise awareness of implicit bias decision-making. Attorneys ought to be taught about it and its

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<sup>58</sup> It was only at a National Trial College in Macon, Georgia in 2016, over ten years into practice, that this author was first exposed to trial and pre-trial strategies (mostly voir dire) to address racial bias. The training mostly addressed implicit bias and racial stereotypes concerning African-Americans.

<sup>59</sup> See Rapping, *supra* note 12, at 1022.

<sup>60</sup> See GIDEONS PROMISE, <https://www.gideonspromise.org/about> [<https://perma.cc/8JG9-7P9E>].

<sup>61</sup> *Id.*

<sup>62</sup> See Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 130-31 (2004).

<sup>63</sup> See Linda R. Tropp & Thomas F. Pettigrew, *Differential Relationships Between Intergroup Contact and Affective and Cognitive Dimensions of Prejudice*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1145 (2005).

<sup>64</sup> *Id.*

<sup>65</sup> See Rapping, *supra* note 12, at 1022.

effect on behavior. This may require offices to demand attorneys to take the Implicit Association Test (IAT).<sup>66</sup> Finally, attorneys should be directed to perceive their minority clients different than their popular stereotypes. For instance, Muslims should be perceived as peaceful. This approach goes hand-in-hand with attorneys reading disclosure with the point of view that their client is innocent, and that “if a client is black/brown I will think ‘innocent.’”<sup>67</sup>

There are several ways for defense lawyers to prioritize cases to reduce implicit bias. This includes the use of checklists. Public defender offices, accustomed to taking in an overwhelming number of cases, leave no other option but for trial attorneys to triage.<sup>68</sup> Professor Song Richardson urges public defender offices to establish systems in light of how implicit bias can harm such decisions.<sup>69</sup> Without these systems, implicit bias can harm clients of color. Triage standards ought to be based on criteria that are objectively measurable. For instance, cases should be prioritized based on custody status, at random, on speedy trial date, treatment status for mental health, drug or alcohol abuse, traumatic brain injury, and other factors that may help reduce the risk of an unreasonable sentence. These suggestions are ideal because they do not rely on attorneys’ subjective or idiosyncratic judgments. While imperfect, the proposals exemplify the types of objective criteria offices can use to focus attorney decision-making away from client stereotypes.<sup>70</sup> The use of checklists can help reduce biased judgments because having

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<sup>66</sup> See Richardson, *supra* note 12, at 2646 (citing Anthony J Austin, William T. L. Cox, Patricia G. Devine, & Patrick Forscher et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267, 1270 (2012)). See also Henning, *supra* note 12, at 682. Professor Henning suggests that defense attorneys should not only take the IAT, but should also discuss the results in small groups if they choose to. Although the article discusses these strategies as they relate to juvenile offenders, they can be applied to adult defendants.

<sup>67</sup> See Richardson, *supra* note 12 at 2648.

<sup>68</sup> *Id.* at 2644.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

predetermined criteria to guide decision-making can hinder people's unintentional tendency to change the criteria on which their decisions are based in order to fit their preferred course of action.<sup>71</sup> Offices can also ask lawyers to document how much time they spend on cases.<sup>72</sup> Defenders should be able to explain any racial disparities in how they allocated their resources. This rule can reduce implicit bias because people exercise more care when they know their decisions are monitored and will have to be explained.<sup>73</sup>

### *B. Interviewing and Consulting with Clients through Client-Centered Advocacy*

Professor Kristin Henning proposes client-centered advocacy as a way to reduce bias.<sup>74</sup> This type of advocacy promotes nonjudgmental, empathetic, and non-manipulative approaches at various decision points.<sup>75</sup> Defenders that employ this approach appreciate their client's expressed interest in context and help clients make decisions consistent with their own culture and worldview.<sup>76</sup> As lawyers genuinely seek to understand and accept their client's perspectives, they have increasingly less need to impose their own dominant, middle class norms in the relationship.<sup>77</sup> To promote client-centered advocacy, offices should develop written attorney practice

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<sup>71</sup> *Id.*

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

<sup>73</sup> See Casey Reynolds, *Implicit Bias and the Problem of Certainty in the Criminal Standard of Proof*, 37 L & PSYCHOL. REV. 229 (2013). The Implicit Association Test (IAT) is the primary instrument used currently to measure implicit bias. One study suggests that when jurors see the results of their own racial bias IAT, they may view evidence in the case afterwards with a more race-neutral approach. Another study found that doctors who were aware they were involved in an implicit bias study treated patients of different races more neutrally, suggesting that people can compensate for implicit bias when they are aware of it. See also, Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1231-32 (2007).

<sup>74</sup> See Henning, *supra* note 12.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*, citing *Report of the Working Group on the Role of Race, Ethnicity, and Class*, 6 NEV. L.J. 634, 634 (2006).

<sup>77</sup> *Id.*



standards, mission statements, client Bill of Rights, and statements of key principles that mirror client-centered approaches.<sup>78</sup> Offices should also require yearly trainings on ethical obligations to client decision making and client-centered loyalty.<sup>79</sup>

Professor Henning suggests five steps to help reduce implicit bias in client interactions.<sup>80</sup> The five steps are: (1) stereotype replacement, (2) counter-stereotypic imaging, (3) individuation, (4) perspective taking, and (5) increased opportunities with commonly stereotyped groups.<sup>81</sup> The following section will first define each of these approaches and how each can minimize implicit bias in the criminal defense attorney's office.

First, "stereotype replacement" involves being patient and not responding in frustration to a client's anger, hostility, or disengagement in the interview.<sup>82</sup> Attorneys must recognize that their interpretations of the client's behavior could be incorrect and that there may be alternative, or more accurate, explanations for an unwanted reaction. For instance, the client could be missing critical language skills required to express feelings.<sup>83</sup>

Second, "counter-stereotype imaging" requires defenders to imagine their black and Latinx clients in counter-stereotypic ways.<sup>84</sup> The imaging is enhanced when defenders identify and share success stories about black or Latinx children from the local community, including those of former clients enrolled in college, employed, or otherwise excelling in pro-social ways.<sup>85</sup> Defenders should force themselves to imagine their clients completely separate from the reality of being criminally accused. As an example,

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<sup>78</sup> *Id.*

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

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

<sup>81</sup> *Id.*

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

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

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

defenders should visualize clients in a college classroom, a doctor's office, or the judge's bench.<sup>86</sup>

Third, "individuation" compels defense lawyers to suspend disbelief when listening to a client's account of events, and to hypothesize that every case is either going to trial or plea during investigation and pre-trial research.<sup>87</sup> There should be a rejection of the notion that the case is a "typical" drug case or a "typical" robbery.<sup>88</sup> To further individualization, lawyers should have "case rounds" in which they debate the case and assume differing viewpoints about the client, the case, and the overall strategy.<sup>89</sup> These meetings would hold lawyers accountable and help them recognize their own biases, reevaluate their initial impressions and opinions, and ultimately improve client outcomes.<sup>90</sup> Extensive investigation into a client's social history can also help individualize the client and deter the defense attorney from treating the case as run of the mill. All of this individuation has been proven to decrease the impact of implicit bias.<sup>91</sup>

Fourth, "perspective taking" involves defenders assuming the first person perspective of their client during any communication, advocacy, counseling, or decision-making.<sup>92</sup> This means that attorneys, after enough interactions with the client, can assume the client's perspective and preferences in decision-making, write creative pleadings, disclose potentially embarrassing information, and decide to conduct more investigation.<sup>93</sup> These tactics will

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<sup>86</sup> *Id.* at 684.

<sup>87</sup> *Id.* at 685.

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

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Sterling, *supra* note 10, at 2279.

<sup>92</sup> See Henning, *supra* note 12.

<sup>93</sup> See also Lyon, *supra* note 12, at 763-765 (in interacting with clients, lawyers have to be alert to abnormal behaviors. Clients might mean something other than what they mean at the surface. For this reason, clients should receive the benefit of the doubt. In conflicting interactions with clients, lawyers should do their best to stay calm as not doing so will reduce client trust. Lawyers should stay true to their words with clients by following through on what they say they will do).

help defenders increase their psychological affinity with the client and enhance the lawyer's respect for and deference to client autonomy.<sup>94</sup>

Last, "increased opportunities with commonly stereotyped groups" encourages defenders to see their clients or members of their communities in different ways by engaging in community service or extracurricular activities such as sports teams, tutoring at school, the local church, or recreational events.<sup>95</sup> Defenders might invite clients to participate in an intramural sports league or coach a mock trial competition. Defender offices might host holiday dinners for clients and their families or invite clients to join them in serving dinner to the homeless.<sup>96</sup>

These client-centered approaches embrace loyalty and make it easier for lawyers to develop positive narratives that counter traditional notions of "suspects" or "defendants."<sup>97</sup> This is similar to "getting close" to clients,<sup>98</sup> a point emphasized by Professor Bryan Stevenson, and allows the lawyer to present the person as a human being.<sup>99</sup> The client could be a promising student, a devoted father or mother, a reliable employee, a caretaker of siblings, an active church member, a talented musician, an artist, or an athlete.<sup>100</sup> To aid in the process of countering mainstream narratives, the lawyer should also help judges, jurors, and prosecutors understand challenges in the context of structural racism and cultural realities.<sup>101</sup> For example, this could include the presentation of evidence about unemployment rates or that

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

<sup>95</sup> *Id.* at 684.

<sup>96</sup> *Id.*

<sup>97</sup> See George C. Chen, *Beneath the Surface: Why Diversity and Inclusion Matter for Lawyers of Color, and What Lawyers Can Do to Address Implicit Bias in the Legal Profession*, Fed. Law., June 2015, at 28–29 (2015) [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2015/June/Beneath-the-Surface.aspx?FT=.pdf](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2015/June/Beneath-the-Surface.aspx?FT=.pdf) [<https://perma.cc/RG9X-P5U2>].

<sup>98</sup> BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (Spiegel & Grau, 2014).

<sup>99</sup> *Id.*

<sup>100</sup> Henning, *supra* note 12, at 688.

<sup>101</sup> *Id.*

a particular arrest or conviction was unjustified and reflects merely racial bias.<sup>102</sup> By failing to individualize narratives about clients, defenders become complicit in enforcing dominant norms and invalidating the strengths and virtues of their clients in non-dominant communities.<sup>103</sup>

If applied, these interventions will both increase the defender's awareness of subtle biases and discrimination in the system and revive the defender's waning sense of outrage about racial injustice.<sup>104</sup>

### C. Pre-trial Motion Practice

Traditional and less common pre-trial motions can be used strategically by defense counsel to minimize implicit bias in the courtroom. Traditional pre-trial motions include motions regarding cross-racial identification, oppositions to 404(b) other act evidence, and motions to suppress evidence. Less traditional motions include motions to dismiss the indictment.

In traditional pre-trial motion practice, issues of race are most commonly raised in Fourth Amendment litigation. Contemporary Fourth Amendment jurisprudence requires that defense counsel present evidence that law enforcement officers intentionally used race as a basis for detention or search.<sup>105</sup> In *Whren v. United States*, the Supreme Court of the United States reviewed a pre-trial motion to suppress and denied the defendant's request.<sup>106</sup> The Supreme Court held that, as long as facts give rise to an objectively reasonable basis for an officer to conduct a search or seizure, the fact that the officer was actually motivated by the race of the target might not be considered by a court assessing the legality of the officer's actions.<sup>107</sup> As such, the Supreme Court precluded defense counsel from trying to ferret out

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 686.

<sup>105</sup> See Rapping, *supra* note 12, at 1025.

<sup>106</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>107</sup> *Id.*

racism in policing when asking the trial court to evaluate stops and searches under the Fourth Amendment.<sup>108</sup>

The defense attorney practicing from a race-conscious approach should try to convince the court that implicit racial bias played a role in causing a traffic stop, detention, or search. Implicit bias affects how police officers evaluate facts, causing them to likely interpret ambiguous behavior as consistent with criminal involvement when the target is black.<sup>109</sup> A trial court should consider this pernicious influence when evaluating whether the justification for the conduct in question actually exists. Because implicit bias affects how we later remember facts, causing us to likely misremember them in ways consistent with criminality when relating to darker-skinned persons, trial courts should consider this influence when determining how much credit to give an officer's testimony regarding his or her memory of facts used to justify the conduct in question.<sup>110</sup> Defenders should argue that the influence of implicit bias "undermines the objective basis claimed by the officer, both by improperly skewing how (s)he evaluated the facts on the scene and how (s)he recollects them at the hearing on the motion to suppress."<sup>111</sup> If the court refuses to consider expert testimony without knowing whether the particular officer is influenced by implicit bias, defense counsel might consider requesting that the officer either be evaluated by an implicit bias expert or submit to testing designed to answer this question.<sup>112</sup> In motions to suppress evidence, the defense attorney can also ask the court's permission to introduce evidence of the officer's record of arrests, whether the neighborhood is actually a "high crime area," and witness accounts of the entire interaction between the officer and the defendant.<sup>113</sup>

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<sup>108</sup> See Rapping, *supra* note 12, at 1025.

<sup>109</sup> *Id.* at 1026.

<sup>110</sup> *Id.* at 1026-27.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Sterling, *supra* note 10, at 2268.

Pre-trial motions to dismiss based on race are uncommon. Many jurisdictions allow the filing of a motion to dismiss when the equities favor sparing the defendant the risks of moving forward.<sup>114</sup> A defense attorney can file a motion to dismiss “in the interests of justice.”<sup>115</sup> The broad title, “in the interests of justice,” is an excellent vehicle to get race-related issues before the court that would otherwise not be admissible.<sup>116</sup> Such a motion can be filed in a case in which the lawyer represents a minority client, and the alleged victim is a white law enforcement officer, in a jurisdiction that has advisory sentencing guidelines, where racial overtones are explicit, or cases that would result in greatly disproportionate sentences.<sup>117</sup> As the government emphasizes the importance of “public safety,” the defense attorney can counter, for instance, with a discussion of “public justice” when litigating this type of motion. As with other strategies relating to race, the defense attorney should weigh the pros and cons of filing such a motion in terms of appellate review, plea bargaining, or possible reactions from the specific trial judge.

Another way to raise race through pre-trial motions involves motions to suppress cross-racial identifications, which has been the subject of abundant literature in psychology, law, and in many court decisions.<sup>118</sup> Psychological research shows that cross-racial identifications are inherently less reliable compared to same race identifications.<sup>119</sup> In a case with cross-racial

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<sup>114</sup> See Sterling, *supra* note 12, at 24.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See *Manson v. Brathwaite*, 432 U.S. 98 (1977). See also Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 137 (2006).

<sup>119</sup> See Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); see also Robin Parker, “*They All Look Alike*” - *A Historical Perspective on State v. Cromedy*, N.J. LAW., Aug. 2000, at 57. (“After centuries of experience, courts have concluded that eyewitness identifications of strangers may be unreliable evidence unless other facts link a defendant to the crime. The problem is especially thorny when a witness identifies a stranger of a different race”).

identification, the defense attorney should call an eyewitness identification expert to testify at a motion to suppress hearing and at trial.

Lastly, the defense lawyer should file motions to preclude other act evidence under Federal Rule of Evidence 404(b). Judges tend to admit 404(b) evidence over defense objections unfairly.<sup>120</sup> Other act evidence, if not objected on grounds of negative implicit bias repercussions, will harm minority clients.<sup>121</sup>

#### *D. Voir Dire*

The attorney's primary goal during voir dire is to learn as much as possible about jurors in order to ask the court to strike members for cause and to exercise peremptory strikes properly.<sup>122</sup> Another important goal of voir dire should be to educate the jury about implicit racial bias.<sup>123</sup> The attorney should highlight the significance of race in the case at hand so that those who end up on the jury will be more aware of the ways in which race may have shaped the perceptions of persons involved and the ways in which race may influence jurors' perceptions.<sup>124</sup> This section discusses motions to require jurors to take the IAT, requests for the court to explain implicit bias, requests for attorney conducted voir dire on implicit bias, examples of questions to ask jurors, and race questions on jury questionnaires.

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<sup>120</sup> See Demetria Frank, *The Proof is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & The Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 55 (2016) (defense lawyers should challenge uncharged conduct evidence as exacerbating bias in decision-making or at least use that information to give jury instructions on how to consider the evidence).

<sup>121</sup> *Id.*

<sup>122</sup> See *Scott v. Lawrence*, 36 F.3d 871, 874 (9th Cir. 1994) ("The principal purpose of voir dire is to probe each prospective juror's state of mind to enable the trial judge to determine actual bias and to allow counsel to assess suspected bias or prejudice").

<sup>123</sup> See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, The Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 169 (2010).

<sup>124</sup> See Lee, *supra* note 9, at 1593.

First, attorneys can address implicit bias by filing a motion, well in advance of trial, requiring the entire venire to submit to the IAT.<sup>125</sup> Research shows that the process of taking the IAT and seeing the results can help address implicit bias.<sup>126</sup>

Second, the attorney can also ask that the court explain implicit racial bias to the jury and instruct the venire on the influence it has over all of us, including the risk it poses to the jury's ability to reach a verdict based solely on appropriate considerations.<sup>127</sup> For example, in northern Iowa, Senior District Court Judge Mark W. Bennett includes a discussion of implicit racial bias in a PowerPoint presentation to the venire before allowing individualized attorney voir dire.<sup>128</sup> This practice may be worth bringing to the attention of the trial judge by attaching a copy of the PowerPoint presentation to a pre-trial motion seeking permission to discuss implicit bias and racial stereotyping. An explanation of this type from the court would likewise serve to educate the judge and jury because it would be supported by a review of the social science literature.<sup>129</sup>

Third, the lawyer should ask for attorney -conducted voir dire, as research shows jurors are more forthcoming with lawyers as compared to judges.<sup>130</sup> Because of the likelihood of a deeper knowledge of implicit bias, the race-conscious lawyer can question and follow up in a more effective fashion

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<sup>125</sup> *Id.* at 1027. The IAT is the most common evaluative instrument designed to show the presence of implicit bias in a person.

<sup>126</sup> See Rapping, *supra* note 12, at 2019, quoting Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 873, n.346 (2012).

<sup>127</sup> *Id.* at 1030. The Western District of Washington has a video it shows to the venire <https://www.wawd.uscourts.gov/jury/unconscious-bias> [<https://perma.cc/H4NZ-A7F5>].

<sup>128</sup> See Bennett, *supra* note 123, at 149-51.

<sup>129</sup> *Id.*

<sup>130</sup> See Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 432 (1985) ("The responding attorneys generally agreed that [10 minute attorney-conducted voir dire] aided the empaneling of an unbiased jury ... [and] enabled them to exercise their peremptory challenges better.").



compared to the judge. The questioning of jurors should first educate to raise awareness, and then learn the extent to which the jurors appreciate implicit bias's influence. Furthermore, the attorney should conduct a general examination of jurors' life experiences that help reveal already-established relevant attitudes and belief systems. The lawyer should ask whether jurors are receptive to or critical of the concept of implicit bias.<sup>131</sup> The lawyer should explore jurors' beliefs about race, but also look for attitudes that make it more likely that a juror will consciously guard against the influence of implicit racial bias.<sup>132</sup>

Fourth, during voir dire, the lawyer should ask questions that elicit life-based experiences, such as, "Describe a particularly impactful interaction that you or someone you know had with a member of another race."<sup>133</sup> This is a good ice breaker for discussion about race and stereotypes. Another useful starting point is for the attorney to share a personal story about race. If the lawyer cannot recall an experience, the attorney can share that Jesse Jackson, a well-known African American civil rights activist, admitted, "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 look around and see somebody white, and feel relieved."<sup>134</sup> Stories like this will personalize the issue for the jury.

Finally, the attorney can ask the court, in a pre-trial motion, to submit questionnaires with relevant questions about race. This is appropriate in all jurisdictions, but it is especially necessary for jurisdictions that do not allow attorney-directed voir dire.<sup>135</sup> In jurisdictions that do not allow attorney

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<sup>131</sup> See McComas & Strout, *supra* note 12 (James McComas and Cynthia Strout recommend using the word "stereotype" as it is a less accusatory term).

<sup>132</sup> See Rapping, *supra* note 12, at 1034.

<sup>133</sup> See Ira Mickenberg, materials for North Carolina Defender Trial School, *Voir Dire and Jury Selection*, <http://www.ncids.org/defender%20training/2011defendertrialschool/voirdire.pdf> [<https://perma.cc/WV3P-LFJZ>].

<sup>134</sup> See McComas & Strout, *supra* note 12, at 22-23.

<sup>135</sup> See Lee, *supra* note 9 at 1612 (quoting Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social*

conducted voir dire, the attorney may have no idea what preconceived implicit biases exist in the jury pool.

### *E. Client Testimony*

It is important that minority defendants have their own voice. Defenders should think more liberally about whether the client should testify. Generally, criminal defendants are encouraged to let their lawyers do the talking for them, but silence undermines the system's goal of individualized consideration."<sup>136</sup> When the client has prior convictions, the defense lawyer should file a motion asking the court to disallow (or at least sanitize) impeachment based on prior convictions.<sup>137</sup> Although an uphill battle, the motion should highlight the importance of individuation about the client's life and conduct relating to the case. After all, clients know about their thoughts, fears, and motivations better than anyone. This type of narrative, which in most cases only comes from the client, should take precedence over the prosecutor's ability to impeach with prior convictions.<sup>138</sup> In some cases, a client should not testify because of statements made to police or to the lawyer, questions concerning whether the client will come across believably, or concerns about impeachment. If convicted, the client's testimony could

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*Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026-29 (2003)). See also Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (2007). In nearly half of the states, voir dire is led predominately by attorneys. In a little over a third of the states, the judge and attorneys share the responsibilities of conducting the voir dire equally. The judge exclusively conducts the voir dire in the minority of the states and the District of Columbia.

<sup>136</sup> See Sterling, *supra*, note 10 at 2245 (citing Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450, 1487 (2005) (arguing that the silencing of criminal defendants, instead of being a protective "victory for defendants," is actually a failure of the democratic process that "exclude[s] [defendants] from the 'marketplace of ideas' that shape[s] the criminal justice system"))).

<sup>137</sup> See Roberts, *supra* note 12.

<sup>138</sup> *Id.* ("[B]ecause jurors are known to harbor implicit racial stereotypes that threaten the presumption of innocence, individuating information offers hope of amelioration, "Rather than allowing this factor to remain dormant and allowing defendants to sit mute because of fears of the impeachment that has become the default, this Article urges that the factor be revived").

also increase the risk of obstruction of justice enhancements. On the other hand, there may not be an alternative to presenting the defense theory. In some cases, the client may insist on taking the stand despite the lawyer's advice.

#### *F. Use of Expert Testimony*

Defense lawyers should use implicit bias experts to explain its operation and how it can be overcome. Experts can testify about the differences between explicit and implicit beliefs, explain how egalitarian-minded persons can overcome their implicit biases by motivation and discuss the concept of "cognitive busyness" and "time pressures."<sup>139</sup> The latter is especially pressing as jurors may want to speed up the deliberative process.<sup>140</sup> The expert can explain the importance of being patient and focused, especially in a case in which there is ambiguous evidence.<sup>141</sup> Jurors tend to give more weight to expert testimony compared to other witnesses or even the judge or the defense lawyer.<sup>142</sup> This is important with a topic like implicit bias, as many people may be initially resistant to its core principles.<sup>143</sup> As racial stereotypes have an impact on perceptions and memories of eyewitnesses to surprising, violent, or ambiguous events, most qualified research psychologists can be prepared to offer such testimony after studying the well-documented research.<sup>144</sup>

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<sup>139</sup> See Rapping, *supra*, note 12 at 1036-1037.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See James M. Doyle, *Applying Lawyers' Expertise to Scientific Experts: Some Thoughts About Trial Court Analysis of the Prejudicial Effects of Admitting and Excluding Expert Scientific Testimony*, 25 WM. & MARY L. REV. 619, 636 (1984) (describing how courts worry that jurors will give expert testimony undue weight because it may be accompanied by an "aura of special reliability and trustworthiness"). See also David L. Faigman, *Admissibility Regimes: The "Opinion Rule" and Other Oddities and Exceptions to Scientific Evidence, the Scientific Revolution, and Common Sense*, 36 SW. U. L. REV. 699, 712-14 (2008).

<sup>143</sup> See Roberts, *supra* note 126, at 868.

<sup>144</sup> McComas & Strout, *supra* note 12, at 22.

### G. Narrative

A person is more than just an accused. Defense lawyers should be aware that humans harbor subconscious schemas and stereotypes that shape how we view the world.<sup>145</sup> A schema is a “cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes, and the relations among those attributes.”<sup>146</sup> Social psychology shows that we fit items into schemas based on how closely related those items resembles the exemplars we have in our minds.<sup>147</sup> For example, a lion may more readily fit our schema for mammal rather than a dolphin, even though both are mammals.<sup>148</sup> We use mapping rules to determine the schema to which a person or object belongs.<sup>149</sup> We then ascribe meanings based on the category we place on the items or the person.<sup>150</sup> Schematic thinking operates automatically, nearly instantaneously.<sup>151</sup> The meanings we attach may be incorrect and the meanings we assign determine our default settings as to any item within that class.<sup>152</sup> Multiple schemas may be activated at the same time.<sup>153</sup>

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<sup>145</sup> See Joan R. Rentsch et al., *Identifying the Core Content and Structure of a Schema for Cultural Understanding*, Technical Report 1251, UNITED STATES ARMY RESEARCH INSTITUTE FOR THE BEHAVIORAL SCIENCES (2009) <https://apps.dtic.mil/dtic/tr/fulltext/u2/a501597.pdf> [<https://perma.cc/GN8M-NUKJ>]. A schema for cultural understanding is more than just a stereotype about members of a culture. Whereas stereotypes tend to be rigid, a schema is dynamic and subject to revision. Whereas stereotypes tend to simplify and ignore group differences, a schema can be quite complex.

<sup>146</sup> See Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 317 (2012) (citing Susan T. Fiske & Shelley E. Taylor, *Social Cognition* 98 (2d ed. 1991)).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 318.

<sup>153</sup> *Id.* at 321.

For example, a Latina woman may be perceived and “schematized” as a maid or housekeeper.<sup>154</sup> If she is an engineer, this will conflict with the original schema, reducing its effect. Just as we have schemas for things and persons, our brains also use them for persons of different races. Because racial schemas are readily accessible, they are triggered frequently on sight.<sup>155</sup> This ready accessibility may explain the pervasiveness of implicit racial bias.<sup>156</sup> The following sections describe three strategies to create narratives to minimize implicit bias.

One such strategy is to get jurors to focus on one schema to “inhibit the activation of stereotypes associated with another category.”<sup>157</sup> This can be accomplished by developing a narrative that promotes the client as a devoted husband, a loving father, a committed son, or a dedicated employee, to list a few examples.<sup>158</sup>

A second strategy is to “prime” jurors, or provoke their subconscious thinking about “ideals of fairness and equality” in order to suppress racial stereotypes.”<sup>159</sup> This strategy is based on research that shows that reminding jurors during closing arguments of our nation’s highest ideals, the role of the jury in promoting justice, and the important principles of law that protect each of us as persons against a far more powerful government may mitigate the impact of implicit bias.<sup>160</sup> Even if the case is based on a compelling story of innocence, lawyers should spend time discussing the importance of the

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<sup>154</sup> *The Impact of Media Stereotypes on Opinions and Attitudes Towards Latinos*, THE NATIONAL HISPANIC MEDIA COALITION, 4 (Sept., 2014), <http://www.latinodecisions.com/blog/wp-content/uploads/2012/09/RevisedNHMC.Aug2012.pdf> [<https://perma.cc/6T7S-RRS7>].

<sup>155</sup> Sara Grossman, *White People: Let’s Start by Understanding Our Own Biases*, THE HAAS INSTITUTE FOR A FAIR AND INCLUSIVE SOCIETY, <https://haasinstitute.berkeley.edu/understand-our-biases> [<https://perma.cc/R3GJ-TX5Y>].

<sup>156</sup> *Id.*

<sup>157</sup> See Rapping, *supra* note 12, at 1038.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

presumption of innocence and fairness.<sup>161</sup> In doing so, jurors are reminded of the need to comb through the evidence carefully and not simply because they were told to by the lawyer. They should take their time deliberating because the constitution and our traditions call for it.<sup>162</sup>

Finally, the “three-dimensional picture of the client,” can be painted by the attorney to mitigate and blunt the impact of racial bias. This approach requires evidence to be presented by the defense attorney during opening statement, again during character witness testimony, and at closing argument to reduce the implicit presence of racial bias.<sup>163</sup> Opening and closing arguments are especially effective avenues because the lawyer speaks to jurors directly to remind them of the narratives presented by witnesses in cross-examination and during the defense case.

#### *H. Jury Instructions*

Jury instructions that address implicit bias or racial stereotypes should be requested at the beginning of the trial and after the close of evidence. Jury instructions are a powerful tool because they come from the judge.<sup>164</sup> This gives them increased credibility.<sup>165</sup> They are read aloud, without interruptions, and in many jurisdictions are physically given to jurors to refer to during deliberations.<sup>166</sup> Lawyers can also refer to them during the closing argument. Judge Mark Bennett<sup>167</sup> reads the following implicit bias instruction before opening statements:

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<sup>161</sup> See Walter I. Gonçalves Jr., *Tips and Strategies for Excellent Closing Arguments*, CRIM. JUST., Winter 2018, at 48, 49 (2018).

<sup>162</sup> *Id.*

<sup>163</sup> See Sterling, *supra* note 10, at 2279.

<sup>164</sup> See *Controlling Jury Damage Awards in Private Antitrust Suits*, 81 MICH. L. REV. 693, 708 (1983) (jurors perceive judges as authority figures and feel some pressure to follow the judges’ instruction).

<sup>165</sup> *Id.*

<sup>166</sup> See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 491 (2006).

<sup>167</sup> See Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1029 (2008) (Mark Bennet is not the only judge that pays attention to race. District

Do not decide this case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is “implicit biases,” that we may not be aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making every important decision in this case, I strongly encourage you to evaluate the evidence carefully and resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of the evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.<sup>168</sup>

This instruction helps jurors reduce implicit bias by introducing them to the concept before any evidence is presented. If jurors pay attention, they will hopefully be guarded as they see and hear evidence.

Another example of a race-based jury instruction is one that asks jurors to switch the race of the client. The “race-switching instruction” asks jurors to examine the possible influence of implicit bias on their decision making by imagining how they would respond if the race of the defendant was different.<sup>169</sup> An example of a race switching instruction is the following:

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of Connecticut Senior Judge Janet Arterton fashions voir dire questions that emphasize the importance of a trial free from any racial bias of any form. She asks jurors to seriously consider the question of whether they could really carry out their duty to be entirely fair and impartial to black defendants or whether they had any inkling of doubt about their ability to be racially fair and unbiased). *See also* Roberts, *supra* note 12, at 870 (describing how at the state court level, one judge in North Carolina, Judge Louis Trosch, Jr., developed a practice of scheduling difficult hearings for early in the morning as research suggests that stress and a lack of time can increase cognitive errors such as implicit bias). *See also* McComas and Strout, *supra* note 12, at 24 (describing the practice of Judge Milton Souter, in Alaska, who agreed to give jurors an instruction on “race-switching” before finalizing a verdict. Judge Souter noted that he “personally engaged in a race-switching exercise whenever he was called on to impose a sentence on a member of a minority race to insure that he was not being influenced by racial stereotypes”).

<sup>168</sup> *See* Kang et al., *supra* note 8, at 1182-83.

<sup>169</sup> *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward A Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 488 (1996).

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 behavior or traits with members of a particular social group. Often, we 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 African American and the accuser is white, you should imagine a white accused and an African-American accuser. If your evaluation of the case is different after engaging in race switching, this suggests a subconscious reliance on stereotypes. You must then re-evaluate the case from a neutral, unbiased perspective.<sup>170</sup>

Other types of instructions to educate the jury about implicit bias include a self-defense instruction that people are more likely to perceive a given ambiguous action as aggressive and dangerous when performed by an

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<sup>170</sup> See McComas & Strout, *supra* note 12, at 22.



African American compared to a white person,<sup>171</sup> and that people misread hostility in African-American faces more often than white faces.<sup>172</sup>

### *I. Sentencing Advocacy*

Sentencing provides an opportunity to have a “one-on-one” with a judge in a less adversarial setting compared to trial.<sup>173</sup> It is a chance to discuss implicit racial bias with a little less pressure. Most of the sentencing argument focuses on the specifics of the client’s life, the circumstances of the offense, and legal objections.<sup>174</sup> Sentencing should also include a discussion of implicit bias. Defense lawyers should have the discussion with all judges, not just the conservatives or liberals. Many judges may decide not to respond to arguments on implicit bias either because they may find it difficult to apply to the particular case or for fear of negative appellate review.<sup>175</sup> This should not stop the lawyer from at the very least raising the issue.

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<sup>171</sup> See Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595 (1976) (seventy-five percent of persons observing an African American shoving a white person considered the shove constituted “violent” behavior, while only seventeen percent of those observing a white person shoving an African American described the shove as “violent” behavior and forty-two percent described the interaction as “playing around”).

<sup>172</sup> See Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 345 (2004) (finding that faces displaying relatively hostile expressions were categorized as African American by persons with high prejudice).

<sup>173</sup> See Edward C. Reddington, *Accounting for Differences in the Military Justice System*, 2011 WL 2547820 (ASPATORE), 5 (comparing military and civilian sentencing procedures).

<sup>174</sup> FED. R. CRIM. P. 32.

<sup>175</sup> See Christine Gwinn, *Judicial Discretion in Sentencing: Is Presumptive or Mandatory Reassignment on Remand the Most Ethical Directive for All Parties?*, 30 GEO. J. LEGAL ETHICS 837, 851 (2017) (public opinion and appellate review are factors that play into judge’s decisions).

Sentencing is unique because judges may already have their minds made to the specific sentence before the hearing.<sup>176</sup> If they have not, they may be more inclined to converse with the prosecutor and defense lawyer. The other unique aspect about sentencing is that it gives lawyers a chance to file sentencing memoranda that includes discussion of relevant social science and its impact on trial judges. The attorney may want to include statistics that show the extent to which race accounts for sentencing disparity in the criminal justice system.<sup>177</sup> If the data were available, counsel would be able to compile statistics about sentencing patterns of the particular judge or the relevant jurisdiction.<sup>178</sup> As a matter of strategy, the lawyer should discuss the client in the context of a schema distinct from race (father, son, dedicated employee, coach, deacon, volunteer, good neighbor, to name a few) and appeal to the judge's role in promoting fairness in our criminal justice system.<sup>179</sup> In particular, as racial justice is an important American ideal, one goal of sentencing should be to send a message to the community that our court system is colorblind. Therefore, countering systemic sentencing disparity on a case-by-case basis is an appropriate sentencing goal.<sup>180</sup> Even though communities seldom pay attention to sentencing outcomes as deterrent factors, many judges still believe that sentencing decisions have a deterrent impact at large.<sup>181</sup> Although many cases end at the sentencing

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<sup>176</sup> See Alan Ellis et. al., *Federal Sentencing Tips*, CHAMPION, April 2013, at 40 (2013) (noting that studies suggest that eighty percent of the time, a judge has a "tentative sentence" in mind even before the sentencing hearing begins).

<sup>177</sup> Kang et al., *supra* note 9, at 1148-52.

<sup>178</sup> Rapping, *supra* note 12, at 1041.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Mann, Wheeler & Sarat, *Sentencing the White Collar Offender*, 17 AM. CRIM. L. REV. 479, 486 (1980) (judges believe prison provides greatest deterrence to white-collar crime). See also William Spelman, *What the Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 CRIME & JUST. 419, 451 (2000) (judges and legislators can be expected to respond to the theory that prisons reduce crime with increased prison populations).

hearing, a discussion of racial bias is appropriate because it primes judges for future cases. Race issues may also arise in sentencing or trial appeals.

The strategies and approaches described above cover a myriad of parts of the trial practice. They are universal, with application to cases involving clients of any ethnic minority. The question remains, how can defense lawyers try to blunt the effects of racial stereotyping with Latinx clients in particular?

### III. STRATEGIES TO MITIGATE THE IMPACT OF RACIAL BIAS FOR LATINX CLIENTS<sup>182</sup>

This section first discusses how Latinxs are affected by implicit bias historically and in the present. Secondly, it shows how individuation and counter-narratives can reduce implicit bias. It discusses examples of how client culture can reduce implicit bias. The final part of the section explains how checklists for cases involving Latinxs, the use of summaries of implicit bias research, and experts, can reduce bias for Latinxs.

#### *A. Implicit Bias and Its Impact on Latinxs*

African Americans have been the focus of most research on implicit bias, while other racial minorities such as Latinxs and Native Americans have been understudied.<sup>183</sup> However, the available research shows that Latinxs are deeply impacted by implicit biases as well.<sup>184</sup> In a study by Professor James Weyant, forty-one college students took longer to associate traits indicative

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<sup>182</sup> See Hispanic Heritage Month Report by U.S. Census, October 2017, <https://www.census.gov/content/dda/Census/newsroom/facts-for-features/2017/cb17-ff17.pdf> [<https://perma.cc/7ZGU-7MPK>] (Latinxs are the largest minority in the United States, having surpassed African-Americans. As of July 1, 2016 the Hispanic population in the United States was 57.5 million, or 17.8 percent of the population. Latinxs have also been the fastest growing minority in the United States).

<sup>183</sup> See Kerwin K. Charles & Jonathan Guryan, *Studying Discrimination: Fundamental Challenges and Recent Progress*, 3 ANN. REV. ECON. 479, 511 (2011) (Latinxs are a relatively understudied minority group in the economics of discrimination literature despite Hispanics being ever more prominent in the political, legal and cultural life of America).

<sup>184</sup> See Kang, *supra* note 50, at 1514-15.

of intelligence with Hispanic than non-Hispanic names, while they could more quickly associate traits indicative of lack of intelligence with Hispanic names.<sup>185</sup> In another study, 210 primary care providers (PCPs) and 190 community members from the same area completed IATs<sup>186</sup> and self-reported measures of implicit and explicit bias.<sup>187</sup> The PCPs showed substantial implicit bias against both Latinxs and African Americans.<sup>188</sup> The results were no different compared to community members, even though explicit bias was largely absent in both groups.<sup>189</sup> Adjustments for background characteristics showed that PCPs had slightly weaker ethnic/racial bias than community members.<sup>190</sup>

In yet another study, an IAT was designed to measure automatic attitudes toward Latinxs vis-à-vis white immigrants.<sup>191</sup> The results showed that participants more easily associated positive words with whites and negative words with Latinxs.<sup>192</sup>

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<sup>185</sup> See James M. Weyant, *Implicit Stereotyping of Hispanics: Development and Validity of a Hispanic Version of the Implicit Association Test*, 27 HISP. J. BEHAV. SCI. 355, 358-62 (2005).

<sup>186</sup> The IAT is a computerized test that measures implicit or automatic associations between stimuli by examining how quickly certain stimuli are associated with evaluative attributes (i.e. positive or negative). The determination of implicit bias on the IAT is based on the assumption that responses to compatible judgment stimulus pairs (e.g., *snakes-dangerous*) will be more automatic, and hence faster, than for incompatible judgment pairs (e.g., *flowers-dangerous*) because of the greater strength of the conditioned association between the stimuli. A. Greenwald et al. *Measuring individual differences in implicit cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. Psych., 1464-80. Racial attitudes operate in much the same way. See generally J. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829 (2001).

<sup>187</sup> See Irene V. Blair et al., *Assessment of Biases Against Latinxs and African Americans Among Primary Care Providers and Community Members*, 103 AM. J. PUB. HEALTH 92 (2013) (This research provided the first evidence of implicit bias against Latinxs in health care, as well as confirming previous findings against African Americans).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See Christelle Fabiola Garza & Philip Gerard Gasquoie, 35 *Implicit Race/Ethnic Prejudice in Mexican Americans*, HISP. J. BEHAV. SCI. 121 (2012).

<sup>192</sup> *Id.*

Negative implicit biases towards Latinxs have real-world implications. People favor their own group at the expense of other groups in terms of their evaluations, judgments, and behavior in intergroup situations.<sup>193</sup> They favor their own in-groups and sometimes derogate other outgroups.<sup>194</sup> Manifestations of implicit bias include the appearance of being uncomfortable and anxious in terms of non-verbal behavior during interracial reactions (i.e. more speech errors and shorter conversations).<sup>195</sup> Research also confirmed less smiling, less eye contact, more tense body posture, less overall friendliness, less interest in conversation, and sitting further away.<sup>196</sup> As one can imagine, criminal justice professionals not in tune with their negative implicit biases could treat Latinx defendants less favorably compared to whites, especially in stressful, hurried situations.<sup>197</sup>

### *B. Historic and Contemporary Media Depictions of Latinxs Increase Negative Racial Bias*

Explanations for the origins of overt and unconscious racism vary.<sup>198</sup> One of these explanations theorizes that the social categories in which people are assigned are generated over a long period of time.<sup>199</sup> The content is transmitted to individual members of society by a process cognitivists call

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<sup>193</sup> See Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*. 17 SOC. JUST. RES. 143 (2004).

<sup>194</sup> See Dominic Abrams and Michael A. Hogg, *Comments on the motivational status of self-esteem in social identity and intergroup discrimination*. 18 EUR. J. SOC. PSYCHOL. 317 (1988).

<sup>195</sup> See Denise Sekaquaptewa et al. *Stereotypic explanatory bias: Implicit stereotyping as a predictor of discrimination*. 39 J. EXP. SOC. PSYCHOL. 75 (2003).

<sup>196</sup> See Nilanjana Dasgupta, *Beyond the Black Box: The Behavioral Manifestations of Implicit Prejudice*. Paper presented at the Annual Meeting of Society for Personality and Social Psychology, Savannah, GA, Feb. 2, 2002.

<sup>197</sup> See Richardson & Goff, *supra* note 12.

<sup>198</sup> See Richard Delgado et al. *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1378-79 (1985) (summarizing social theories of racism).

<sup>199</sup> See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987).

‘assimilation,’<sup>200</sup> through which persons learn and internalize preferences and evaluations. Cultural attitudes and beliefs are learned at an early age,<sup>201</sup> at a time when it is difficult to separate the perceptions of one’s teacher (usually a parent) from one’s own. As such, implicit biases develop when we are highly sensitive to social contexts.<sup>202</sup> Children learn from their parents, and these beliefs are further reinforced in their cultures and through the media.<sup>203</sup> As Professor Jody Armor notes, “because stereotypes are established in children’s memories at an early age and constantly reinforced through the mass media and other socializing agents, stereotype-congruent responses may persist long after a person has sincerely renounced prejudice.”<sup>204</sup> The following section delves deeper into how the media increases negative implicit bias to Latinx populations through contemporary and historical images.

Mass media perpetuates shared ideas, images, and representations of the social world.<sup>205</sup> It offers an array of characterizations that associate different identity groups with different possibilities for how to be a person (i.e., how to act or behave) in society.<sup>206</sup> These representations typically reflect stereotypes of groups (e.g., African Americans as athletes and musicians, women as sexualized beings) that vary in quality.<sup>207</sup>

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<sup>200</sup> *Id.*

<sup>201</sup> See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989) (stereotypes are well established in children’s memories before children develop the cognitive ability and flexibility to question or critically evaluate the stereotype’s validity or acceptability).

<sup>202</sup> *Id.*

<sup>203</sup> See Lawrence, *supra* note 199, at 323.

<sup>204</sup> See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision Makers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 743 (1995) (arguing that a person’s initial biased reaction is often based on group-stereotype and if that person is made conscious of what she is doing she can make better decisions in terms of racial justice).

<sup>205</sup> See Peter A. Levitt et al. “Frozen in Time”: *The Impact of Native American Media Representations on Identity and Self-Understanding*, 71 J. SOC. ISSUES, 39, 40 (2015).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

It follows that the role of the media in reinforcing and perpetuating negative images about Latinxs is powerful and significantly affects implicit bias.<sup>208</sup> At the same time that the consumption of positive images can decrease a person's implicit bias (although they may register no difference on measures of explicit bias), consuming negative images can exacerbate implicit bias.<sup>209</sup> If mental imagery can produce such effects, watching direct portrayals in electronic media may well have an even stronger impact.<sup>210</sup> Mainstream American perception of Latinxs, already unfavorable, is worsened by their historic and contemporary depictions.

Although Latinxs represent a population of over 54 million people that now surpasses 17 percent of the United States national total, stories about Latinxs and Latinx issues constitute less than .78 percent of the news in studied networks.<sup>211</sup> Year after year, Latinxs and Latinx issues are included in about one percent of the stories considered newsworthy by national network news programs.<sup>212</sup> Even more troubling, the primary topics of coverage remain focused on Latinxs as people with problems or causing problems and on news related to immigration or crime, or a combination of both.<sup>213</sup> Studies of Latinx portrayals in crime reporting in Los Angeles and Orlando, for instance, have found that Latinxs are more likely to be represented as perpetrators than as victims of crime.<sup>214</sup> In the coverage of

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<sup>208</sup> See Kang, *supra*, note 50, at 1561.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> See Federico Subervi, et al. *Latinxs in TV Network News 2008-2014: Still Mostly Invisible and Problematic*, page 2 (April 2015), Unpublished report, submitted to the Communication Workers of America <https://www.mediadiversityforum.lsu.edu/latinos-in-tv-network-news-2008-14.pdf> [<https://perma.cc/UX88-AZW7>].

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 20.

<sup>214</sup> See Travis L. Dixon & Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 COMM. RES. 547 (2000). See also Travis L. Dixon & Cristina L. Azocar, *The Representation of Juvenile Offenders by Race on Los Angeles Area Television News*, 17 HOW. J. COMM. 143 (2000) (portrayal of juvenile lawbreakers in local television news programming in Los Angeles, California).

ongoing trials, Latinx defendants, along with African-American defendants, are more likely to be linked to prejudicial information in comparison with Caucasians.<sup>215</sup>

The media also broadcasts political messages about Latinxs. The Reagan administration framed unauthorized migration as a national security issue, using images of Central Americans as terrorists.<sup>216</sup> President Reagan said, “Terrorists and subversives are just two days’ driving time from Harlingen, Texas.”<sup>217</sup> He described Central American refugees as undesirables coming in “tidal waves.”<sup>218</sup> Currently, President Donald Trump described Mexicans as rapists and “bad hombres” during his campaign for president in 2016.<sup>219</sup> The President’s use of derogatory language about Latinxs and other minorities has continued during his presidency.<sup>220</sup>

Latinx news coverage also focuses on negative aspects of immigration.<sup>221</sup> A study of network and cable TV news from 2008 to 2012 found that Latinxs are overrepresented as undocumented immigrants in comparison to figures

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<sup>215</sup> See Travis L. Dixon & Daniel Linz, *Television News, Prejudicial Pretrial Publicity, and the Depiction of Race*, 46 J. BROADCASTING & ELECTRONIC MEDIA 112 (2002).

<sup>216</sup> See Yolanda Vazquez, *Constructing Crimmigration: Latinx Subordination in A “Post-Racial” World*, 76 OHIO ST. L.J. 599, 636 (2015).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 657, quoting TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992*, at 13 (1996).

<sup>219</sup> See Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Months*, WASH. POST (Oct. 20, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?noredirect=on&utm\\_term=.4e3bb8dcf5d0](https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?noredirect=on&utm_term=.4e3bb8dcf5d0) [<https://perma.cc/RU9T-Q42M>].

<sup>220</sup> See Gregory Korte & Alan Gomes, *Trump Ramps Up Rhetoric on Undocumented Immigrants: ‘These Aren’t People. These Are Animals.’* USA TODAY (May 16, 2018), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002> [<https://perma.cc/KS73-JG9K>].

<sup>221</sup> Erik Bleich and A. Mauritis van der Veen, *Sure, a lot of newspapers’ coverage of Latinos is negative—but not when it comes to cultural achievements*, *The Washington Post* (Jan. 23, 2019), [https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/23/sure-a-lot-of-newspaper-coverage-of-latinos-is-negative-but-not-when-it-comes-to-cultural-achievements/?noredirect=on&utm\\_term=.218cb4ea64d5](https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/23/sure-a-lot-of-newspaper-coverage-of-latinos-is-negative-but-not-when-it-comes-to-cultural-achievements/?noredirect=on&utm_term=.218cb4ea64d5) [<https://perma.cc/C8MT-KTF2>].



from official reports.<sup>222</sup> News articles about immigrants generate negative perceptions about Latinxs among white viewers.<sup>223</sup> Yet, this is exactly the type of coverage shown. A 2005 study of coverage of the Minuteman project<sup>224</sup> in newspapers from states on the United States-Mexico border, for example, revealed negative characterizations of immigrants through the use of abstract and general language.<sup>225</sup> The metaphors used to describe migration in these stories is also troubling and included the words “tides,” “floods,” and “pollutants.”<sup>226</sup>

Even in discussions about the law, the word “alien” is used to describe immigrants. The comprehensive immigration statute, the Immigration and Nationality Act, blandly defines an “alien” as “any person not a citizen or national of the United States.”<sup>227</sup> The word “alien” brings forth images of space invaders seen on television and in movies, such as the blockbuster Independence Day.<sup>228</sup> Popular culture reinforces the idea that aliens will take over the world if they are not killed, incarcerated, or subjugated.<sup>229</sup> The term

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<sup>222</sup> See Travis L. Dixon & Charlotte L. Williams, *The Changing Misrepresentation of Race and Crime on Network and Cable News*, 65 J. COMM. 24 (2014).

<sup>223</sup> See CLARA E. RODRIGUEZ, *LATIN LOOKS: IMAGES OF LATINAS AND LATINOS IN THE U.S. MEDIA* (1997).

<sup>224</sup> See Justin A. McCarty, *The Volunteer Border Patrol: The Inevitable Disaster of the Minuteman Project*, 92 IOWA L. REV. 1459, 1477 (2007). The Minutemen Project is an anti-immigration organization launched in 2004 to oppose the entry of undocumented immigrants into the United States through the Mexican border. The group attracted considerable attention from media and lawmakers after staging several high profile anti-immigration acts, most notably assembling volunteers to stop border crossings in southwestern states.

<sup>225</sup> See Subervi & Sinta, *supra* note 211.

<sup>226</sup> See Eileen Diaz McConnell, *An ‘incredible Number of Latinxs and Asians:’ Media Representations of Racial and Ethnic Population Change in Atlanta, Georgia*, 9 LATINX STUD. 177 (2011).

<sup>227</sup> INA § 101(a)(3); 8 U.S.C. § 1101(a)(3)(1994).

<sup>228</sup> See Kevin R. Johnson, *“Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 272 (1997) (citing Jonathan Freedland, *Aliens are Coming Home*, OBSERVER (July 7, 1996) at T7 (discussing popularity of movie in which United States thwarted attack of aliens bent on destroying human race by attacking major cities)).

<sup>229</sup> *Id.* at 273.

“alien” legitimizes the mistreatment of noncitizens, helps mask human suffering, and serves as a means of dehumanization.<sup>230</sup>

The historical record of studies about Latinxs depicted in the media paint equally disturbing pictures. Before the second half of the 20<sup>th</sup> century, the media largely ignored Latinxs.<sup>231</sup> News outlets featured Latinxs in the context of immigration crises and safety threats, with heavy use of the pejorative labels “Zoot Suiter,” “Wetback,” and “Pachuco,” among others.<sup>232</sup> In fictional accounts, Latinx characters have been typically depicted either as criminals, unfaithful “Latin lovers,” or as comic relief.<sup>233</sup> Some studies have found that the media often portrayed Latinxs in a limited set of occupations, usually as law enforcement officers, and increasingly as low-skilled domestic and service workers.<sup>234</sup>

Such depictions in the media over a long period contributed to contemporary racial stereotypes of Latinxs. The images are ubiquitous and form a part of our everyday thinking. These depictions impact everyone, including criminal justice professionals who represent Latinxs in criminal court. Fortunately, defense attorneys can reduce their negative impact.

### *C. Individuation and Client Narratives to Counter Stereotypes and “Schemas”*

One of the ways to decrease the impact of implicit racial bias is to develop a “schema” of the client that runs counter to mainstream stereotypes.<sup>235</sup>

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<sup>230</sup> *Id.*

<sup>231</sup> See Rodriguez, *supra* note 223, at 2.

<sup>232</sup> See Félix Gutiérrez, THROUGH ANGLO EYES: CHICANOS AS PORTRAYED IN THE NEWS MEDIA, (1978) <https://files.eric.ed.gov/fulltext/ED159693.pdf>; Ralph H. Turner & Samuel J. Surace, *Zoot-Suiters and Mexicans: Symbols in Crowd Behavior*, 62 A. J. SOC. 14 (1956).

<sup>233</sup> See BRADLEY S. GREENBERG (ED.), *LIFE ON TELEVISION: CONTENT ANALYSIS OF U.S. TV DRAMA*, 3-12 (2005).

<sup>234</sup> See John F. Seggar & Penny Wheeler, *World of Work on Television: Ethnic and Sex Representation in TV Drama*, 17 J. BROADCASTING & ELECTRONIC MEDIA, 201 (1973).

<sup>235</sup> A schema is a category in the mind which contains information about a particular subject. See Taylor & Crocker, *Schematic Bases of Social Information Processing*, in

Schemas and stereotypes for Latinx criminal defendants are negative, with parallels to long-established stereotypes frequently applied to African American males.<sup>236</sup> Research shows that Latinxs have been associated with “innate criminality,”<sup>237</sup> typified as “dangerous,”<sup>238</sup> as drug traffickers,<sup>239</sup> violence-prone,<sup>240</sup> “predatory,” “disposed to chronic criminal offending,”<sup>241</sup> “ruthlessly violent,” and “gang bangers.”<sup>242</sup> As such, the defense attorney representing a Latinx client should counter the schemas with the use of narrative. The following section will discuss the use of the narrative strategy in criminal defense litigation, including examples from a real-life case.

The defense attorney should get positive details about the client’s life to create a meaningful story of innocence or mitigation. Counter-narratives mitigate the role schemas play in perpetuating implicit bias.<sup>243</sup> If effectively presented, written and oral stories can reduce its impact.<sup>244</sup> In the case of Latinx clients, schemas such as “drug dealer” or “illegal immigrant” will trigger negative schemas.<sup>245</sup> If the defense attorney develops terms that run

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1 SOCIAL COGNITION: THE ONTARIO SYMPOSIUM 89, 91 (E. Higgins, C. Herman & M. Zanna, eds. 1981).

<sup>236</sup> See Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONT. CRIM. JUST., 276 (2007).

<sup>237</sup> See Malcolm D. Holmes et. al, *Minority Threat, Crime Control, and Police Resource Allocation the Southwestern United States*, 54 CRIM. & DELINQUENCY, 128 (2007).

<sup>238</sup> See Coramae Richey-Mann et. al, (eds.), *IMAGES OF COLOR, IMAGES OF CRIME: READINGS*, (2013).

<sup>239</sup> See Theodore Curry & Guadalupe Corral-Camacho, *Sentencing Young Minority Males for Drug Offenses*, 10 PUNISHMENT & SOC’Y, 253 (2008).

<sup>240</sup> See Katherine Beckett & Theodore Sasson, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA*, (2000).

<sup>241</sup> See Cassia Spohn & Dawn Beichner, *Is Preferential Treatment of Female Offenders a Thing of the Past? A Multisite Study of Gender, Race, and Imprisonment*, 11 CRIM. JUST. POL’Y REV. 149 (2000).

<sup>242</sup> See Steven W. Bender, *GREASERS AND GRINGOS: LATINXS, LAW, AND THE AMERICAN IMAGINATION* (2003).

<sup>243</sup> See Wilkins, *supra* note 116, at 340.

<sup>244</sup> *Id.* at 332.

<sup>245</sup> See Dana E. Mastro & Elizabeth Behm-Morawitz, *Latinx Representation on Primetime Television*, 82 JOURNALISM & MASS COMM. Q., 110, (2005). Latinxs are more often

counter to “drug dealer” or “illegal immigrant,” implicit biases can be blunted. To do this, many defense attorneys, in both capital and non-capital cases, point to horrific childhood situations, “bad” neighborhoods, or aspects of a client’s background that are clearly mitigating. On the other hand, while legally important, some of these narratives may enforce traditional views of Latinxs. Judges, prosecutors, and jurors believe that due to their backgrounds (typically presented as traditional mitigation), Latinx criminal defendants become violent, drug traffickers, or gang-bangers.<sup>246</sup>

Defense attorneys must understand that traditional narratives may produce better results for Caucasian clients, who have less stigmatizing schemas. A compelling narrative for a white defendant becomes “a stock script” when applied to a black, Latinx, or Native American defendant.”<sup>247</sup> For all minority clients, therefore, the key is to use evidence to develop persuasive stories in a counter-narrative form. Defense attorneys must describe mitigating circumstances such as domestic violence, drug addiction, and neglect experienced by many urban Latinx youths in the United States and Latin America. On the other hand, this information, by itself, simply feeds traditional stereotypes of underprivileged urban Latinxs. The defense attorney must find success stories about their client to counter traditional schemas.

A narrative consists of a: (1) scene or setting, (2) an agent (or cast of characters), (3) action (the plot), (4) agency (the means or instruments of

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represented in stories related to crime and participate in a disproportionate amount of conversations about crime and violence on primetime programming.

<sup>246</sup> See Alycee Lane, “*Hang Them if They Have to Be Hung*”: *Mitigation Discourse, Black Families, and Racial Stereotypes*, 12 *NEW. CRIM. L. REV.* 171, 204 (2009) (traditional mitigation narratives about defendants’ dysfunctional family lives may reinforce jurors’ racial prejudices, undermine defense attempts to create juror empathy for capital defendants who happen to be black, and ultimately increase the likelihood of death sentences against such defendants).

<sup>247</sup> See Wilkins, *supra* note 146 at 343.

action), and (5) purpose (the motivations and goals of characters).<sup>248</sup> The death penalty sentencing of a New York man, Alan Quinones, provides a compelling and successful narrative.<sup>249</sup> In convincing jurors not to impose death, his lawyers employed narratives that relied on more than just traditional mitigation.<sup>250</sup> Although Quinones’s attorneys applied this strategy to a death penalty sentencing, it can be applied to any phase of a criminal case that permits the use of narrative, including plea negotiation letters, or settlement conferences.

The government portrayed Alan Quinones as a “Latinx drug trafficker.”<sup>251</sup> Evidence during the guilt phase portrayed him as a high-level drug dealer in Pennsylvania and New York who set an informant on fire after learning he snitched on him.<sup>252</sup> At trial, his lawyers had to combat these deeply embedded narratives and images.<sup>253</sup> The schemas ascribed to “Latinx drug traffickers” are that they are “ruthless, violent, avaricious, parasites of the underworld who prey on economically depressed communities and kill brutally without compunction.”<sup>254</sup> To counter these descriptions, his lawyers used metaphors and altered the setting.<sup>255</sup> They called the defendant a “child of God.”<sup>256</sup> This primed jurors with values animating the cruel and unusual punishment clause in the United States Constitution,<sup>257</sup> such as respect for the dignity of the

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<sup>248</sup> *Id.* at 333 (citing Ty Apler et al., *Introduction to Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 20 (2005)).

<sup>249</sup> *Id.* at 349. Pamela Wilkins describes how the opening statement’s narrative and metaphors challenge culturally embedded images and master stories with other culturally embedded images and master stories. She examines how the opening statement’s narrative inhibits activation of schemas involving Latinxs and drug traffickers.

<sup>250</sup> *Id.* at 348.

<sup>251</sup> See Wilkins, *supra* note 146 at 350.

<sup>252</sup> *Id.* at 350.

<sup>253</sup> *Id.* at 349.

<sup>254</sup> *Id.* at 351-52.

<sup>255</sup> *Id.* at 355.

<sup>256</sup> *Id.* at 352.

<sup>257</sup> See U.S. CONST. amend. VIII.

person.<sup>258</sup> They presented him as a counter-stereotypical exemplar among drug traffickers, exempting him, to a degree, from the “Latinx drug trafficker” schema.<sup>259</sup> They emphasized that rather than spending his money on jewelry or cars, he spent it as a “Secret Santa” for orphans in his neighborhood and on bribes to secure housing for his mentally ill mother.<sup>260</sup>

Mr. Quinones was also described as respectful and friendly to women because he had several trusted female friends. This gender-based narrative countered the traditional schema of the “Latinx drug trafficker” as a womanizer and a misogynist.<sup>261</sup> Mr. Quinones was presented as a “Father/Protector” and self-sacrificing, first-generation immigrant.<sup>262</sup> He entered the drug trade to lift his family from poverty, saved food for his siblings, worked at a grocery store, and gave money to his mother.<sup>263</sup> He remembered birthdays, gave Christmas cards, took his family out to eat, and talked about the importance of education and staying off the streets.

During closing argument, his lawyers invoked the cultural master narrative concerning the immigrant story and the American dream.<sup>264</sup> This placed Mr. Quinones squarely within a broad American tradition that challenges the idea that he is a foreigner and aligns him with other immigrant populations.<sup>265</sup> His lawyers depicted his entry into the drug business and return to it after attempting a low-paying wage job as opportunities for his immediate family

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 351.

<sup>260</sup> *Id.* at 353.

<sup>261</sup> See Ediberto Román, *Who Exactly is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 39 (2000) (examining portrayals of Latinxs in five films with Latino/Latina protagonists and concluding that the hot-blooded role is one of the four most popular in these films).

<sup>262</sup> See Wilkins, *supra* note 146, at 357.

<sup>263</sup> *Id.* at 356.

<sup>264</sup> *Id.* at 351.

<sup>265</sup> *Id.*

and the next generation as opposed to any selfish motive.<sup>266</sup> These successful strategies, backed up with evidence, spared his life.<sup>267</sup>

Lawyers should dig deep by interviewing family members, counselors, teachers, and community members to find and then present evidence that runs counter to traditional schemas. For example, the defense team should investigate if the client read books to his children, nieces and nephews, or saved money for hospital bills. In a case of United States-Mexico drug trafficking, interviews should be conducted to discover if the client worked in agricultural fields in Mexico before being recruited by a drug cartel. The defense lawyer should be encouraged to get to know his/her client as more than just a defendant, but almost as friend or member of his/her community. Despite their worse deeds, even the cruelest-appearing clients have humanity. It is the defense attorney's job to find that humanity and present it to the court.<sup>268</sup> Investigators, paralegals, and mitigation specialists can help construct not simply a list of sentencing mitigators, but a story that includes all five elements of the narrative. This type of story separates the client from traditional schemas.

Along the border between the United States and Mexico, where many Latinxs are federally prosecuted, drug cartels recruit innocent men and women they meet at soccer matches, taco stands, clubs, and grocery stores.<sup>269</sup> These persons are selected because of their desperate economic situation.<sup>270</sup> On the other hand, details about how clients became financially desperate

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<sup>266</sup> *Id.* at 357.

<sup>267</sup> *Id.* at 358.

<sup>268</sup> See Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1241 (1993) (explaining how heroism and empathy provide sufficient motivations for public defenders). Professor Ogletree explains his friendship with a client and how this aided representation.

<sup>269</sup> See ANGEL RABASA ET AL., COUNTERNETWORK: COUNTERING THE EXPANSION OF TRANSLATIONAL CRIMINAL NETWORKS, 45 (2017). See also *United States v. Sinhue Mellado-Aceves*, CR-12-2332-TUC-RCC (2013) (testimony of Peter Chalk during jury trial, day 1, page 139-40).

<sup>270</sup> See *id.*, Sinhue trial testimony, jury trial day 1, page 150 (“economic incentives are used to bribe police but also to co-opt members of society”).

may not be enough. The defense attorney should focus on the client's strengths and responsibilities. For example, emphasize the client's role as "father/protector" or "provider." Female clients with children can be presented as self-sacrificing to properly provide for and take care of their children.

Part of the narrative involves the defense lawyer setting the stage, or "scene and setting," for the action. In the case of Mexicans along the United States-Mexico border, income differentials almost always play a part in the commission of crimes. The United States-Mexico border has the highest income differential compared to any other border in the world.<sup>271</sup> Socio-economic evidence should be emphasized at sentencing and woven into the narrative. One example is the use of studies that show that imposing prison sentences have no deterrent impact on society as a whole.<sup>272</sup> Other types of studies discussing low economic standards of living in areas where clients reside helps the trial judge see a setting for the story.<sup>273</sup> This includes any possible economic motivations for the crime.

For clients that claim lack of knowledge of drug trafficking, the lawyer should align the narrative of the case with others falsely accused. If the defense is lack of knowledge of drugs, the attorney should consider introducing evidence of actual "blind mule" (i.e. innocent courier) cases investigated by the FBI.<sup>274</sup>

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<sup>271</sup> See Mark Overmyer-Velazquez, INTRODUCTION: HISTORIES AND HISTORIOGRAPHIES OF GREATER MEXICO, BEYOND LA FRONTERA: THE HISTORY OF MEXICO-U.S. MIGRATION xix, xix (Mark Overmyer-Velazquez ed., 2011).

<sup>272</sup> For an example of such a study see Ellen A. C. Raaijmakers et al., *Why Longer Prison Terms Fail to Serve a Specific Deterrent Effect: An Empirical Assessment on the Remembered Severity of Imprisonment*, 23 PSYCHOL., CRIME & L. 32, 33 (2017).

<sup>273</sup> See Kyle C. Velte, *A Tale of Two Outcomes Justice Found and Lost for Colorado's Schoolchildren*, 12 LEGAL COMM. & RHETORIC JALWD 115, 121-60 (2015) (discussing use of socio-economic setting in storytelling by lawyers in civil cases).

<sup>274</sup> See Walter I. Gonçalves, Jr., *Busted at the Border: Duress and Blind Mule Defenses in Border-Crossing Cases*, CHAMPION, January/February 2018, at 46, 50 (2018) (describing the use of publicized cases of innocent couriers, otherwise known as "blind mules").



Clients charged with illegal entry make up a large segment of federal cases and present unique opportunities for narrative. In those cases the lawyer may change the narrative by describing the life-threatening journey across the border.<sup>275</sup> For Latinxs in illegal re-entry cases with violent or serious prior felony convictions, the attorney should seek to neutralize the impact of prior crimes. Inevitably, the client will face the schema of entering the country as a “Latinx drug trafficker” if (s)he has a drug trafficking prior conviction. In this scenario, the defense lawyer must combat stereotypes of drug trafficking and illegal immigration. This presents the defense attorney with opportunities to study the prior conviction to elicit facts that set the client apart from traditional schemas. For instance, if the prior conviction was for theft, the lawyer could elicit mitigating circumstances such as the financial motive for the crime (i.e. providing for the family). If the client is an addict and committed the crime to fund his/her drug habit, this can also be elicited. In some cases, it may not be worth the effort if the circumstances of the prior conviction are unfavorable, for example, if the crime was violent. The attorney should not discuss gory details otherwise unknown. On the other hand, if the prior conviction is old or if there are good facts, the attorney can construct meaningful counter-narratives. An old prior conviction may be too far removed from present circumstances to be relevant to the sentencing at hand. The attorney needs to weigh the pros and cons of building counter schemas from facts of prior convictions.

Because many Mexicans, Central and South Americans, and Caribbean people enter the country to reunite with family,<sup>276</sup> opportunities abound for narratives of family reunification, sacrifice, and description of journeys to the border from faraway regions. All of these circumstances are fertile for

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<sup>275</sup> See Francisco Cantu, *The Line Becomes a River: Dispatches from the Border*, (2018) (describing tragedies that besiege immigrants encountered by Border Patrol in the southwest after long journeys in the desert).

<sup>276</sup> See Neda Mahmoudzadeh, *Love Them, Love Them Not: The Reflection of Anti-Immigrant Attitudes in Undocumented Immigrant Health Care Law*, 9 SCHOLAR 465, 468 (2007).

storytelling. The socio-economic reality that most immigrants face bolsters the narrative of hard work and self-sacrifice. Most immigrants enter the workforce in the United States earning mediocre wages.<sup>277</sup> Many have to endure often grueling living and working conditions. Some clients enter temporarily to earn money for their Mexican businesses or only enter for seasonal labor.<sup>278</sup> Many Latinx criminal defendants enter the United States to work at jobs many Americans don't want.<sup>279</sup> For many, remitting money abroad is part of their American dream.<sup>280</sup> The point is that investigations into these circumstances and thoughtful construction of counter-narratives can decrease the implicit biases of prosecutors, judges, and juries.

#### *D. The Use of Culture to Mitigate Implicit Bias and Negative Racial Stereotyping*

"Culture" is defined in many ways. A standard definition is that it consists of "[a] set of rules or standards shared by members of a society which, when acted on by the members, produce behavior that falls within a range of variance the members consider proper and acceptable."<sup>281</sup> Although not

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<sup>277</sup> See Jenifer M. Bosco, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMGR. L.J. 71, 80 (Winter 1994) (noting that the low cost of labor is passed on to American consumers through their purchase of goods and use of services).

<sup>278</sup> See JOHN FRASER, PREVENTING AND COMBATING THE EMPLOYMENT OF FOREIGNERS IN IRREGULAR SITUATION IN THE UNITED STATES, in COMBATING THE ILLEGAL EMPLOYMENT OF FOREIGN WORKERS (2000) at 101 (noting that large number of illegal immigrants come to United States from Mexico and Central America).

<sup>279</sup> See Fran Ansley, *Inclusive Boundaries and Other (Im)possible Paths Toward Community Development in A Global World*, 150 U. PA. L. REV. 353, 417 (2001) (citing Ruth Milkman, Introduction to Organizing Immigrants: The Challenge for Unions in Contemporary California 1, 11 (Ruth Milkman ed., 2000)) ("In many of the state's industries and occupations... as wages and working conditions deteriorated after employers successfully eliminated or weakened unions, native workers simply exited and were subsequently replaced by immigrants").

<sup>280</sup> See Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1 (2008) (remittances should be understood as an anti-poverty tool, but not as a route to development).

<sup>281</sup> See Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 916 (2007) (citing Michaël Fischer, Note,

legally recognized, lawyers occasionally obtain favorable outcomes when applying cultural defenses.<sup>282</sup> A cultural defense is an affirmative defense in which a defendant is excused of a crime because s(he) complied with the dictates of his or her culture when committing the criminal act.<sup>283</sup> Cultural defenses are not to be confused with introducing elements of client or community culture.<sup>284</sup> The following section explains cultural defenses and strategies for successfully executing such defenses with Latinx clients and their specific cultural norms; for example, machismo.

A way to decrease the impact of stereotypes and implicit bias is to infuse the theory of defense with specific examples of the client's culture. This distinguishes the client and can decrease bias.<sup>285</sup> Culture enmeshes our day-to-day lives. It dictates what we do and how we think, and it gives meaning to our lives. By intelligently exposing stakeholders to the everyday culture of Latinx clients, defense attorneys can achieve this goal.<sup>286</sup> Although trial judges are reluctant to admit cultural evidence, defense attorneys should not give up. Unsuccessful attempts to admit cultural evidence can educate and prime judges for future cases.

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*The Human Rights Implications of a "Cultural Defense,"* 6 S. CAL. INTERDISC. L.J. 663, 669 (1998).

<sup>282</sup> See Lee, *supra* note 187, at 941-58. Professor Lee describes three examples of successful use of culture in criminal cases and argues that some cultural defenses are easier to get than others.

<sup>283</sup> See *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) (exploring the possibility of developing a 'cultural defense' in the criminal law).

<sup>284</sup> See *id.* (describing examples, in particular, *People v. Kamura*, No. A-091133 (Los Angeles Cty. Super. Ct. filed Apr. 24, 1985) (*cited in* Sherman, *Legal Clash of Cultures*, NAT'L L.J. (Aug. 5, 1985) at 1)).

<sup>285</sup> See Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 250-52 (2002). See also Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267 (2013).

<sup>286</sup> See Thomas F. Pettigrew & Linda Thorpe, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH., 751 (2006) (interactions and exposure to different groups has been shown to decrease prejudice). See also Devine et al., *supra* note 189.

Jurors, judges, prosecutors, and probation officers can perceive evidence of culture<sup>287</sup> as positive or negative.<sup>288</sup> Either way, both can be used by the defense lawyer. A positive example of a Latin American cultural trait is family unity.<sup>289</sup> A negative cultural trait is patriarchy.<sup>290</sup> While some scholars reject the use of cultural stereotypes that paint minority groups poorly, the ethical obligations of defense lawyers trump any of these concerns.<sup>291</sup>

An example of a negative cultural trait that can aid the client is “machismo.”<sup>292</sup> Lawyer Patricia M. Hernandez, citing Professors Martha Morgan and Julia Perilla, defines machismo as a set of cultural expectations for men that include both positive and negative elements.<sup>293</sup> Positive elements include notions of pride, honor, courage, responsibility, and obligation to family.<sup>294</sup> Along with positive traits, however, machismo ideals also imply sexual prowess, aggressive behavior, and the belief that men are physically

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<sup>287</sup> Other examples include the introduction of an expert on United States-Mexico border violence in a case of duress or a “blind mule” expert to discuss the how drug organizations sometimes load cars with drugs, i.e. the “unknown courier” defense. See Gonçalves, *supra* note 274, at 48-50.

<sup>288</sup> See Zoya Gubernskaya & Joanna Dreby, *US Immigration Policy and the Case for Family Unity*, 5 J. MIGRATION & HUMAN SEC. 2, 417-30 (2017) (discussing family unity as a hallmark of US immigration policy over the past 50 years). See also Charlotte Higgins, *The Age of Patriarchy: How an Unfashionable Idea Became a Rallying Cry for Feminism Today*, THE GUARDIAN (June 22, 2018), <https://www.theguardian.com/news/2018/jun/22/the-age-of-patriarchy-how-an-unfashionable-idea-became-a-rallying-cry-for-feminism-today> [<https://perma.cc/AA94-S82H>].

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> See Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL’Y & L. 117 (2003) (arguing that lawyers should think carefully about broader consequences before applying racist, sexist, and anti-gay narratives to benefit the client). See also Anthony Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (arguing that negative racial stereotypes are heightened when lawyers use racialized narratives to defend young Black males charged with crimes involving interracial violence).

<sup>292</sup> See Aaron Monty, *Retranslating Differences*, 52 CLEV. ST. L. REV. 255, 262 (2005).

<sup>293</sup> See Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 ST. THOMAS L. REV. 859, 862 (2003).

<sup>294</sup> *Id.*

and morally superior to women. The male resolves male/female conflicts through absolute dominance.<sup>295</sup>

The defense attorney can use machismo to reduce racial stereotypes by intertwining it with the theory of defense. Consider a drug trafficking case with a Latina client. Machismo cultural norms may help explain the client's lack of knowledge of drugs in a trafficking or importation case. Many macho boyfriends or husbands keep their girlfriends or wives out of all their dealings.<sup>296</sup> They only meet with friends in private or outside the home, assume charge of major decisions in the relationship, and, in many cases, are verbally or physically abusive. In a duress scenario, machismo could help a jury understand why a Latina was targeted. Threats may have come from a family member in a drug organization.

In other duress cases, machismo can help explain domestic violence. Depending on the charge or facts, cultural explanations give meaning to evidence and places the client in a favorable light. Details of abuse individualizes, thereby reducing negative racial undertones. This humanization also paints her as a victim of a larger patriarchal system.

Migrant families in the United States likewise feel the impact of machismo.<sup>297</sup> A Latina migrant woman in the United States accused of drug trafficking or alien smuggling may be afraid to call the police to report threats that led her to commit the crime due to fears of deportation.<sup>298</sup> The drug cartel may have targeted her due to her undocumented status. The defense lawyer must be judicious and consider the benefits and pitfalls of this strategy if the client's legal status is not part of the admissible evidence.

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<sup>295</sup> *Id.*

<sup>296</sup> Diana Palaversich, (*DIS*) *Locating Masculinity in Latin(o) America*, 7 *GLQ: J. OF LESBIAN AND GAY STUD.* 645 (2001).

<sup>297</sup> See Chad Broughton, *Migration as Engendered Practice: Mexican Men, Masculinity, and Northward Migration*, 22 *GENDER & SOC'Y* 568, 571-73 (2008) (noting that masculinities shape migrants' border crossing identity).

<sup>298</sup> See Erica Campbell, *Racializing Intimate Partner Violence Among Black, Native American, Asian American, and Latina Women*, 12 *INT'L J. PROGRESSIVE EDUC.*, 73 (2016).

Many cultures have some variant of machismo.<sup>299</sup> As such, the concept resonates with most jurors.<sup>300</sup> In order to educate prosecutors, judges, and jurors, the defense lawyer should call cultural experts on machismo.<sup>301</sup> The defense attorney can also attach a social science article on machismo as an exhibit to a pre-trial motion.<sup>302</sup> The defense lawyer should move to admit expert evidence by arguing that although many are familiar with machismo, they are unaware of its full effect on the client or witness. Jurors may not understand that in some communities, women are expected not to ask certain questions, stay in the home, only tend to the children, and leave husbands to their own affairs.<sup>303</sup> Although mainstream jurors generally understand these concepts and see parallels of it in their own lives, they do not understand its

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<sup>299</sup> See Frances Cleaver, *MEN AND MASCULINITIES: NEW DIRECTIONS IN GENDER AND DEVELOPMENT*, IN FRANCES CLEAVER, ED., *MASCULINITIES MATTER MEN, GENDER AND DEVELOPMENT* (2002).

<sup>300</sup> See Craig A. Field & Raul Caetano, *Longitudinal Model Predicting Partner Violence Among White, Black, and Hispanic Couples in the United States*, 27 *ALCOHOLISM: CLINICAL AND EXPERIMENTAL RESEARCH* 1451 (2006) (explaining research generally shows that among ethnic groups in the United States, blacks are the most likely to experience domestic violence, either male-to-female or female-to-male, followed by Latinxs and then whites).

<sup>301</sup> See Zoe Flowers, *FROM ASHES TO ANGEL'S DUST: A JOURNEY THROUGH WOMANHOOD* (2017). An expert on "machismo" can address many topics. Some applicable to victims of domestic violence in a "machista" context are the following: (1) Victims have a skepticism and distrust that shelters and intervention services are not culturally or linguistically competent. (2) Victims often defer to family unity and strength as opposed to their individual needs. (3) Victims have a strong personal identification based on familial structure/hierarchy, patriarchal elements and cultural identity. (4) Religious beliefs reinforce a woman's victimization and legitimizes the abuser's behavior. (5) Victims are guarded and reluctant to discuss private matters. (6) Fear rejection from family, friends, congregation and community. (7) Distrust law enforcement (fear subjecting loved ones to a criminal and civil justice system they see as sexist, and/or racially and culturally biased).

<sup>302</sup> One example could be Patricia M. Hernandez's article, *supra* note 293.

<sup>303</sup> See Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 *HASTINGS L.J.* 811, 826, 828 (2014) ("Without exposure to Latino life, non-Latino jurors likely have limited ability to understand a Latino defendant's community and culture. This lack of familiarity can lead to harmful results").

prevalence in Latinx households.<sup>304</sup> They also do not fully understand how deeply patriarchy is embedded in culture.<sup>305</sup>

Defense lawyers can incorporate culture in myriad other ways when representing Latinxs. Arizona Assistant Federal Public Defender and trial unit supervisor Victoria Brambl uses culture as much as possible in defending clients.<sup>306</sup> Her lawyering philosophy is to present the defense from the client's perspective.<sup>307</sup> Her defense of a Tohono O'odham man, in two cases, illustrates how use of culture can lead to excellent outcomes.<sup>308</sup> Even though the example is of a Native American man, the cultural traditions used are common to Latinxs in the southwest and could have easily been applied if the client was Latinx.<sup>309</sup>

The following two case summaries were obtained from an interview with Ms. Brambl: in the first case, the United States charged the client with possession of ammunition by a convicted felon. Police found two shotgun shells in the top drawer of a dresser in the client's mother's house. When the family was outside, the police found the two shotgun shells that the client's brother placed in the drawer without the client's knowledge. Ms. Brambl called family members to testify at trial that the brother lived with his mother, and shared the drawer when the client came to visit. The arrest fell on "Día de los Muertos,"<sup>310</sup> an important day for Mexicans in the southwest and the Tohono O'odham. They cook a feast, place it outside, and visit the graveyard. The defense described the cultural practice, its importance, the cooked meal,

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<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> Interview with Supervisory Assistant Federal Public Defender Victoria Brambl, at Federal Public Defender, District of Arizona, Tucson, Arizona (Sept. 7, 2018).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> Silvio Torres-Saillant, *The Indian in the Latino: Genealogies of Ethnicity*, 10 S. LAT. STUD. 587 (2012), <https://doi.org/10.1057/lst.2012.42> [<https://perma.cc/DT47-H5K3>] (generalizing that structures and patterns of inequality notwithstanding, conceptually some indigenous populations share the mantle of Latin-Americanness with the descendants of those who invaded them over five centuries ago).

<sup>310</sup> Also known as "Day of the Dead" or "All Soul's Day."

and that the client visited to help his single mother who was frail and required a cane to walk. Evidence of this cultural practice, along with a narrative that the client was a dutiful son, helped a no possession defense. The case ended after two hung juries and a favorable guilty plea to six months' time-served in custody.

In a vehicular manslaughter case,<sup>311</sup> the same client pled guilty to the lesser of involuntary manslaughter. While driving intoxicated, he crashed, killing his first cousin and best friend. In presenting a mitigation counter-narrative, Ms. Brambl argued that the victim's mother forgave him for the accident, and that he spent lots of time with her after the death, helping take care of her as her son did before his death (the victim's mother was on kidney dialysis for many years). The client built a memorial for the victim at the accident site as was customary in his culture.<sup>312</sup> He worked every weekend for a year after the accident, buying ingredients and cooking food, such as burritos, to raise money to build the memorial. The memorial was finished a year after the death, a culturally significant period, as the Tohono O'odham believe a deceased's spirit lingers before departing to heaven.

The incorporation of the client's culture in helping family during Dia de los Muertos and erecting a shrine for the deceased after one year, as culturally prescribed, not only gave the jury facts supporting the theory of defense or mitigation but also connected him to the larger community.<sup>313</sup> Undoubtedly, these meaningful injections of culture mitigated racial stereotypes before the judge and jury and resulted in a favorable plea agreement and sentencing decision.

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<sup>311</sup> Interview with Victoria Brambl, *supra* note 304.

<sup>312</sup> See Rachael M. Byrd, *Rest in Place: Understanding Traumatic Death Along the Roadsides of the Southwestern United States*, 26 ARIZ. ANTHROPOLOGIST 53 (2016) (describing the practice of creating ritual site, called *descansos*, or "resting places" along edges of highways and streets across the Southwestern United States). *Descansos* allow people to release intense personal emotion socially through the acts of building, visiting, altering, and dismantling, or abandoning these memorials.

<sup>313</sup> See F.M. Anayet Hossain & Md. Korban Ali, *Relation Between Individual and Society*. 2 OPEN J. SOC. SCIENCES, 130 (2014).



Other, more mundane, but no less important aspects of culture should be addressed when representing Latinxs. One of them is eye contact.<sup>314</sup> Children from many Latin American communities are told, when they are in trouble, not to look at a parent or authority figure.<sup>315</sup> According to James Archer (and also from this author's personal experience in interviewing clients), many Latinxs look at the floor or avoid eye contact when talking to lawyers or to judges.<sup>316</sup> Before testifying in front of a jury or at any other time in court, clients should be told to make eye contact. At least, the defense lawyer should explain these ingrained habits to jurors and the court as clients may not be able to fully stop the deeply inculcated behavior during proceedings.

#### *E. Use of Checklists for Latinxs*<sup>317</sup>

Checklists mitigate the negative impact on Latinx clients because they force the attorney to complete all tasks for all clients.<sup>318</sup> Specific checklists for certain types of cases will decrease implicit bias.<sup>319</sup> For instance, if an office primarily represents Latinx clients accused of importation of drugs and illegal entry, the office can design a checklist to combat implicit bias that tends to permeate those specific case types.

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<sup>314</sup> See Marianne LaFrance & Clara Mayo, *Racial Differences in Gaze Behavior During Conversations: Two Systematic Observational Studies*, 33 J. PERSONALITY & SOC. PSYCHOL. 547 (1976).

<sup>315</sup> *Id.*

<sup>316</sup> See James B. Archer, *BEYOND WORDS: A RADICALLY SIMPLE SOLUTION TO UNIFY COMMUNITIES, STRENGTHEN BUSINESSES, AND CONNECT CULTURES THROUGH LANGUAGE* (2017).

<sup>317</sup> See ATUL GAWANDE, *THE CHECKLIST MANIFESTO* (2009).

<sup>318</sup> See Pamela A. Fenning, Ph.D., Miranda B. Johnson, J.D., M.P.A., *Developing Prevention-Oriented Discipline Codes of Conduct*, 36 CHILD. LEGAL RTS. J. 107, 129 (2016) (explaining one example of a checklist for defense practice explains topics to cover for mitigation when interviewing clients at various phases of representation). *Defending a Federal Criminal Case*, at 16-657 (Federal Defenders of San Diego, Inc., 2016). The questions cover a host of topics from social history, observations of client in custody, school history, to medical and mental health history and religious background/community activity.

<sup>319</sup> See Richardson & Goff, *supra* note 12 at 2644.

Checklists are important in reducing implicit bias because they affirm uniformity across all cases.<sup>320</sup> While defenders could spend less time going through the checklist for some clients, checklists decrease the likelihood of mistakes being made and any corner cutting. They can be an impetus for and record of quality representation. Various defender offices, including the San Francisco Public Defender's Office, have created checklists to account for dozens to hundreds of tasks that form the basis for criminal defense representation.<sup>321</sup> Similarly, federal defender offices have developed outlines and checklists for the representation of illegal entry prosecutions, drug busts, and other types of offenses.<sup>322</sup> Ideally, each indigent defense office should assign a "checklist committee" to begin drafting checklists for use in the most common cases. A checklist on mitigation would be helpful to encourage lawyers to find strengths and weaknesses that can help counter stereotypes.

#### *F. Documentation and Summaries of Implicit Bias Research*

To alert prosecutors and judges of the impact of implicit bias to all minority defendants, defense lawyers should be familiar with the relevant social science studies mentioned in this article as they relate to Latinxs and other minority clients. There has been an increase in awareness of implicit bias among the defense bar, courts, and prosecutors.<sup>323</sup> Nonetheless, not all judges, and only a minority of prosecutors, are familiar with the social science

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<sup>320</sup> See Jeff Adachi, *Using Checklists to Improve Case Outcomes*, 39 CHAMPION, 30, 36 (2015) (noting that checklists should aid the representation, not suppress it by preventing meaningful connections with clients).

<sup>321</sup> *Id.*

<sup>322</sup> For example, the Federal Defenders of San Diego have an excellent outline for defending illegal entry cases. The Arizona office has a similar outline, and others, to defend drug busts and duress cases.

<sup>323</sup> See Sandeep K. Narang, M.D., J.D., John D. Melville, M.D., Christopher S. Greeley, et. al., *A Daubert Analysis of Abusive Head Trauma/shaken Baby Syndrome-Part II: An Examination of the Differential Diagnosis*, 13 HOUS. J. HEALTH L. & POL'Y 203, 313 (2013) (noting that judges have recently increased awareness and education on implicit bias in judicial decision making).

research<sup>324</sup> on implicit bias. By including the studies in sentencing memorandums, pointing them out in motions relating to voir dire, and sending the studies to judges and prosecutors, the defense lawyer raises awareness. While not all prosecutors and judges will read all or even part of the studies, some of them may, and this could be a starting point for discussion and knowledge building. The defense attorney should also try to succinctly summarize the relevant findings at pre-trial motion hearings, and bench and settlement conferences. The selection of studies and documentation of racial bias must be intelligent, proportionate, and reasonable, as race can be a contentious topic even among the most open-minded players in the system. The lawyer should discover, if possible, the judge's knowledge of implicit bias. This should dictate what studies are presented, and in what form. Even though there is scant research on Latinxs and implicit bias,<sup>325</sup> the defense lawyer can assist judges in understanding how it applies to Latinxs by extrapolation.

### *G. Use of Expert Witnesses and Social Science Literature for Trial and Sentencing*

Public awareness of implicit bias has grown over the years.<sup>326</sup> Courtroom testimony relating to implicit bias is a recent phenomenon, but is becoming more frequent.<sup>327</sup> As such, the defense lawyer should become aware of social

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<sup>324</sup> See Douglas A. Berman, *Are Costs a Unique (And Uniquely Problematic) Kind of Sentencing Data*, 24 FED. SENT. R. 159, 160, 2012 WL 3288703 (Vera Inst. Just.) (judges have started paying greater attention to new social science research concerning sentencing).

<sup>325</sup> See Pilar Margarita Hernández Escontrías et. al., *The Future of Latinos in the United States: Law, Mobility, and Opportunity (A Project of the American Bar Foundation)*, Prof. Law., 2017, at 21, 23 (2017) (noting that Latinxs are understudied and there is little collaboration and network-building among law schools, research centers, community organizations, foundation officials, and media organizations).

<sup>326</sup> See Project Implicit, <https://implicit.harvard.edu/implicit> [<https://perma.cc/L6ZB-DC4A>].

<sup>327</sup> See Roberts *supra*, note 12 at 851 (*citing* *Dukes v. Wal-Mart Store, Inc.* 603 F.3d 571, 638 (9th Cir. 2010), *rev'd* 131 S. Ct. 2541 (2011) (Ikuta, J. dissenting) (noting that in district court, William Bielby, an expert witness testified that subjective decision making is "susceptible to unconscious discriminatory impulses"); *Farrakhan v. Gregoire*, No. CV-

psychologists and other experts with an interest or expertise in racial bias in local universities or in practice in their communities. Experts on racial bias can discuss the frailties of cross-racial identification and the impact of implicit racial bias on victims' interpretations of suspects' behavior.<sup>328</sup> Expert testimony can also be used in motions to suppress challenging stops at or near the border or in urban areas.

At sentencing, expert testimony from sociologists or anthropologists can focus on the specific socio-economic factors in the defendant's community, whether in Mexico or in a poor urban neighborhood in the United States. More powerfully, the expert could analyze the client's life within his or her socio-economic milieu. Although this may not be realistic in every case for budgetary reasons, the testimony can go a long way in educating judges. Some of the testimony on socioeconomic factors can be used in later cases for clients that come from the same geographic area. If an expert cannot be retained, social science research is available to cover a host of topics relevant to race and ethnicity.<sup>329</sup>

## CONCLUSION

While it is socially improper for mainstream Americans to act out on racist attitudes and behaviors, the problem of implicit bias and racial stereotyping persists for all Latinxs as well as other minority defendants. Without

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96-076, 2006 WL 1889273, at \*5-6 (E.D. Wash. July 7, 2006), aff'd 623 F.3d 990 (9th Cir. 2010) (finding that expert testimony on racial discrimination, including implicit biases, in Washington's criminal justice system was admissible, relevant, and persuasive); Michael Orey, *White Men Can't Help It*, BUS. WK. (May 15, 2006), at 54 ("Now if an employer is faced with a class action based on gender or race, there is at least a 50% chance that plaintiffs will cite unconscious bias theory . . .").

<sup>328</sup> See Henning, *supra* note 12, at 693.

<sup>329</sup> See e.g. AMERICAN PSYCHOLOGICAL ASSOCIATION, *Ethnic and Racial Minorities & Socioeconomic Status*; David Willams et al., *Understanding Associations between Race, Socioeconomic Status and Health: Patterns and Prospects* 35 HEALTH PSYCHOL. 407 (2016); Nat'l Poverty Center, *The Colors of Poverty: Why Racial & Ethnic Disparities Persist* (2009) [http://www.npc.umich.edu/publications/policy\\_briefs/brief16/PolicyBrief16.pdf](http://www.npc.umich.edu/publications/policy_briefs/brief16/PolicyBrief16.pdf). [<https://perma.cc/KZK5-9QD5>].

awareness and education, implicit bias and stereotyping will continue to negatively influence the behavior of criminal justice professionals and jurors. This will result in harsher outcomes for minority clients.<sup>330</sup> Given this reality, defense attorneys should carefully study and become familiar with racial stereotyping and implicit bias. Only in this way will they be able to educate others in the system.

The application of this new knowledge for Latinx clients can be creatively applied to fit the person, whether (s)he is Puerto-Rican, Brazilian, Mexican, or El Salvadorian. The use of narrative, client culture, and individuation can be applied to the client's specific life circumstances and background. The lack of studies and articles on Latinxs in the criminal justice system, despite their increasing presence, calls for more research. This article presents a starting point.

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<sup>330</sup> See, e.g., David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285, 306 (2001) (finding that black and Hispanic defendants receive substantially longer sentences than white defendants and are also more likely to be incarcerated).



